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**Encyclopedia and Digest of All the Texas Case Law (Civil) up
to and including Volume 102 Texas Reports, Volume 49
Civil Appeals, Posey's Unreported Cases, White &
Willson's Texas Appeals Civil, and Cases
in Southwestern Reporter not
Officially Reported.**

UNDER THE EDITORIAL SUPERVISION OF

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Table of Titles.

Titles in *italics* are cross references only.

<i>Evidence at Former Trial or Preliminary Examination</i> , 1.	EXECUTIONS, 229.
<i>Examination</i> , 1.	<i>Execution Sales</i> , 363.
<i>Examined Copy</i> , 1.	<i>Executive</i> , 363.
<i>Excavations</i> , 1.	<i>Executive Department</i> , 363.
<i>Exceptions</i> , 1.	<i>Executive Officers</i> , 363.
EXCEPTIONS AND OBJECTIONS, 2.	<i>Executor De Son Tort</i> , 363.
EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL, 91.	EXECUTORS AND ADMINISTRATORS, 364.
<i>Exception to Pleading</i> , 216.	EXECUTORS' AND ADMINISTRATORS' SALES, 757.
<i>Excess</i> , 217.	<i>Executory Consideration</i> , 909.
<i>Excess Baggage</i> , 217.	<i>Executory Contracts</i> , 909.
<i>Excessive Damages</i> , 217.	<i>Executory Deeds</i> , 909.
<i>Excessive Fees</i> , 217.	<i>Executory Devises</i> , 909.
<i>Excessive Fines and Penalties</i> , 217.	<i>Executory Limitations</i> , 909.
<i>Excessive Homestead</i> , 217.	<i>Executory Remainders</i> , 910.
<i>Excessive Levy</i> , 217.	<i>Executory Trust or Use</i> , 910.
<i>Excessive Taxation</i> , 217.	<i>Executrix</i> , 910.
<i>Excessive Verdict</i> , 217.	EXEMPLARY DAMAGES, 910.
<i>Exchange and Re-Exchange</i> , 217.	<i>Exemplifications</i> , 941.
<i>Exchange, Bill of</i> , 218.	<i>Exempt</i> , 941.
<i>Exchange Brokers</i> , 218.	<i>Exemption</i> , 942.
<i>Exchange of Judges</i> , 218.	<i>Exemptions</i> , 942.
EXCHANGE OF PROPERTY, 218.	EXEMPTIONS FROM EXECUTION AND ATTACHMENT, 942.
<i>Excise</i> , 227.	<i>Exercise</i> , 966.
<i>Exclamations</i> , 227.	<i>Exhaustion</i> , 967.
<i>Exclusion</i> , 227.	<i>Exhibitor</i> , 967.
<i>Exclusive Jurisdiction</i> , 227.	EXHIBITS, 967.
<i>Exclusive Possession</i> , 227.	<i>Exidos</i> , 970.
<i>Exclusive Privileges</i> , 227.	<i>Existence</i> , 970.
<i>Exclusive Rights</i> , 227.	<i>Ex Officio</i> , 970.
<i>Excommunication</i> , 228.	<i>Exoneration</i> , 971.
<i>Excursion Tickets and Excursions</i> , 228.	<i>Ex Parte Proceedings</i> , 971.
<i>Excuse</i> , 228.	<i>Expatriation</i> , 971.
<i>Executed and Executory Consideration</i> , 228.	<i>Expectancy</i> , 971.
<i>Executed Contract</i> , 228.	<i>Expediente</i> , 971.
<i>Executed Trust</i> , 228.	<i>Expenditure and Expense</i> , 971.
EXECUTION AGAINST THE BODY AND ARREST IN CIVIL CASES, 228.	<i>Experience</i> , 972.
<i>Execution and Proof of Documents</i> , 229.	<i>Experiments in Evidence</i> , 972.
<i>Execution of Powers</i> , 229.	EXPERT AND OPINION EVIDENCE, 972.
	<i>Expert Witnesses</i> , 1106.
	<i>Explanations</i> , 1106.

ABBREVIATIONS.

Dallam	Dallam's Reports.
Posey.....	Posey's Unreported Cases.
S. W.....	Southwestern Reporter.
Tex. Civ. App.....	Texas Civil Appeals Reports.
App. Civ. Cases.....	Texas Appeals, Civil Cases (White & Willson).
Tex.....	Texas Supreme Court.
25 Tex. Supp.....	25 Texas Supplement.
No op.....	No opinion.

Encyclopedic Digest of Texas Reports (Civil Cases)

Evidence at Former Trial or Preliminary Examination.

See the title HEARSAY EVIDENCE.

Examination.

See the title INSPECTION AND PHYSICAL EXAMINATION. See, also, the titles DISCOVERY, vol. 6, p. 431; SEQUESTRATION. As to examination for insurance, see the title INSURANCE. As to examination of witnesses, see the titles DEPOSITIONS AND INTERROGATORIES, vol. 6, p. 326; WITNESSES. As to examination of attorneys, see the title ATTORNEY AND CLIENT, vol. 2, p. 570. As to examination of debtor in proceedings supplementary to execution, see the titles EXECUTION AGAINST THE BODY AND ARREST IN CIVIL CASES; GARNISHMENT; SUPPLEMENTARY PROCEEDINGS. As to examination of insane person, see the title INSANITY. As to privy examination of married women, see the title ACKNOWLEDGMENTS, vol. 1, p. 66. As to post mortem examinations, see the title CORONERS, vol. 4, p. 680. Of expert witness, see the title EXPERT AND OPINION EVIDENCE. Of juror, see the title JURY. Of headright certificates, see the title PUBLIC LANDS. Of physicians, see the title PHYSICIANS AND SURGEONS. Of title, see the title ABSTRACT OF TITLE, vol. 1, p. 47. As to review of rulings on examination of witnesses, see the title APPEAL AND ERROR, vol. 1, pp. 412, et seq., 833, et seq.

Examined Copy.

See the title DOCUMENTARY EVIDENCE, vol. 6, p. 531. See, also, the titles FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS; JUDGMENTS AND DECREES; RECORDS.

Excavations.

See the titles ADJOINING LANDOWNERS, vol. 1, p. 151; EXPERT AND OPINION EVIDENCE; MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS; WORKING CONTRACTS. See, also, the titles GAS; MASTER AND SERVANT; NEGLIGENCE.

Exceptions.

See, generally, the titles EXCEPTIONS AND OBJECTIONS; EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL; TRIAL;

VENUE. In deeds, see the title **DEEDS**, vol. 6, p. 242, et seq.; in insurance policy, see the title **INSURANCE**; in other instruments, see the titles treating thereof. As to burden of proving, see the title **PRESUMPTIONS AND BURDEN OF PROOF**. As to exceptions to answer, see the title **EQUITY**, vol. 6, p. 966. As to exceptions to report or finding of referee or master, see the title **REFERENCE**. As to disposing of special exceptions as waiver of plea in abatement, see the title **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, p. 38. As to exceptions in statute of limitations, see the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION**. As to exceptions to depositions, see the title **DEPOSITIONS AND INTERROGATORIES**, vol. 6, p. 371, et seq. As to exceptions on accounting between partners, see the title **PARTNERSHIP**. As to exceptions to account, see the titles **ACCOUNTS AND ACCOUNTING**, vol. 1, p. 57; **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**, vol. 2, p. 166, et seq. See, also, the titles **EXECUTORS AND ADMINISTRATORS**; **GUARDIAN AND WARD**; **TRUSTS AND TRUSTEES**. As to exceptions to assessment, see the titles **EMINENT DOMAIN**, vol. 6, p. 849; **SPECIAL ASSESSMENTS**. As to exceptions to award of arbitrators, see the title **ARBITRATION AND AWARD**, vol. 2, p. 38, et seq. As to exceptions to jurors, see the title **JURY**. As to exceptions to pleading, see the title **PLEADING**. As to exceptions to partition, see the title **PARTITION**.

EXCEPTIONS AND OBJECTIONS.

BY S. BLAIR FISHER.

I. General Rules Relating to Exceptions and Objections, 6.

- A. Objections, 6.
 - 1. Necessity That Objections Be Made and Acted upon in Court Below, 6.
 - a. General Rule, 6.
 - b. Exceptions to Rule, 7.
 - 2. When to Be Made, 8.
 - 3. Presentation of Grounds of Objection, 8.
- B. Exceptions, 9.
 - 1. Necessity, 9.
 - 2. By Whom Taken, 9.
 - 3. When to Be Taken, 9.
 - 4. Form and Sufficiency, 10.

II. Applications of Rules to Exceptions and Objections in Particular Instances, 10.

- A. Jurisdiction, 10.
 - 1. Of Person, 10.
 - 2. Of Subject Matter, 11.
 - 3. Objections to Court or Judge, 13.
- B. Venue, 13.
- C. Process or Service Thereof, 14.
 - 1. Defective Process, 14.
 - 2. Defective Service, 15.
- D. Parties, 15.

1. Defect of Parties, 15.
 - a. Proper Parties, 15.
 - b. Necessary Parties, 16.
2. Misjoinder of Parties, 18.
3. Names of Parties, 19.
4. Right or Capacity to Sue or Defend, etc., 19.
5. Intervention or Substitution, 20.
6. Discontinuance or Dismissal as to One of Several Defendants, 20.
7. Death of Parties, 21.
- E. Affidavits, Bonds, etc., 21.
- F. Pleadings, 21.
 1. Objections, 21.
 - a. Necessity, 21.
 - (1) As Dependent on Nature of Defect, 21.
 - (2) To Petition, 22.
 - (a) Names of Parties, 22.
 - (b) Allegations, 22.
 - aa. In General, 22.
 - bb. Clerical Omissions, Verbal Inaccuracies, etc., 22.
 - cc. Failure to State Facts Sufficient to Constitute Cause of Action, 22.
 - (c) Defective or Omitted Prayer, 24.
 - (d) Verification, 24.
 - (e) Indorsement, 25.
 - (f) Objections to Supplemental or Amended Petitions, 25.
 - (3) To Plea or Answer, 25.
 - (a) In General, 25.
 - (b) Defects of Substance, 25.
 - (c) Verification, 25.
 - (d) Amendment, 26.
 - (4) To Filing Pleadings and Papers, 26.
 - b. Manner, 27.
 2. Exceptions, 27.
- G. Premature Suit, 27.
- H. Nonproduction of Instrument Sued on, 27.
- I. Jury, 27.
- J. Conduct of Trial, 29.
 1. Order of Trial, 29.
 2. Conducting Two Trials at Same Time, 29.
 3. Second Trial at Same Term, 29.
 4. Placing Party to Suit under Rule, 29.
 5. Exception to Action of Court in Granting a Severance, 29.
 6. Order of Argument, 30.
 7. Conduct or Remarks of Judge, 30.
 8. Conduct or Remarks of Counsel, 30.
 - a. Objections, 30.
 - (1) Necessity, 30.
 - (a) General Rule, 30.
 - (b) Exceptions to Rule, 31.
 - (2) Time, Manner and Sufficiency, 32.
 - b. Exceptions to Court's Ruling on Remarks of Counsel, 32.

9. Conduct of Parties, 32.
10. Conduct of Jury, 33.
- K. Evidence, 33.
 1. Admission of Evidence, 33.
 - a. Objections, 33.
 - (1) Necessity, 33.
 - (a) General Rule Stated and Construed, 33.
 - (b) Applications of Rule, 35.
 - (c) Necessity for Renewal of Objection, Notwithstanding Previous Unsuccessful Objection, 40.
 - (d) Necessity for Further Objection Where First Obviated, 40.
 - (2) Time and Manner of Making, 41.
 - (a) In General, 41.
 - (b) Practice Where Evidence Already Admitted, 42.
 - (3) Requisites and Sufficiency, 43.
 - (a) Necessity for Specific Objections Stating Grounds, 43.
 - aa. General Rule, 43.
 - bb. Exceptions to Rule, 48.
 - (b) Insufficiency of General Objection to Evidence, Any Portion of Which Is Admissible, 48.
 - (4) Waiver of Objections to Evidence Admitted Over Objection, 50.
 - b. Exceptions, 51.
 - (1) Necessity, 51.
 - (2) Time of Taking, 51.
 2. Exclusion of Evidence, 51.
 - a. Necessity for Exception to Ruling, 51.
 - b. Time of Taking, 52.
 - c. Showing as to Nature of Evidence Proposed to Be Introduced, 52.
 3. Questions and Answers, 53.
 - a. Questions, 53.
 - b. Answers, 54.
 - c. Objections on Ground of Surprise at Witness' Testimony, 56.
 4. Insufficiency of Evidence, 56.
 - a. Necessity for Raising Question Below by Motion for New Trial, 56.
 - (1) General Rule, 56.
 - (2) Exceptions to Rule, 57.
 - b. Specification of Particulars Wherein Evidence Insufficient, 58.
 5. Variance, 58.
- L. Witnesses, 59.
 1. Objection That Witness Was Not Sworn, 59.
 2. Objections as to Qualifications and Competency of Witness, 59.
- M. Instructions, 60.
 1. Erroneous Charge, 60.
 - a. Necessity for Objections Below to Appear of Record, 60.
 - (1) In General, 60.
 - (2) When Unnecessary, 61.
 - (3) Charge Considered as Excepted to under Present Statute, and Reviewable without Bill of Exceptions, 62.

- b. Time of Making, 63.
 - c. Requisites and Sufficiency, 63.
 - d. Attacking Charge on Certain Grounds as Waiver of Other Objections, 64.
- 2. Omissions or Defects in Charge, 64.
 - a. General Rule as to Duty of Parties to Request Additional Instructions, 64.
 - b. Applications of Rule, 67.
- 3. Objections Relating to Submission of Issues, 72.
 - a. That Charge Was Erroneous in Submitting Issue, 72.
 - b. To Form of Submission, 73.
 - c. For Failure to Properly State or Submit Issues Involved, 73.
 - (1) General Rule as to Necessity for Request for Special Charge, 73.
 - (2) Necessity for Request Though Case Submitted on Special Issues, 74.
 - (3) When Request Unnecessary, 75.
 - (4) Necessity for Written Request, 75.
 - (5) Time for Request for Submission upon Special Issues, 75.
- N. Verdict, 75.
 - 1. Necessity for Objections Below, 75.
 - a. Defects or Omissions, 75.
 - (1) Formal Defects or Irregularities, 75.
 - (2) Defects of Substance, 76.
 - b. Excessiveness or Inadequacy, 77.
 - c. Failure to Direct Verdict, 77.
 - 2. Time of Taking, 77.
 - 3. Manner, Form and Sufficiency, 78.
 - 4. Admission of Liability as Waiving Objections, Save as to Amount of Verdict, 79.
- O. Findings of Court, 79.
 - 1. To Failure to File, 79.
 - 2. To Time of Filing, 81.
 - 3. To Correctness or Sufficiency of Finding, 81.
 - a. General Rule, 81.
 - b. Exceptions to Rule, 83.
 - (1) Where Judgment Excepted to, 83.
 - (2) Where Record Contains All the Facts, 84.
 - (3) Where Conclusions Filed by Judge Voluntarily and without Request, 85.
 - (4) In Absence of Objection by Appellee, 85.
 - c. Necessity, Manner and Sufficiency of Noting on Record Exceptions, under Rev. Stat., art. 1333, 85.
- P. Judgments, 86.
 - 1. Necessity for Raising Objection in Court Below, 86.
 - a. When Necessary, 86.
 - (1) General Rule, 86.
 - (2) Applications of Rule, 86.
 - b. Objections Available on Appeal Though Not Raised Below, 87.
 - 2. Form and Requisites of Objection, 88.
 - 3. Reduction of Exceptions to Writing, 88.
- Q. Costs, 88.

- R. Rulings on Applications for Continuances or Postponements, 89.
- S. Rulings on Motions for New Trial, 90.
- T. Form and Manner of Prosecuting Appeal, 90.
- U. Objections to Claims Presented to Administrator, 90.
- V. Objections to Auditors' Reports, 90.
- W. Objections to Validity of Foreign Assignments for Benefit of Creditors, 90.

CROSS REFERENCES.

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 1; AMENDMENTS, vol. 1, p. 203; APPEAL AND ERROR, vol. 1, p. 313; APPEARANCES, vol. 2, p. 1; ARGUMENTS OF COUNSEL, vol. 2, p. 42; ASSIGNMENTS OF ERROR, vol. 2, p. 185; BRIEFS, vol. 3, p. 168; CONTINUANCES, vol. 4, p. 482; COSTS, vol. 4, p. 971; DEMURRERS, vol. 6, p. 270; EVIDENCE, vol. 6, p. 1098; EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL; FINDINGS OF COURT; INSTRUCTIONS; JUDGMENTS AND DECREES; JURISDICTION; JURY; MOTIONS; NEW TRIALS; PARTIES; PLEADING; SUMMONS AND PROCESS; VARIANCE; VENUE; VERDICT; WITNESSES.

I. General Rules Relating to Exceptions and Objections.

A. OBJECTIONS:

1. Necessity That Objections Be Made and Acted upon in Court below.

a. General Rule.

Necessity for Raising Objection in Lower Court.—It is a well-established general rule that objections not made in the court below can not be urged for the first time on appeal. *Hansborough v. Towns*, 1 Tex. 58, 61; *Pettus v. Perry*, 4 Tex. 486; *Hopkins v. Donaho*, 4 Tex. 336, 338; *Beal v. Alexander*, 6 Tex. 531, 541; *Knight v. Holloman*, 6 Tex. 153; *Herndon v. Casiano*, 7 Tex. 322; *Trigg v. Moore*, 10 Tex. 199; *Parker v. Leman*, 10 Tex. 116; *Ryan v. Jackson*, 11 Tex. 391, 401; *Hamilton v. Rice*, 15 Tex. 382, 385; *Burnley v. Rice*, 18 Tex. 481, 496; *Rector v. Hudson*, 20 Tex. 234, 237; *Williams v. Wright*, 20 Tex. 499, 503; *Carson v. Russell*, 26 Tex. 452; *Allen v. Traylor*, 31 Tex. 124; *Ann Berta Lodge v. Levertton*, 42 Tex. 18; *Morris v. State*, 47 Tex. 583, 591; *Johnson v. Blount*, 48 Tex. 38; *Brown v. Chenoworth*, 51 Tex. 469, 479; *Texas, etc., R. Co. v. Casey*, 52 Tex. 112, 123;

Tierney v. Frazier, 57 Tex. 437; *Pool v. Wedemeyer*, 56 Tex. 287, 300; *Houston, etc., R. Co. v. Adams*, 63 Tex. 206; *Gaines v. National, etc., Bank*, 64 Tex. 18, 21; *Tom v. Sayers*, 64 Tex. 339, 341; *Hance v. Burke*, 75 Tex. 62, 66, 11 S. W. 135; *Corsicana v. Kerr*, 75 Tex. 207, 208, 12 S. W. 982; *Davis v. State*, 75 Tex. 420, 12 S. W. 957; *Welsh v. Morris*, 81 Tex. 159, 16 S. W. 744; *Cason & Bros. v. Connor*, 82 Tex. 26, 18 S. W. 668; *Waller v. Léonard*, 89 Tex. 507, 35 S. W. 1045; *Wheeler v. Tyler, etc., R. Co.*, 91 Tex. 356, 43 S. W. 876, affirming 41 S. W. 517; *Smith v. Olsen*, 92 Tex. 181, 46 S. W. 631, reversing 44 S. W. 874; *Kane v. Sholars*, 41 Tex. Civ. App. 154, 90 S. W. 937; *Merrielles v. State Bank*, 5 Tex. Civ. App. 483, 486, 24 S. W. 564; *O'Connor v. Koch*, 9 Tex. Civ. App. 586, 29 S. W. 400, affirmed in 93 Tex. 647, no op.; *Carter-Battle Grocer Co. v. Jackson*, 18 Tex. Civ. App. 353, 45 S. W. 615, affirmed in 93 Tex. 726, no op.; *Moor v. Moor*, 24 Tex. Civ. App. 150, 57 S. W. 992, affirmed in 94 Tex. 706, no op.; *Finks v. Hollis*, 38 Tex. Civ. App. 23, 85 S. W. 463; *Cummings v. Masterson*, 42 Tex. Civ. App. 549, 93 S. W. 500, affirmed in

101 Tex. 633, no op.; *Hahl v. Kellogg*, 42 Tex. Civ. App. 636, 94 S. W. 389, affirmed in 101 Tex. 640, no op.; *Morris v. Morris*, 47 Tex. Civ. App. 244, 105 S. W. 242, affirmed in 102 Tex. 588, no op.; *Danby Millinery Co. v. Dogan*, 47 Tex. Civ. App. 323, 105 S. W. 337 (see 102 Tex. 581, no op.); *Cochran v. Moerer*, 47 Tex. Civ. App. 372, 105 S. W. 1138, affirmed in 102 Tex. 580, no op.; *Williams v. Smith* (Civ. App.), 24 S. W. 1115; *Green v. Fisher* (Civ. App.), 45 S. W. 429; *Williams v. Leon* (Civ. App.), 55 S. W. 374; *Boyd v. Ghent* (Civ. App.), 61 S. W. 723, affirmed in 95 Tex. 46; *San Antonio v. Thigpen* (Civ. App.), 75 S. W. 836, affirmed in 97 Tex. 646, no op.; *Sanger Bros. v. Corsicana Nat. Bank* (Civ. App.), 87 S. W. 737, affirmed in 99 Tex. 565; *Vaughn v. Lee* (Civ. App.), 94 S. W. 912; *Laughlin v. Schnitzer* (Civ. App.), 106 S. W. 908.

A party must make the objections on which he relies in the court below, and such as are not then made can not be raised in the supreme court for the first time. *Pool v. Wedemeyer & Schulte*, 56 Tex. 287.

It is too late to insist, in the supreme court, on a defect which should have been objected to at the trial and was there susceptible of an easy remedy. *Hansborough v. Towns*, 1 Tex. 58.

"He who was silent in the court below, where he ought to have spoken, and has thus permitted the opportunity of making his defense to pass by, ought not to be first heard in this court." *Hopkins v. Donaho*, 4 Tex. 336, 338." *Allen v. Traylor*, 31 Tex. 124.

The supreme court can only consider such objections as were made in the court below, and will not consider proper objections which might have been made in place of improper objections which were made. *Ann Berta Lodge No. 42 I. O. O. F. v. Leverton*, 42 Tex. 18.

Objection which could have been made upon motion for new trial will not be heard for first time on appeal. *Welsh v. Morris*, 81 Tex. 159, 161, 16 S. W. 744.

An assignment of error should be overruled where the matter complained of was not called to the attention of the trial court by motion for new trial. *Morris v. Morris*, 47 Tex. Civ. App. 244, 105 S. W. 242.

Necessity for Action by Trial Court on Objections There Made.—It would seem to be the general rule that not only must a proper objection be made in the court below, but such objection must be acted on by the trial court, in order that it may be available in the appellate court. *Sanger Bros. v. Corsicana Nat. Bank* (Civ. App.), 87 S. W. 737, affirmed in 99 Tex. 565.

Presumption as to Waiver of Demurrer on Which No Action Invoked.—See the titles APPEAL AND ERROR, vol. 1, p. 313; DEMURRERS, vol. 6, p. 270.

b. Exceptions to Rule.

Exception Stated.—A well-established exception to the general rule that an appellate court will not consider objections first raised on appeals exists in case of errors apparent on the face of the record. The appellate court will consider objections raised for the first time on appeal where the errors are apparent on the face of the record, and are either fundamental in their character, or determine a question on which the right of the case depends. *Hahl v. Kellogg*, 42 Tex. Civ. App. 636, 94 S. W. 389, affirmed in 101 Tex. 640, no op. See, also, *Swigley v. Dickson*, 2 Tex. 193; *Pettus v. Perry*, 4 Tex. 486, 488; *Ford v. Taggart*, 4 Tex. 492; *Long v. Anderson*, 4 Tex. 422; *McNairy v. Castleberry*, 6 Tex. 286; *Booth v. Todd*, 8 Tex. 137; *Hollingsworth v. Holshousen*, 17 Tex. 41; *Taylor v. Rowland*, 26 Tex. 293; *Brooks v. Breeding*, 32 Tex. 752; *Grant v. Whitteley*, 42 Tex. 320; *Johnson v. Blount*,

48 Tex. 38; Texas, etc., *Co. v. Lawson*, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919, reversing 31 S. W. 842; *Holloway Seed Co. v. City Nat. Bank*, 92 Tex. 187, 47 S. W. 95, 516; *Wilson v. Johnson*, 94 Tex. 272, 60 S. W. 242; *Coleman v. Lytle*, 49 Tex. Civ. App. 42, 107 S. W. 562; *El Paso, etc., R. Co. v. Murtle*, 49 Tex. Civ. App. 273, 108 S. W. 998, affirmed, no op.; *Friedman v. Payne* (Civ. App.), 35 S. W. 47; *Harmon v. Callahan* (Civ. App.), 35 S. W. 705; *Capps v. Leachman* (Civ. App.), 35 S. W. 397; *Luke v. El Paso* (Civ. App.), 60 S. W. 363; *Parham v. Shockler* (Civ. App.), 73 S. W. 839; *Western Union Tel. Co. v. Hidalgo* (Civ. App.), 99 S. W. 426, affirmed in 102 Tex. 596, no op.

Fundamental errors, whether accepted to or not, are ground for reversal. *Hamilton v. Flume*, 2 Posey, Unrep. Cas. 694.

The province of the appellate court is to decide only those questions which were presented and passed upon in the court below, except where the foundation of the action itself appears to have failed or where objection first taken on appeal goes to the merits or foundation of the action. *Pettus v. Perry*, 4 Tex. 486, 488.

Objections apparent of record, which go to the foundation of the action, are equally available on error, as in arrest of judgment. *McDonough v. State*, 19 Tex. 293.

The supreme court has jurisdiction to consider the question of the legality of the contract which was the basis of the plaintiff's claim and of the counterclaim of the defendant, although the point was not raised in the trial court nor by assignment of error. Texas, etc., *Coal Co. v. Lawson*, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919, reversing 31 S. W. 843, 10 Tex. Civ. App. 491. See the title **CONTRACTS**, vol. 4, p. 546.

Parties can not, by express waiver of illegality of a contract, induce the

court to overlook such illegality and administer their rights thereunder as if it were valid, and the mere omission to notice such vice can not have that effect. Texas, etc., *Coal Co. v. Lawson*, 89 Tex. 394, 403, 32 S. W. 871, 34 S. W. 919.

Errors Held within Exception to General Rule.—For instances of errors held to be within the exception to the general rule, and available, though first raised in the appellate court, see the appropriate subsections under post, "Applications of Rules to Exceptions and Objections in Particular Instances," II.

2. When to Be Made.

As to the proper time for raising objections in the court below, see the appropriate subsections under post, "Applications of Rules to Exceptions and Objections in Particular Instances," II.

3. Presentation of Grounds of Objection.

Necessity and Sufficiency.—Where no reason for an objection is assigned below, or presented on appeal, none will be considered. *Erhard v. Callaghan*, 33 Tex. 171, 178.

Under Dist. Ct. Rule 68 (67 S. W. xxv), providing that grounds for objection couched in general terms—as that the court erred in its charge, that the verdict of the jury is contrary to law, and the like—shall not be considered, an objection on motion for a new trial that the verdict of the jury is excessive, without pointing out wherein it is excessive, is too general to be considered on appeal. *International & G. N. R. Co. v. McVey* (Civ. App.), 81 S. W. 991, rehearing denied (Civ. App.), 83 S. W. 34. Reversed 99 Tex. 28, 87 S. W. 328.

Shifting Grounds of Objection.—Exceptions filed in the district court alleged that an order of the county court, directing an administrator's sale of land, was illegal, because ordering

the sale to be made for cash, and that the return was not within 30 days. At the trial in the county court the contestant offered evidence that the sale was unfairly made. Held, that the contestant could not shift his previous ground, at the trial, and that the evidence was inadmissible and rightly rejected. *Brown v. Hobbs*, 19 Tex. 167.

B. EXCEPTIONS.

1. Necessity.

In General.—Where no exceptions were taken to rulings, errors therein will not be considered. *Mahon v. Kinney County* (Civ. App.), 28 S. W. 1024, affirmed in 93 Tex. 713, no op.; *International, etc., R. Co. v. Mercer* (Civ. App.), 78 S. W. 562, affirmed in 98 Tex. 621, no op.; *Peoples v. Terry* (Civ. App.), 43 S. W. 846; *Equitable Mortg. Co. v. Thorn* (Civ. App.), 26 S. W. 276; *Moore v. Blum* (Civ. App.), 40 S. W. 511, affirmed in 91 Tex. 273; *Davis v. State*, 75 Tex. 420, 12 S. W. 957.

Action of a trial court is not subject to revision on appeal unless it was excepted to at the proper time. *Owens v. Missouri Pac. R. Co.*, 67 Tex. 679, 683, 4 S. W. 593.

Failure to except at the proper stage deprives the parties of all rights other than those *stricti juris* and his objections can not be urged for the first time on appeal, save to prevent an obvious violation of justice. *Crosby v. Huston*, 1 Tex. 203.

"A party waives the error in a ruling where it is necessary for him to reserve an exception, and fails to do so. It is not necessary, however, to take exception to judgments of the court upon matters which constitute the record proper in the case, at common law, as the pleadings, motions for new trial, or an arrest of judgment, and final judgment. Rule 53 of district and county courts. The rule is but a declaration of the rule announced in *Cunningham v. Wheatly*, 21 Tex. 181. It is sufficient that the rulings were

complained of in the motion for new trial and by assignment of error here. In fact, it has been held that it is not necessary to do so in the motion for new trial. *Marsalis v. Crawford*, 8 Tex. Civ. App. 485, 28 S. W. 371, citing *Clark v. Pearce*, 80 Tex. 146, 151, 15 S. W. 787; but we doubt the correctness of the rule last mentioned, in view of art. 1369, Rev. Stat." *White v. San Antonio Waterworks Co.*, 9 Tex. Civ. App. 465, 29 S. W. 252.

In absence of exceptions in lower court the only question before the appellate court is whether the judgment is correct. *Mann v. Thruston*, Dallam 370, 371.

Necessity for Record to Show Taking of Exceptions.—If the record does not show that exceptions were taken to the ruling of the court below, the appellate court will not review the same on appeal. *Leaverton v. Leaverton*, 40 Tex. 218; *Ballinger Nat. Bank v. Bryan*, 12 Tex. Civ. App. 673, 34 S. W. 451.

2. By Whom Taken.

Either party to a cause may except to a ruling or other action of the trial court, with which he is dissatisfied. Art. 1360 (1358), *Sayles' Civ. Stats. International, etc., R. Co. v. Mercer* (Civ. App.), 78 S. W. 562, affirmed in 98 Tex. 621, no op.

3. When to Be Taken.

Where exception to a ruling is necessary to assign error upon it, the exception must be taken at the time the ruling is made. *Price v. Lauve*, 49 Tex. 74, 80.

By art. 1360 (1358), *Sayles' Civ. Stats.*, it is provided that "whenever, in the progress of a cause, either party is dissatisfied with any ruling, opinion or other action of the court, he may except thereto at the time the same is made or announced," etc. *International, etc., R. Co. v. Mercer* (Civ. App.), 78 S. W. 562, affirmed in 98 Tex. 621, no op.

All exceptions which are merely dilatory are regarded by the law with disfavor, and the omission to urge them at once and at the first opportunity will deprive the party of the right to be heard to urge them, unless it be where to deny the right would be to sanction an obvious violation of law, or where the objection brings in question the jurisdiction of the court to proceed to a decision on the merits. *Horton v. Wheeler*, 17 Tex. 52.

4. Form and Sufficiency.

An exception to a particular ruling should, on appeal, be made distinctly to appear as it occurred upon the trial, and if it should not appear to have been taken to the testimony of any witness in particular, or to any particular evidence, it will, on the ground of indefiniteness of the exception, be held no error in the ruling. *Rains v. Hood*, 23 Tex. 555.

II. Applications of Rules to Exceptions and Objections in Particular Instances.

A. JURISDICTION.

1. Of Person.

In General.—Where the trial court has jurisdiction of the subject matter, objection to its want of jurisdiction over the person must be raised at the proper time, and in the proper manner, or such objection will be held to have been waived. *Piedmont, etc., Life Ins. Co. v. Ray*, 50 Tex. 511; *Vickery v. Ward*, 2 Tex. 212; *Frosh v. Holmes*, 8 Tex. 29; *Brooks v. Chat-ham*, 57 Tex. 31; *Douglas v. Baker*, 79 Tex. 499, 505, 15 S. W. 801.

While generally the giving of a bond strictly as required by statute is essential to the exercise of jurisdiction of the supreme court, the jurisdiction over the subject matter in controversy is conferred by the constitution, and parties may waive irregularities in matters of detail by which that jurisdiction is brought into exercise, and

which were intended for their benefit. *Tynberg v. Cohen*, 76 Tex. 409, 13 S. W. 315.

Jurisdiction over the person may be obtained without the service of citation when the defendant waives such service. *Mercer v. Woods*, 33 Tex. Civ. App. 642, 78 S. W. 15, affirmed in 98 Tex. 624, no op.

The authorities are numerous to the effect that although personal notice of the suit be not served on the defendant, yet if he chooses to appear and contest the merits, thereby waiving his personal immunity and submitting to the jurisdiction of the court, the judgment will bind him personally and be entitled to the same respect, even in a foreign country, as if the process had been served upon the defendant and the judgment obtained in the ordinary mode. *Campbell v. Wilson*, 6 Tex. 379, 394.

If a party has some privilege which exempts him from the jurisdiction, as, for instance, that of a defendant to be sued in the county of his residence, he may waive it if he chooses; and though the court has not acquired jurisdiction of the person of the defendant by the service of process upon him, he may appear and submit his person to the jurisdiction of the court, and if he do so it will be a waiver of the objection. *Frosh v. Holmes*, 8 Tex. 29, 32.

The right of the defendant to be sued in a particular county, being a question of local jurisdiction merely, is a personal privilege which the defendant, if he thinks proper, may waive, and which, by pleading to the action without objecting to the jurisdiction, he will be deemed to have waived. *Morris v. Runnells*, 12 Tex. 175. See, also, *Ryan v. Jackson*, 11 Tex. 391; *Burnley v. Cook*, 13 Tex. 586; *Piedmont, etc., Life Ins. Co. v. Ray*, 50 Tex. 511; *Houston, etc., R. Co. v. Graves*, 50 Tex. 181, 201; *Masterson v. Ashcom*, 54 Tex. 324; *Sanger v. Overmier*, 64 Tex. 57, 59; *Watson*

v. Baker, 67 Tex. 48, 2 S. W. 375; *Bonner v. Hearne*, 75 Tex. 242, 251, 12 S. W. 381; *Swearigen v. Wilson*, 2 Tex. Civ. App. 157, 160, 21 S. W. 74; *Logan v. Texas Bldg., etc., Ass'n*, 8 Tex. Civ. App. 490, 28 S. W. 141.

For a full treatment of the effect of failure to plead in abatement the privilege of defendant to be sued in county of residence, see the title **ABATEMENT, REVIVAL AND SURVIVAL**, vol. 1, pp. 25, 37.

Where the plaintiff and defendant were nonresidents and the suit was commenced by attachment, the defendant appeared and answered to the merits and obtained a continuance; afterwards, on motion of the defendant, the attachment was quashed, the defendant then moving to dismiss the suit for want of jurisdiction. Held, that he had submitted to the exercise of jurisdiction over his person, and it was too late to claim his personal immunity and to object to the exercise of the jurisdiction of the court on that ground. *Campbell v. Wilson*, 6 Tex. 379.

Where a foreign corporation doing business in a state appears and answers to merits in a suit for breach of contract to be wholly performed in another state, it can not for the first time on appeal object to the jurisdiction of the trial court. *Western Union Tel. Co. v. Russell*, 12 Tex. Civ. App. 82, 85, 33 S. W. 708.

Presumption as to Submission to Jurisdiction.—Where the question of jurisdiction was presented by demurrer, but the record fails to show any action thereon, all parties in interest being before the court will be presumed to have submitted to its jurisdiction. *County of Galveston v. Noble*, 56 Tex. 575.

Agreement for Judgment as Precluding Objection to Jurisdiction.—An agreement for judgment precludes the raising of questions as to jurisdiction. *Craighead v. Bruff* (Civ. App.), 55 S.

W. 764. See the title **JUDGMENTS AND DECREES**.

2. Of Subject Matter.

In General.—The appellate court will take cognizance of the fact that the lower court had no jurisdiction of the subject matter of the suit, where such fact is apparent of record, though the question was not raised below. *Heidenheimer Bros. v. Marx*, 1 App. Civ. Cases, § 171, citing *Hardeman v. Morgan*, 48 Tex. 103; *Lane v. Doak*, 48 Tex. 227; *Mawthe v. Crozier*, 50 Tex. 153. And see *Corsicana v. Kerr*, 75 Tex. 207, 208, 12 S. W. 982.

Where the question of jurisdiction is not raised, still the want of jurisdiction in the court trying a case must always be noticed, and is always fatal whether complained of or not. *Newman v. McCallum*, 1 App. Civ. Cases, §§ 273, 274, citing *Tarbox v. Kennon*, 3 Tex. 7; *Graham v. Roder*, 5 Tex. 141, 146; *Austin v. Jordan*, 5 Tex. 130; *Evans v. Pigg*, 28 Tex. 586, 590; *Able v. Bloomfield*, 6 Tex. 263; *Bridge v. Ballew*, 11 Tex. 269.

The appellate court may notice want of jurisdiction of court below, although not specially pleaded. *Swigley v. Dickson*, 2 Tex. 193, 195.

Where plaintiff's petition fails to show an amount involved sufficient to bring the cause of action within the jurisdiction of the district court, the judgment of that court for plaintiff is fatally erroneous. *Moore v. Snell* (Civ. App.), 88 S. W. 270. See, generally, the title **COURTS**, vol. 5, p. 161.

If the county court did not have jurisdiction of the subject matter of the suit, and that fact is apparent of record, the supreme court will take cognizance of it, though the question was not raised in that court. *Bohl v. Brown*, 2 App. Civ. Cases, § 538.

Where an appeal was taken to the county court from a justice's judgment which was not final, the court of civil appeals, on a further appeal from

the county court, will take notice of the county court's want of jurisdiction, and reverse its judgment, though no objection for want of jurisdiction was made in the county court. *Carothers v. Holloman*, 75 S. W. 1084, 33 Tex. Civ. App. 131.

A judgment of the county court foreclosing an attachment lien on land being void, will be reversed, though objection thereto was not presented in the lower court. *Wright v. Cullers*, 2 App. Civ. Cases, §§ 750, 751.

Consent Ineffective to Confer Jurisdiction.—Not even consent, express or implied can give jurisdiction, when the court has not jurisdiction of the subject matter. *Swigley v. Dickson*, 2 Tex. 193; *Hearn v. Cuthberth*, 10 Tex. 216; *Capps v. Leachman* (Civ. App.), 35 S. W. 397; *Horan v. Wahrenberger*, 9 Tex. 313; *Fitzhugh v. Custer*, 4 Tex. 391; *Griffin v. Brown*, 1 App. Civ. Cases, §§ 1097, 1099; *Kirk v. Ivey*, 2 App. Civ. Cases, § 37.

"Jurisdiction over the person may be obtained without the service of citation when the defendant waives such service; but that rule has no application when considering a question of jurisdiction over the subject matter. Jurisdiction of the latter class can not be obtained by consent, and can only exist when the law conferring such jurisdiction has been complied with." *Mercer v. Woods*, 33 Tex. Civ. App. 642, 645, 78 S. W. 15, affirmed in 98 Tex. 624, no op.

The agreement of the parties to waive what the law requires to be done can not give a court jurisdiction. *Day v. Flournoy*, 34 Tex. 439, 440.

Under const. 1845, the only mode by which a district court could acquire jurisdiction of an action cognizable by a justice of the peace was by the writ of certiorari; and in such an action it was not competent for the parties litigant to waive the issuance of the writ, and still confer jurisdiction upon the district court as though it

had duly issued. *Day v. Flournoy*, 34 Tex. 439.

Objection Available at Any Stage of Proceedings.—The want of jurisdiction of the subject matter may be set up at any time. *Griffin v. Brown*, 1 App. Civ. Cases, §§ 1097, 1099; *Kirk v. Ivey*, 2 App. Civ. Cases, §§ 37, 38; *Bohl v. Brown*, 2 App. Civ. Cases, § 538; *Fitzhugh v. Custer*, 4 Tex. 391; *Horan v. Wahrenberger*, 9 Tex. 313; *Neil v. State*, 43 Tex. 91; *Able v. Bloomfield*, 6 Tex. 263; *Banton v. Wilson*, 4 Tex. 400.

A question affecting the jurisdiction of the appellate court may be raised at any stage of the proceedings. *St. Louis Southwestern Ry. Co. of Texas v. Hall*, 85 S. W. 786, 98 Tex. 480.

It is the duty of the court to raise a question of jurisdiction whenever the disqualifying fact may become known. *Burks v. Bennett*, 55 Tex. 237.

Questions which involve the jurisdiction of the court will be considered at any time that they may come to the notice of the court, however great the lapse of time may have been after docketing the cause in the appellate court, and whether raised by motion to dismiss, or brought to the attention of the court in any other way. *Smith v. Parks*, 55 Tex. 82, 86; *Evans v. Pigg*, 28 Tex. 586, 590; *Griffin v. Brown*, 1 App. Civ. Cases, §§ 1097, 1099.

A question as to the lawful creation and existence of the trial court, since it affects appellate jurisdiction, may be raised in a case pending in the supreme court on writ of error, though not brought to the attention of either the trial or the appellate court. *St. Louis, etc., R. Co. v. Hall*, 98 Tex. 480, 85 S. W. 786, reversing 81 S. W. 571.

When a district court assumed jurisdiction over a set-off less in amount than the minimum jurisdiction of such court, held, fundamental error, upon which reversal may be based, although no error thereto was assigned at the trial or on a former appeal. *Robinson*

v. Garrett (Civ. App.), 54 S. W. 269, 270.

"Appellee moved to dismiss this appeal because the affidavit made in lieu of an appeal bond was not in compliance with the law. Appellant resisted the motion upon the ground that it came too late; that it should have been filed on or before the second day of the second assignment, but was not filed until several days thereafter, and in support of this position he cited rule 8 of the supreme court. Held, rule 8 does not apply to this motion, because the ground of this motion is not an informality, and is not such an objection as can be waived. If the affidavit is not in substantial compliance with the statute, it can not give this court jurisdiction of the appeal, and want of jurisdiction is fatal at any time, and can not be cured by waiver, or consent of the parties. Rule 9 is the rule applicable to this motion, and under that rule the motion may be entertained at any time after notice given to the adverse party." *Kirk v. Ivey*, 2 App. Civ. Cases, § 37. See the title **APPEAL AND ERROR**, vol. 1, p. 313.

Appellate Court May Notice of Its Own Motion.—Rendering of a judgment in a cause over which the trial court had no jurisdiction, is fundamental error and ground for reversal, though the question of jurisdiction was neither raised below nor urged by appellant on appeal. *Capps v. Leachman* (Civ. App.), 35 S. W. 397, citing *Curtis v. Ford*, 78 Tex. 262, 14 S. W. 614.

Though a cause be submitted on its merits without motion to dismiss the appeal, yet, if it appear by the record that the court does not possess jurisdiction, it will not attempt to exercise it, and in such case the supreme court will, of its own motion, dismiss the appeal. *Smith v. Parks*, 55 Tex. 82, 86; *Chambers v. Miller*, 7 Tex. 75. See the title **APPEAL AND ERROR**, vol. 1, p. 313.

3. Objections to Court or Judge.

See, generally, the title **JUDGES**.

A party can not complain for first time on appeal that the special judge who tried the case was not sworn. *Western Union Tel. Co. v. Neel* (Civ. App.), 35 S. W. 29, affirmed in 93 Tex. 653, no op.

The record should in all cases show how a special judge trying a cause became such; but if the record is silent, a party who, without objection, has participated in the trial of his cause before such judge, can not, for the first time on appeal, raise the objection that his authority did not appear. *Shultz & Bro. v. Lempert*, 55 Tex. 273.

Objection to the disqualification of the district judge can not be made for first time in the supreme court. *Austin v. Nalle*, 85 Tex. 520, 550, 22 S. W. 668, 960.

B. VENUE.

See, generally, the title **VENUE**.

General Rule as to Necessity for Objections at Proper Stage of Proceedings.—Objections to the venue of a cause, made for the first time on a motion for new trial, and based on the alleged unconstitutionality of the act creating the county in which the cause was tried, will not be considered on appeal. *Beazley v. Denson*, 40 Tex. 416.

The supreme court will not consider objection, made for first time in that court, that suit in the district court, respecting land, was brought in the wrong county. *Coles v. Perry*, 7 Tex. 109, 144.

A defendant sued in the district court in Galveston county in trespass to try title to recover land described as situate in the city of Galveston without reference to county or state, can not for the first time raise the objection to the jurisdiction of the court by asking the court to give a charge on the subject that the suit did not appear to have been brought in the county

where the land was. *Solyer v. Romanet*, 52 Tex. 562.

Objections to Change of Venue.—Objections that venue was changed for causes not authorized by law will not be heard when made for first time in supreme court. *Love v. Henderson*, 42 Tex. 520, 522.

Where the supporting affidavits for a change of venue are for the first time attacked in the supreme court for informality or defect in the jurat, which could have been amended after objection below, the objection will not be regarded. *Farley v. Deslonde*, 58 Tex. 588.

Waiver of Objection Not Set up in Record.—An objection to the venue, when not set up in the record, must be deemed waived. *Spicer v. Taylor* (Civ. App.), 21 S. W. 314.

C. PROCESS OR SERVICE THEREOF.

See, generally, the title SUMMONS AND PROCESS.

1. Defective Process.

General Rule as to Defects Curable by Amendment.—A party to an action who has not objected to the sufficiency of a citation in the trial court will not be heard on appeal to complain of such defects as might have been cured by amendment. *Marshall v. Marshall* (Civ. App.), 30 S. W. 578.

"In *Cave v. Houston*, 65 Tex. 619, 622, Chief Justice Willie says: 'With the means in his power of ascertaining the correctness of the statement made in the citation, the defendant could not wait till a judgment by default was taken, and then, upon appeal to this court for the first time set up so slight a defect as the ground for reversing the judgment. If the process is void, the defendant is not required to obey it; but, if merely defective, it brings defendant into court. If he does not then take his exceptions, at the proper time, he can not afterwards be heard to urge it as error in this court. *Crain v.*

Griffis, 14 Tex. 358.' In the case thus referred to the same rule is laid down, and it is said, in substance, that if the defect was one that might be cured by amendment, on motion to quash, the party will not be heard on error to complain, not having objected in the court below. These decisions have been referred to and followed in other cases. *Loungeway v. Hale*, 73 Tex. 495, 497, 11 S. W. 537; *Hale v. McComas*, 59 Tex. 484, 487." *Marshall v. Marshall* (Civ. App.), 30 S. W. 578, 579. See, also, *Holstein v. Gardner*, 16 Tex. 115.

Party permitting default judgment can not on appeal urge mere amendable clerical error in writ in lower court. *Allen v. Traylor*, 31 Tex. 124, 125.

Where the name of the defendant stated in the petition was Sampson Christie, and the name of the citation was Sampson, and the sheriff returned the citation served on the defendant Sampson Christie, and there was judgment by default, the court said it was not like the case of *Burleson v. Henderson*, 4 Tex. 49, and held that the defect was not fatal on error, although it might have required amendment if the objection had been made in the court below. *Crain v. Griffis*, 14 Tex. 358.

A citation, in other respects complying with the statute, bore the date March 20th, and stated that the petition was filed on that date; while it was served, together with a copy of the petition, on February 21st, and cited the defendant to appear on March 6th. Held, that such defects, not being misleading, and no objection having been made to them in the trial court, were not grounds for reversal. *Marshall v. Marshall* (Civ. App.), 30 S. W. 578.

The objection to an execution purporting to have been issued by a justice of the peace, and directed to the sheriff or any constable of another county, that it was not accompanied by a certificate under seal of the clerk of the county court that the officer is-

suing the same was a justice of the peace, can not be made available when presented for the first time in the supreme court. *Hodde v. Susan*, 58 Tex. 389.

Defects Available on Appeal.—If the objection goes to the validity of the process, and it is void, the defendant is not required to obey it. *Crain v. Griffis*, 14 Tex. 358; *Holstein v. Gardner, etc., Co.*, 16 Tex. 115; *Hale v. McComas*, 59 Tex. 484; *Cave v. Houston*, 65 Tex. 619.

A party upon whom defective process has been served may appear and take advantage of it, in limine, by a motion to quash, or he may, upon writ of error, obtain the reversal of any judgment rendered by default in the suit. *Frosch v. Schlumpf*, 2 Tex. 422; *Haley v. Greenwood & Co.*, 28 Tex. 680.

The citation issued in the district court (O. & W. Dig., art. 409) must state the names of the parties to the suit. If the citation is defective in that regard, and a judgment by default be rendered, without any amendment of the writ, the defendant may avail himself of the invalidity of such service on him, on error, in the supreme court. *Norvell v. Garthwaite*, 25 Tex. 583, 584.

If judgment by default be taken against a defendant on a citation, which commands him to appear at a wrong or impossible time, he may avail himself of the defect on writ of error in the supreme court. *Covington v. Burleson*, 28 Tex. 368.

2. Defective Service.

Merely defective service of process does not of itself invalidate a judgment rendered upon it so as to render it void. *Hale v. McComas*, 59 Tex. 484.

Objection can not be heard in the district court to the service of the process of the justice's court; nor can the defendant set up any defense that does not go to the merits of the action. *Perry v. McKinzie*, 4 Tex. 154.

It is too late to object for the first time in the supreme court that a writ of inquiry was executed in the district court on a legal holiday and on which writ a judgment was afterwards rendered. If the objection were good it should have been made in the court below to set aside the proceedings for irregularity. *Houston, E. & W. Ry. Co. v. Harding*, 63 Tex. 162.

The filing of a paper in a cause, designated therein as an "amended petition," wherein one not before a party to the cause seeks to make himself a plaintiff in lieu of the original plaintiff, is an irregularity though filed with leave of the court, and no judgment can be rendered thereon until after service thereof upon the defendant as in an original suit. The fact that defendant has not been cited to appear and answer the petition of such a party affords no ground for exception to the petition, though a plea to the jurisdiction of the person for want of service should be sustained. If, however, after attempting to except to such petition because there was no service thereof, the defendant answers in full to the merits, he will be regarded as having waived the irregularity of the proceeding. *Armstrong v. Bean*, 59 Tex. 492.

Defect in service of process being apparent upon the record, the objection may be raised in the supreme court by writ of error. *Booth v. Holmes*, 2 Posey 232, 233; *James v. Watson*, 2 Posey 741.

Where the service of a citation appears from the record to be defective, it is not incumbent on the defendant to appear and make the objection in the court below; but the same may, if he do not appear, be taken advantage of by writ of error. *Burleson v. Henderson*, 4 Tex. 49.

D. PARTIES.

See, generally, the title PARTIES.

1. Defect of Parties.

a. Proper Parties.

In General.—An objection for the

want of merely proper parties can not be raised for the first time on appeal. *Shelby v. Burtis*, 18 Tex. 644, 648; *Hughes v. Roper*, 42 Tex. 116, 125; *Caruth v. Grisby*, 57 Tex. 259; *Hill v. Newman*, 67 Tex. 265, 3 S. W. 271; *Isaacks v. Wright*, 50 Tex. Civ. App. 312, 110 S. W. 970; *Spicer v. Taylor* (Civ. App.), 21 S. W. 314; *Southern, etc., Ass'n v. Skinner* (Civ. App.), 42 S. W. 320; *Brackenridge v. Claridge*, (Civ. App.), 42 S. W. 1005; *Leslie v. Elliott*, 26 Tex. Civ. App. 578, 64 S. W. 1037, affirmed in 95 Tex. 681, no op. And see *Hartford Fire Ins. Co. v. Houston* (Civ. App.), 110 S. W. 973; *Holloway v. Blum*, 60 Tex. 625; *Rush v. Bishop*, 60 Tex. 177; *Reagan v. Copeland*, 78 Tex. 551, 14 S. W. 1031.

"The point is made, in a written argument for appellants, that the judgment should be reversed on account of the failure of appellee to make C. C. Cherry a party defendant. No such question was raised by the pleadings, nor by any assignment of error, nor is the question presented at all by the brief filed for appellants. It can not be raised, so as to require consideration, in the argument alone." *Isaacks v. Wright*, 50 Tex. Civ. App. 312, 110 S. W. 970.

An appellant can not complain for the first time on appeal that a certain person was not made a party unless injury has thereby resulted to appellant. *Sears v. Green*, 1 Posey Unrep. Cas. 727.

In an action on a note, the accommodation maker, who, on the trial, does not complain of the nonjoinder of the party in whose interest the note was made, can not urge the defect upon appeal. *Southern, etc., Ass'n v. Skinner* (Civ. App.), 42 S. W. 320.

The fact that the trustee in a deed of trust was not made a party can not be taken advantage of where the question is not raised until after trial. *Leslie v. Elliott*, 26 Tex. Civ. App. 578, 64 S. W. 1037, affirmed in 95 Tex. 681, no op.

Effect of Consent Judgment as Precluding Objection on Appeal.—Where judgment is by consent, objection of want of parties can not be raised for the first time on appeal by the party consenting. *Herndon v. Crawford*, 41 Tex. 267.

b. Necessary Parties.

The nonjoinder of necessary parties to a suit or action is fundamental error, and may be taken advantage of for the first time on appeal or writ of error, though the objection was not raised below. *Monday v. Vance*, 11 Tex. Civ. App. 374, 32 S. W. 599; *Hanner v. Summerhill*, 7 Tex. Civ. App. 235, 26 S. W. 906, affirmed in 93 Tex. 730, no op.; *Holloway v. McIlhenny C.*, 77 Tex. 657, 14 S. W. 240.

Where it appears that indispensable parties have not been joined in the suit, the appellate court will take notice thereof, and will remand the cause in order that they may be joined, although no objection has been made on that account. *King v. Commissioners Court*, 10 Tex. Civ. App. 114, 30 S. W. 257.

"We believe, however, it is the practice, even of appellate courts, to take notice of the absence of indispensable parties, and to remand the cause, in order that they may be joined. This is the course which has been pursued by our supreme court in partition proceedings, in which it has said: 'It is a general rule in equity, subject to but few exceptions, that all persons interested in the subject matter of the suit must be made parties to it. * * * And even though no objection was or could have been made to the petition, when in the course of the trial it became apparent that there were necessary parties who were not before the court, it should have stopped the case and required them to be brought in, before making a decree or partition.' *Buffalo Bayou Ship, etc., Co. v. Bruly*, 45 Tex. 6." *King v. Commissioners Court*, 10 Tex. Civ. App. 114, 30 S. W. 257.

That all tenants in common are indispensable parties to a suit for partition is well settled in the supreme court. Want of parties can not be cured by failure to take action upon it on the trial. *Holloway v. McIlhenny Co.*, 77 Tex. 657, 14 S. W. 240.

"Appellee insists that because there was no attempt in the court below to arrest the proceedings for want of necessary parties until the final judgment was amended at a term subsequent to that at which the trial was had the objection comes too late. But we are of opinion that the error can not be cured by failure to take action in the trial court. A decree of partition in a suit to which one or more of the owners of the land are not parties does not affect their rights. They can not be bound by the decree, and can have it set aside in any proper proceedings in which all parties are before the court. Courts of justice do not sit to enter empty decrees, and hence will arrest a proceeding of this character for want of necessary parties at any stage of the proceedings. The rule results from the impossibility of making a binding decree without having all parties who own an interest in the land to be affected by it before the court." *Holloway v. McIlhenny Co.*, 77 Tex. 657, 14 S. W. 240.

Failure to make the necessary parties plaintiff in an action on a joint contract will be considered on appeal if brought to the court's notice whether defendant pleaded the want of parties below or not, since it is fundamental error. *Hammer v. Summerhill*, 7 Tex. Civ. App. 235, 26 S. W. 906.

"The failure to make the necessary parties plaintiff to an action on a joint contract will be considered on appeal by this court if brought to its notice, whether the defendant plead the want of parties below or not, as it is fundamental error. In *Holliman v. Rogers*, 6 Tex. 91, Lipscomb, judge, in discussing this question, said: 'Should it be

said that a defect of parties can only be taken advantage of by plea in abatement, the answer is, that the general rule, that exceptions to parties should be taken advantage of by plea in abatement, giving to the party a better writ, is subject to exceptions. And one of these exceptions is, that a defendant may take advantage of such defect in a party plaintiff on the trial, if it should appear from the evidence, although not pleaded. Not so, however, as to a want of proper parties defendant. This the defendant must show by his plea, and give the names of the parties that should have been joined with his.'" *Hammer v. Summerhill*, 7 Tex. Civ. App. 235, 26 S. W. 906, affirmed in 93 Tex. 730, no op.

Where beneficiaries are necessary parties to suit by trustee to remove cloud from title to trust property, non-joinder of beneficiaries as parties to suit is fundamental error and may be first taken advantage of on appeal or writ of error. *Monday v. Vance*, 11 Tex. Civ. App. 374, 377, 32 S. W. 559.

Defendant city sued the water company for loss, caused by its breach of contract to furnish adequate water pressure to put out fires, whereby the city market house was burned, plaintiff insurance company intervening, claiming, upon paying the policy on the market house, to be subrogated to the city's right against the water company, but the city thereafter dismissed the suit against the water company upon buying its plant, and as part of the consideration for the sale agreed to pay the demands of the insurance companies, and the latter thereafter sued the water company on their demand in subrogation and made the city a party defendant. Held, that while the making of new parties is largely in the discretion of the trial court, where such parties are not necessary, and though the city was not a necessary party, as its liability was independent of the water company's, under the cir-

cumstances both issues may be settled by the same suit, and the joinder of the city as defendant was so manifestly proper that error in refusing to make the city a party may be reviewed on appeal. *Hartford Fire Ins. Co. v. Houston* (Civ. App.), 110 S. W. 973.

"We are aware of certain expressions in opinions of the supreme court to the effect that the making of new parties is largely in the discretion of the trial court, where the new parties are not necessary parties. *Holloway v. Blum*, 60 Tex. 625; *Rush v. Bishop*, 60 Tex. 178; *Reagan v. Coupland*, 78 Tex. 555, 14 S. W. 1031. When the making of such new party is so manifestly proper as in the present case, we think that the error in the refusal to do so may properly be revised by the appellate court." *Hartford Fire Ins. Co. v. Houston* (Civ. App.), 110 S. W. 973.

An objection for failure to join an alleged necessary party can not be raised for the first time in argument on appeal. *Isaacks v. Wright*, 50 Tex. Civ. App. 312, 110 S. W. 970.

Where a party does not except to pleadings for failure to make a necessary party in the lower court, or plead in abatement, he can not be heard to complain on appeal of the action of the court, in a case where the defendant in the court below is in possession under a deed, claimed by plaintiff to be a mortgage, and the defendant asks a foreclosure as to the plaintiffs, where the party claimed to be a necessary party is a nonresident of the state. *Baker v. Collins*, 4 Tex. Civ. App. 520, 23 S. W. 493.

Effect of Failure to Plead in Abatement the Misjoinder or Nonjoinder of Parties.—See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 1.

2. Misjoinder of Parties.

In General.—Objection for misjoinder of parties can not be first made on appeal. *Blackman v. Green*, 17 Tex.

322, 327; *San Antonio St. R. Co. v. Helm*, 64 Tex. 147, 149; *Allen v. Read*, 66 Tex. 13, 21, 17 S. W. 115.

No objection having been made below to creditors uniting in contesting an administrator's report, objection can not be made on appeal on the ground of a misjoinder. *Chifflet v. Willis & Bro.*, 74 Tex. 245, 11 S. W. 1105.

In suit on notes held as collateral security, seeking to foreclose lien on realty, objection that makers were improperly joined as defendants with principal obligor can not be urged for the first time on appeal to defeat jurisdiction of the court. *Green v. Scottish American Mortg. Co.*, 18 Tex. Civ. App. 286, 290, 44 S. W. 319.

Misjoinder of Husband and Wife.—Where a husband and wife were erroneously joined in an action for injuries to the wife, but no objection was made thereto at the trial, a judgment in favor of plaintiff will not be reversed for such misjoinder of parties. *Galveston, etc., R. Co. v. Baumgarten*, 31 Tex. Civ. App. 253, 72 S. W. 78, affirmed in 97 Tex. 833, no op.

In trespass to try title by husband and wife, defendants may not complain that on appeal the court of civil appeals on reversing judgment for them awarded judgment for the wife, as well as the husband, because the property was community property, since both plaintiffs prayed for recovery, and no exception was at any time made to the unnecessary joinder of the wife, and since, the judgment being generally for both plaintiffs, the husband, as representative of the community is concluded by the judgment. *Henderson v. Rushing*, 47 Tex. Civ. App. 485, 105 S. W. 840, affirmed in 102 Tex. 584, no op.

While the wife is not a necessary or proper party to an action by the husband for damages resulting from personal injuries to her, yet where no objection was made at the trial because

of her joinder as plaintiff, and no prejudice is shown to have resulted therefrom to the defendant, the question of such misjoinder can not be raised on appeal. *San Antonio, etc., R. Co. v. Jackson*, 38 Tex. Civ. App. 201, 85 S. W. 445, affirmed in 101 Tex. 657, no op.

That Minor Was Improperly Made Party.—Defendant can not, for the first time on appeal, object that a minor was improperly made party to a suit and judgment erroneously rendered against him, unless defendant is shown to have been injured thereby. *Sears v. Green*, 1 Posey 727, 734.

3. Names of Parties.

An objection that one codefendant is sued by the wrong name can not be raised for the first time on appeal. *Chandler v. Scherer*, 32 Tex. 573, 575. See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, pp. 20, 36; NAMES; PARTIES.

The objection that the name of plaintiff was not stated in the petition in the manner required by statute comes too late where made for the first time in the appellate court. *Hawkins v. Stevenson*, 3 Dall. Dig. 558.

Where no objection to a discrepancy in names in different parts of petition was made in the trial court, it will not be heard for the first time on appeal. *Flewellen v. Fort Bend County*, 17 Tex. Civ. App. 155, 159, 42 S. W. 775.

4. Right or Capacity to Sue or Defend, etc.

Authority of Plaintiff to Sue.—Although no objection be made at the trial of a cause in the lower court to the authority of the plaintiff to sue, yet, if the record does not show that he had authority, the objection will be heard in the supreme court and will be fatal. *Crosby v. Huston*, 1 Tex. 203.

Right of Foreign Corporation to Sue.—The question of the right of a foreign corporation to sue in this state, where there is no allegation in its petition of a permit to do business in the state, can be raised for the first time in the

appellate court. *Mansur, etc., Imp. Co. v. Beer*, 18 Tex. Civ. App. 311, 45 S. W. 972, affirmed in 93 Tex. 713, no op., following *Taber v. Interstate Bldg., etc., Ass'n*, 91 Tex. 92, 40 S. W. 954.

Lack of Interest in Plaintiff.—Objections to lack of interest in plaintiff come too late after judgment. *Reinhardt v. Pleasants*, 36 Tex. 684, 686.

Executor can not object for the first time in the supreme court that the party appealing from the county to the district court, had no interest in the decree. *Davenport v. Hervey*, 30 Tex. 308, 328.

Right of Plaintiff to Recover in Capacity in Which He Sues.—The question of plaintiff's right to recover in the capacity in which he sues must be raised in the trial court in order to be available as ground for reversal. *San Antonio, etc., R. Co. v. Jones*, 30 Tex. Civ. App. 316, 70 S. W. 349, citing *Rev. Stats. art. 1265*; *Dolson v. De Ganahl*, 70 Tex. 620, 8 S. W. 321; *Grand Lodge v. Stumpf*, 24 Tex. Civ. App. 309, 58 Tex. 840.

An administrator who is plaintiff can not be required to prove his authority to prosecute a cause under a general denial or a plea of not guilty. It is too late after trial to question the authority of one suing as administrator. *Dignowitty v. Coleman*, 77 Tex. 98, 13 S. W. 857.

Where suit was instituted in 1839 by an executor, the petition showing he had been appointed more than a year before, and not showing a continuance of his character by the proper tribunal, the defendant asked the court to instruct the jury that, to "enable the plaintiff to maintain this suit, it is indispensable that he show that he is now the executor of Stephen F. Austin;" held, that the objection was not taken in due time and in the proper manner. *Coles v. Perry*, 7 Tex. 109.

Omission of Profert of Letters by Administrator.—Objection that plaintiff who was administrator did not make

profert of letters in his pleadings comes too late on appeal. *Holdeman v. Knight*, Dallam 566, 568.

Right of Plaintiff to Sue as Executrix.—Where plaintiff's right to sue as executrix has not been contested below, it can not be attacked by motion to dismiss the appeal. *Rankin v. Busby* (Civ. App.), 25 S. W. 678.

Infant Suing by Next Friend.—Party can not object to suit by infant by his next friend, for the first time on appeal. *Brooke v. Clark*, 57 Tex. 105, 112.

Objection That Recovery against Estate Was Not Made Through Administration.—Parties can not complain for the first time on appeal that a recovery against an estate was not made through administration, where the heirs were made parties after defendant's death and four years elapsed between the death of the original defendant and the rendition of judgment. *Stelle v. Shannon*, 62 Tex. 198, 200.

5. Intervention or Substitution.

An assignment of error complaining that the court allowed a defendant to amend and file a cross bill and interveners to file petitions of intervention when the suit had abated by the death of the plaintiff, is not available on appeal where there is nothing in the record to show when the latter died, or that plaintiffs in error objected to the filing of such pleas, or made any move in relation thereto in the court below. *Long v. Behan*, 19 Tex. Civ. App. 325, 45 S. W. 555, affirmed in 93 Tex. 733, no op.

Where plaintiff in trespass to try title died pending suit, and his widow and minor son were substituted as plaintiffs, the wife suing as guardian for the son, alleging her appointment as such in another state, and seeking to recover for him his interest in the land, a judgment for plaintiff will not be disturbed on the ground that the wife, as a foreign guardian only, could not prosecute a suit in Texas, since,

being the mother and natural guardian of the child, she had the right to prosecute the suit as next friend, and, in the absence of objection on the trial, her suit will be treated as having been prosecuted in that capacity, and her allegation as to suing as guardian will be regarded as a mere technical inaccuracy. *Bonner v. Ogilvie*, 24 Tex. Civ. App. 237, 58 S. W. 1027.

Where the defendants proceed with an action, treating the widow of the deceased plaintiff as properly the plaintiff therein until after the trial has begun, they thereby waive objections to the prosecution of the suit by her as plaintiff. *Yarbrough v. De Martin*, 28 Tex. Civ. App. 276, 67 S. W. 177, affirmed in 95 Tex. 690, no op.

6. Discontinuance or Dismissal as to One of Several Defendants.

See, generally, the title DISMISSAL, DISCONTINUANCE AND NON-SUIT, vol. 6, p. 433.

Objection to the discontinuance of an action as to one of several defendants not urged in the court below will not be considered on writ of error. *Shipman v. Allee*, 29 Tex. 17.

Objection to discontinuance of suit as to joint defendant served must be made at trial to be available on appeal. *Horton v. Wheeler*, 17 Tex. 52, 55; *Gamble v. Talbot*, 2 App. Civ. Cases, § 729; *Head v. Cleburne Bldg., etc.*, Ass'n (Civ. App.), 25 S. W. 810, 811.

Where a defendant allowed the court to enter an order of dismissal of the suit as against a codefendant, and did not except thereto, it could not thereafter complain of the order by virtue of the court overruling a motion to have the codefendant brought in as a party, and the utmost defendant could obtain from the last ruling was the right to complain of being refused the privilege to have the codefendant made a party. *Sexton Rice & Irrigation Co. v. Sexton*, 48 Tex. Civ. App. 190, 106 S. W. 728.

Dismissal as to one defendant not

excepted to can not be availed of an appeal where no prejudice to rights is shown. *White v. Leavitt*, 20 Tex. 703, 706.

7. Death of Parties.

An objection in the supreme court to a judgment of the district court, because rendered when the record disclosed the fact that one of the partners of the defendant firm was dead, comes too late. The death of a party defendant should have been called to the attention of the district court by suggestion, and service had upon the legal representatives of the deceased party. *Blum v. Goldman & Son*, 66 Tex. 621, 1 S. W. 899.

E. AFFIDAVITS, BONDS, ETC.

Affidavits.—Objections to defect in an affidavit for attachment can not be raised for the first time on appeal. *Rowan v. Shapard*, 2 App. Civ. Cases, § 295. See the title ATTACHMENT, vol. 2, p. 296.

Motion to quash attachment because of omission of word "sworn" or some equivalent in affidavit will not be considered when urged for the first time on appeal. *Merrielles v. State Bank*, 5 Tex. Civ. App. 483, 486, 487, 24 S. W. 564. See the title ATTACHMENT, vol. 2, p. 296.

Objection to affidavit attacking deed for forgery can not be first made on appeal. *Brown v. Perez*, 79 Tex. 157, 160, 14 S. W. 1055.

On appeal in a sequestration suit, objection that the affidavit for sequestration was not made before a proper officer will not be considered, where it did not appear that it was called to the attention of the trial court. *Vaughn v. Lee* (Civ. App.), 94 S. W. 912.

Bonds.—Clerical error or omission in bail bond amendable below can not be objected to for the first time on appeal. *State v. Franklin*, 35 Tex. 497, 498.

On appeal from a judgment against sureties on a bail bond, the fact that

the bond does not appear to have been filed among the papers in the cause is no ground for reversal when objection is not raised below. *Brown v. State*, 40 Tex. 49, 50.

Where in an action on a replevin bond, no question as to its validity was raised in the trial court, and it was sufficient in form to support judgment, its validity could not be questioned for the first time on appeal. *Cummings v. Masterson*, 42 Tex. Civ. App. 549, 93 S. W. 500, affirmed in 101 Tex. 633, no op. See the title REPLEVIN.

On appeal in a sequestration suit, an objection that the sequestration bond was not approved, will not be considered, where it does not appear that it was called to the attention of the trial court. *Vaughn v. Lee* (Civ. App.), 94 S. W. 912.

F. PLEADINGS.

See, generally, the title PLEADING.

1. Objections.

a. Necessity.

(1) As Dependent on Nature of Defect.

Formal Defects or Irregularities.

The sufficiency of pleadings on appeal must be tested by the objections urged against them in the court below. *Irvin v. Ellis*, 76 Tex. 164, 166, 13 S. W. 22.

Objection to defective pleadings will be considered waived where no objection in the lower court appears of record. *O'Connor v. Towns*, 1 Tex. 107, 108.

As a general rule all exceptions touching the legal sufficiency whether of form or of substance, of the pleadings should be taken before going to trial upon the issues of fact. *Williams v. Bailes*, 9 Tex. 61.

Objections to pleadings not excepted to in the lower court can not be heard on appeal. *Andrews v. Jones*, 36 Tex. 149, 150.

Where exceptions to pleadings so general as to be only a general de-

murrer were urged in the court below, specific reasons of objection can not be heard on appeal. *Irvin v. Ellis*, 76 Tex. 164, 13 S. W. 22. See the title DEMURRERS, vol. 6, p. 270.

If a pleading be sufficient prima facie to embrace the evidence, though defective in specific averments the opposite party can avail himself of the defect only by exception to the pleading or objection to the evidence in the court below. *Park v. Prendergast, etc., Co.*, 4 Tex. Civ. App. 566, 23 S. W. 535.

Admission of evidence under defective pleading can not first be objected to on appeal. *Roemilie v. Leeper*, 2 Posey 535, 536.

Fundamental Errors.—Fundamental errors or omissions in pleadings are not cured by the verdict, or waived by failure to object in the lower court. *Ramsay v. McCauley*, 2 Tex. 189; *De Witt v. Miller*, 9 Tex. 239; *Elliott v. Wiggins*, 16 Tex. 596; *Powell v. Davis*, 19 Tex. 380; *Locke v. Huling*, 24 Tex. 311; *Black v. Calloway*, 30 Tex. 232; *Worley v. Smith*, 26 Tex. Civ. App. 270, 63 S. W. 903; *Lewis v. Batten*, 35 Tex. Civ. App. 370, 80 S. W. 389; *Alamo Fire Ins. Co. v. Davis* (Civ. App.), 45 S. W. 604.

A pleading is cured by the verdict when the omitted fact is such that it is to be presumed that the judge would not have directed the jury to give the verdict, or the jury would not have given it, unless it (the omitted allegation) had been proved. But a verdict will not cure the omission of a necessary substantive allegation. *Schuster v. Frendenthal & Co.*, 74 Tex. 53, 11 S. W. 1051.

Where a pleading is fatally defective, it need not be first excepted to in the lower court. *Alamo Fire Ins. Co. v. Davis* (Civ. App.), 45 S. W. 604.

An omission to except can not constitute a pleading, which discloses no legal right, the basis of an adjudication. *Ford v. Taggart*, 4 Tex. 492,

citing *Borden v. Houston*, 2 Tex. 594; *Patterson v. Goodrich*, 3 Tex. 331.

(2) To Petition.

(a) Names of Parties.

Where the names of both parties were given in full in the caption of an amended petition and in the body of the petition, they were referred to as plaintiff and defendant, and no objection was made in the trial court on the ground that the amended petition failed to set forth the names of the parties and their residences, the objection could not be regarded on appeal. *Hance v. Burke*, 73 Tex. 62, 11 S. W. 135.

(b) Allegations.

aa. In General.

Though the facts are stated in the petition in a general way, which might have rendered it liable to special exceptions, yet where sufficient allegations are made to constitute a cause of action, after verdict it is too late to require a greater certainty and particularity in the statement of the facts upon which the suit is founded. *McCarty v. Wood*, 42 Tex. 38.

Defects in petition, to be availed of on appeal, must have been made below. *Satterthwaite v. Loomis*, 81 Tex. 64, 68, 16 S. W. 616.

It is too late, after trial, to urge exceptions to plaintiff's petition. *Grand Lodge A. O. U. W. v. Bollman*, 22 Tex. Civ. App. 106, 53 S. W. 829, affirmed in 93 Tex. 684, no op.

The fact that no objections were taken to a petition before judgment will incline the court on appeal not to sustain an objection, taken thereafter, that it was not sufficient to warrant recovery, though it is admittedly very defective. *Bialek v. Richmond* (Civ. App.), 51 S. W. 47.

Insufficiency of petition and objections to evidence can not be raised for the first time on appeal. *Western Union Tel. Co. v. McHenry*, 3 App. Civ. Cases, § 9.

In a suit to correct alleged errors

in an account settled by note, exceptions on the ground of insufficiency of petition can not be raised on appeal where no exception to it as evidence introduced, was raised below. *Murphy v. Stell*, 43 Tex. 123, 128.

In an action to set aside a judgment based on defective service an exception based on plaintiff's failure to state whether the term of court at which the judgment was rendered had adjourned, when he first learned of such rendition will not be reviewed when first presented on appeal. *Hamblen v. Knight*, 60 Tex. 36.

In *Thurmond v. Brownson*, 69 Tex. 597, 6 S. W. 778, it appeared from the record that appellant filed no pleading, or answer of any kind, other than his disclaimer, nor was there any exception made by him to the petition, nor did he object to the evidence introduced by appellants. It was held that his very neglect to except at the proper stage of the proceedings deprived him of all rights except those *stricti juris*, and his objections when urged on appeal for the first time, would be considered only to prevent an obvious violation of the principles of law and justice.

Where, in an action to correct a mistake in a division of land, plaintiff's petition alleged that the error was due to "some mistake, inadvertency, accident or miscalculation," a failure to allege that the mistake was mutual was cured by the verdict, and objection on that account could not be made for the first time on motion for new trial. *Lewis v. Batten*, 35 Tex. Civ. App. 370, 80 S. W. 389.

An objection to a decree of partition upon the ground that the property was not sufficiently described in appellee's petition, is one that should have been made by exception to the pleadings. *Moor v. Moor*, 24 Tex. Civ. App. 150, 57 S. W. 992, affirmed in 94 Tex. 706, no op.

Where no exception was made in

the trial court to the manner in which partnership was alleged, its sufficiency can not be urged on appeal. *Gulf, etc., R. Co. v. Wilbanks*, 7 Tex. Civ. App. 489, 497, 27 S. W. 302.

Though the averments in an action on a bill of exchange were insufficient to charge the defendant with certain acts if excepted to, yet as there was no exception to the petition on those grounds, no motion in arrest of judgment nor assignment of error, and as it was a matter susceptible of being cured by amendment it was not an error of which the appellate court would take notice of its own motion, as a ground for reversing the judgment. *Carson v. Russell*, 26 Tex. 452.

Where an action for broker's commissions was tried on the theory that the complaint alleged a several liability and also authorized a recovery on a quantum meruit, and the petition was susceptible of such construction, defendant could not claim on appeal that the petition did not authorize a recovery on a quantum meruit, nor against one of the defendants alone. *McDonald v. Cabiness* (Civ. App.), 98 S. W. 943, affirmed in 100 Tex. 615.

bb. Clerical Omissions, Verbal Inaccuracies, etc.

A clerical omission in petition can not be taken advantage of for the first time on appeal. *Rogers v. Golson* (Civ. App.), 31 S. W. 200, 201.

Mere verbal inaccuracies in a petition, which, if excepted to, would have been cured by amendment, can not be assigned as error on appeal. *Houston, etc., R. Co. v. Rowell* (Civ. App.), 45 S. W. 763, affirmed in 92 Tex. 147.

cc. Failure to State Facts Sufficient to Constitute Cause of Action.

In General.—An objection that the petition does not state facts sufficient to constitute a cause of action may be urged for the first time on appeal. *Western Union Tel. Co. v. Hidalgo* (Civ. App.), 99 S. W. 426, affirmed in

102 Tex. 596, no op.; *Grant v. Whittlesey*, 42 Tex. 320; *Bradshaw v. Davis*, 12 Tex. 336.

Such error is fundamental and not cured by verdict. *Black v. Calloway*, 30 Tex. 232; *Locke v. Huling*, 24 Tex. 311, 312.

Though a demurrer on which no action is invoked is in general considered as waived, and a defective plea is cured by verdict, yet when a petition is fatally defective, and fails to state a cause of action, the fact that defendant did not rely on his demurrer will not prevent him from availing himself of such defect on appeal or writ of error. *Grant v. Whittlesey*, 42 Tex. 320.

There being no foundation in pleadings for judgment, objection may be taken to it on appeal. *Stansbury v. Nichols*, 30 Tex. 145, 149.

Where the petition is insufficient to support the judgment, a reversal will be ordered though no exception to the petition was taken in the lower court. *Harmon v. Callahan* (Civ. App.), 35 S. W. 705; *Black v. Calloway*, 30 Tex. 232; *Locke v. Huling*, 24 Tex. 311, 312; *Elliott v. Wiggins*, 16 Tex. 596; *De Witt v. Miller*, 9 Tex. 239.

Failure to except to a pleading which manifestly discloses no right in the party can not entitle him to a recovery, nor to introduce evidence upon the trial which does not conduce to any legal defense to the action, though it be in proof of his allegation. *Powell v. Davis*, 19 Tex. 380.

Illustrations.—The failure in a suit to recover school land by applicant for the purchase thereof to allege and prove that plaintiff was an actual settler, or was an owner of and settler on other land, held errors apparent on the face of the record. *Sterling v. Self*, 30 Tex. Civ. App. 284, 70 S. W. 238.

If the petition exhibits a cause of action which is barred by the statute

of limitations, the defendant can avail himself of the defect on assignment of error, although he may not have done so by answer, demurrer, or motion in arrest of judgment. *Long v. Anderson*, 4 Tex. 422.

Judgment will be reversed though not excepted to when the petition shows that defendant was a minor and his guardian was not made defendant, nor a guardian ad litem appointed for him. *Taylor v. Rowland*, 26 Tex. 293.

(c) Defective or Omitted Prayer.

Objection for defect in prayer comes too late after cause submitted to the jury. *Fulton v. Craddock*, Dallam 458, 459.

In an action for personal injuries incurred during the receivership of a road, where petition alleges company's statutory liability, but prays for no judgment against it, the omission, not being excepted to below, is not ground for reversal. *International, etc., R. Co. v. Cook* (Civ. App.), 33 S. W. 888.

(d) Verification.

After exceptions to the sufficiency of a petition for injunction, and after appeal, defendant can not urge for the first time that the petition was not verified. *Hamblen v. Knight*, 60 Tex. 36.

Objections not urged below to jurat on petition for habeas corpus will not be considered on appeal. *Bean v. Mathieu*, 33 Tex. 591, 596; *Adcock v. Creighton*, 27 Tex. Civ. App. 243, 65 S. W. 42.

It was within the discretion of the trial court to permit, pending the trial, the amendment of a pleading by having the same sworn to. The attorney may make such an affidavit, but objection to the sufficiency of the same comes too late if first made in the appellate court. *Dyer v. Winston*, 33 Tex. Civ. App. 412, 77 S. W. 227.

Objection to admission of a claim not properly verified can not be considered on appeal when objection was

not made in the lower court. *Porter v. Heath*, 2 App. Civ. Cases, § 124.

(e) Indorsement.

Exception on ground that petition was not indorsed as required by statute can not be raised on appeal for the first time. *Wade v. Converse*, 18 Tex. 233, 234.

In trespass to try title a failure to indorse upon the petition that it is an action of trespass to try title, as prescribed by the statute, can not be urged by general demurrer, nor raised for the first time on appeal. *Perkins v. Davidson*, 23 Tex. Civ. App. 31, 56 S. W. 121; *Day Land, etc., Co. v. State*, 68 Tex. 526, 4 S. W. 865. See, also, *Bradley v. Deroche*, 70 Tex. 465, 7 S. W. 779; *McIlhenny v. Miller*, 68 Tex. 356, 4 S. W. 614. See the title TRESPASS TO TRY TITLE AND EJECTMENT.

The objection to a petition that it is not indorsed, "An action to try title, as well as for damages," can not be considered when raised for the first time on appeal. *Echols v. Jacobs Mercantile Co.*, 38 Tex. Civ. App. 65, 84 S. W. 1082, affirmed in 101 Tex. 634, no op.

(f) Objections to Supplemental or Amended Petitions.

Where no objection is made that averments which were made as a supplemental petition should properly have been made as amendments to the original petition, the objection will be deemed to have been waived on appeal. *Galveston, Harrisburg & San Antonio Ry. Co. v. State of Texas*, 81 Tex. 572, 17 S. W. 67.

An objection that petition was amended after judgment without judgment being first set aside can not be raised for first time on appeal. *Bates v. Evans*, 2 App. Civ. Cases, § 211. See the title AMENDMENTS, vol. 1, p. 203.

Trial amendments to the petition to conform to the evidence, where defendants did not claim surprise nor ask a continuance, are not ground for

reversal. *Merchants' Ins. Co. v. Reichman* (Civ. App.), 40 S. W. 831 (see 93 Tex. 714, no op.); *Davis v. John Farwell Co.* (Civ. App.), 49 S. W. 656.

(3) To Plea or Answer.

(a) In General.

Objection that answer of defendant is too general can not be taken for the first time on appeal. *Johnson v. International, etc., R. Co.*, 24 Tex. Civ. App. 148, 149, 150, 57 S. W. 869, affirmed in 94 Tex. 706, no op.

Objections to plea in abatement can not be raised for first time on appeal. *Pfeuffer v. Burns* (Civ. App.), 24 S. W. 36, 37.

Objections to the form of a defense must be taken and disposed of by exception before trial, and can not be made to the admission of testimony, and certainly not in the charge of the court of its own motion after the defense has been proved. *Ashcroft v. Stephens*, 16 Tex. Civ. App. 341, 40 S. W. 1036, affirmed in 93 Tex. 678, no op., citing *Gaines v. Salmon*, 16 Tex. 311; *Powers v. Caldwell*, 25 Tex. 352; *Booth v. Pickett*, 53 Tex. 436; *Johnson v. Granger*, 51 Tex. 42, 44; *Tillman v. Fletcher*, 78 Tex. 673, 674, 15 S. W. 161.

The supreme court has repeatedly held that any objection to the form in which an offset is presented should be disposed of on exceptions, so that the defendant might have the privilege of amending his answer in that particular. *Vance v. Claiborne*, 2 Posey 344.

(b) Defects of Substance.

Where the defect in a plea is one of substance, and not of form, and it is subject to a general demurrer, it is fatal on appeal, though the specific objection was not raised in the court below. *Worley v. Smith*, 26 Tex. Civ. App. 270, 63 S. W. 903.

(c) Verification.

Where no exception was addressed to the defendant's pleading because it

was not verified by affidavit, that question can not be presented for the first time in the appellate court. *Adcock v. Creighton*, 27 Tex. Civ. App. 243, 244, 65 S. W. 42.

Failure of defendant to verify by affidavit a plea of failure of consideration, as required by the statute, is waived where plaintiff goes to trial without excepting to it on that ground, but urges his objection to evidence offered to sustain the plea. *Ashcroft v. Stephens*, 16 Tex. Civ. App. 341, 40 S. W. 1036, affirmed in 93 Tex. 678, no op. See, also, *Stegall v. Levy & Co.*, 3 App. Civ. Cases, §§ 468, 469.

In the case of *Nasworthy v. Draper*, (Civ. App.), 28 S. W. 564, the court of civil appeals decided that the omission of affidavit to the plea of failure of consideration could not be reached by general demurrer, but that the omission must be specially excepted to, and that the defect was waived unless so specially noticed.

In *Rankert v. Clow*, 16 Tex. 9, 10, defendant pleaded payment and in re-convention not sworn to; and there was a trial and a new trial granted, and at the next term plaintiff moved to strike out the answer because it was not sworn to. It was held that the oath had been waived by going to trial at the former term without objection.

Evidence under a plea is not open to the objection that the plea is not verified in the absence of exceptions to the plea on such ground. *Oneal v. Weisman*, 39 Tex. Civ. App. 592, 88 S. W. 290.

(d) Amendment.

Where a cause is tried without a jury, and on motion for new trial defendant is permitted to amend a plea which the court had refused to allow on the trial, and to produce proof in support of it, and defendant does not claim he was not ready for trial, he can not complain on appeal, though it would have been more regular to have

granted a new trial, and set the cause for another trial. *Davis v. Jones* (Civ. App.), 68 S. W. 291.

That the county court permitted plaintiff to amend his claim by setting up new items, no objection thereto being made by defendant, furnishes no sufficient reason for allowing defendant, over objections of plaintiff then made, to also set up new items not pleaded in the justice court. *Downtain v. Connellee*, 2 Tex. Civ. App. 95, 21 S. W. 56.

An objection that an issue should not be submitted because raised only by supplemental answer will not be considered, as the exception should have been made on the ground that the matter was not pleaded in proper form. *Meyer v. Hill* (Civ. App.), 45 S. W. 333.

(4) To Filing Pleadings and Papers.

Order of Filing Pleas.—No exception having been filed in the trial court to a plea in abatement, an objection to a judgment sustaining the plea, urged on the ground that the plea was not filed in due order, will not be considered on appeal. *Hayden v. Kirby*, 31 Tex. Civ. App. 441, 72 S. W. 198.

File Marks on Papers Deposited with Clerk and Acted on by Court.—It has been repeatedly held by the supreme court that the objection to a paper for want of a file mark, which has obviously been placed in the custody of the clerk and acted upon by the court below, comes too late when urged for the first time in the supreme court. *Eggenberger v. Brandenberger*, 74 Tex. 274, 11 S. W. 1099, citing *Knight v. Holloman*, 6 Tex. 153; *Holman v. Chevaillier*, 14 Tex. 337; *Turner v. State*, 41 Tex. 549.

Where the record shows that the court below took action on a paper, it will be presumed that it was marked "filed," although it does not appear so from the transcript, unless the objection be made in the court below; and where the objection was made in the

court below that the paper (being an amendment) did not appear to have been filed with the consent of the court, held, that it did not amount to an objection that the paper was not marked "filed," but rather indicated that it was. *Knight v. Holloman*, 6 Tex. 153.

b. Manner.

By Demurrer.—Defects in pleading should be taken advantage of by demurrer, and not by objection to the evidence. *Hurst v. Benson*, 27 Tex. Civ. App. 227, 65 S. W. 76.

Attempts to take advantage of a defective pleading by objections to the admissibility of evidence are not regarded with favor; and where no special exception has been urged against such defect, the pleading will, in this respect, be liberally interpreted. *Gulf, etc., R. Co. v. Jones*, 1 Tex. Civ. App. 372, 21 S. W. 145.

Generally as to the necessity of exceptions (or demurrers) to pleadings, time of making, form, requisites and sufficiency, see the title DEMURRERS, vol. 6, p. 270.

By Motion to Make More Definite and Certain.—See the title PLEADING.

By Motion to Strike.—See the title PLEADING.

2. Exceptions.

Necessity for Exception to Ruling on Plea.—Error in overruling a nonresident's plea of privilege can not be reviewed on appeal unless an exception was taken. *Equitable Mortg. Co. v. Thorn* (Civ. App.), 26 S. W. 276.

Where a defendant's plea of privilege was overruled, but the ruling was not excepted to, and after judgment defendant moved for a reconsideration of the ruling, defendant could not complain on appeal of the original ruling. *Atchison, T. & S. F. Ry. Co. v. Dawson* (Civ. App.), 90 S. W. 65.

G. PREMATURE SUIT.

Objection that a claim was sued on

before it fell due can not be raised for the first time on appeal. *Williams v. Smith* (Civ. App.), 24 S. W. 1115, 1116.

In a garnishment suit, an objection that all of the debt garnished was not due can not be first made on appeal, where no motion was made to quash the writ on that ground. *W. S. Danby Millinery Co. v. Dogan*, 47 Tex. Civ. App. 323, 105 S. W. 337.

H. NONPRODUCTION OF INSTRUMENT SUED ON.

Objection that account sued on was not filed or produced on trial will not be entertained when made for first time on appeal. *Burnley v. Rice*, 18 Tex. 481, 496.

Objection that note sued on was not produced in evidence at the time judgment by default was rendered in the lower court, comes too late when first made on appeal. *Prestage v. Loving*, 1 App. Civ. Cases, § 707.

After a judgment nil dicit, the defendant can not object in the supreme court that the record does not exhibit the note sued on. Such an objection, if not taken before the judgment, comes too late. *Wescott v. Menard & Co.*, Dallam 503.

I. JURY.

See, generally, the title JURY.

Qualification.—Objection to qualification of jurors comes too late, for first time, on appeal. *Tweedy v. Briggs*, 31 Tex. 74, 76.

"The juror having been accepted, any objection on the ground that he did not possess the requisite qualifications comes too late after the verdict. *Schuster v. LaLonde*, 57 Tex. 28." *Moore v. Woodson*, 44 Tex. Civ. App. 503, 99 S. W. 116.

Although parties be ignorant of the fact disqualifying a juror when accepted, still if the fact be known during the trial and they proceed with the trial without objection, it is too late to urge the objection after a ver-

dict. *Blanton v. Mayes*, 72 Tex. 417, 10 S. W. 452.

"It is well settled that when a party has accepted a juror, knowing the objection, he can not, after verdict, make that objection a ground for a new trial. The rule is the same both in criminal and civil cases. (7 Watts & Serg. R. 415; 5 Binn. R. 340; 1 Pick R. 38.) The law will not permit a party, by thus holding his objection to the juror in reserve, to take two chances of obtaining a verdict in his favor. If the defendant supposed the juror partial, and indisposed to give him a fair trial, he should have made his objection known before accepting him as a juror. Not having done so, he waived the objection." *Givens v. State*, 6 Tex. 343.

Under Rev. St. art. 3089, 3094, the challenge of jurors for cause should be made after their names are drawn by the clerk and the jury lists delivered to the parties, but this may be waived by counsel. If before the delivery of the list, an exception be taken to the questions propounded to test the qualification of a juror, it can not be objected on appeal that the examination was conducted at an improper time, when no such objection was urged before. *Houston & T. C. Ry. Co. v. Terrell*, 69 Tex. 650, 7 S. W. 670.

A record on appeal showed that a juror was the father-in-law of one of appellees' attorneys, and that, while such relationship was known to appellant's attorney, he did not know of a contract by which appellees' attorney was to receive a portion of the property recovered, and that, had appellant's attorney known of such contract, he would have challenged the juror. It did not, however, appear that appellant herself, who was present at the trial, did not know of the contract. Held an insufficient showing of diligence to justify a reversal of the verdict. *Cowan v. Brett*, 43 Tex. Civ. App. 569, 97 S. W. 330.

Defendant's objection that one of the jurors was nephew of plaintiff should be interposed as ground for challenge, and when not made till after verdict will not warrant reversal when justice has been done. *Robinson v. Davenport*, 40 Tex. 333, 344.

Challenges.—Defendants who do not show that they desired to challenge talesmen called after their challenges were exhausted, can not object to restriction of number of challenges. *Wolf v. Perryman*, 82 Tex. 112, 115, 17 S. W. 772.

That Officer Summoning Talesmen Was Not Duly Sworn.—Though in a civil action the officer sent to summon talesmen was not sworn according to law, the irregularity was not available to defendant as error; no objection having been raised until after the cause was tried, and it not appearing that defendant did not know of the irregularity at the time. *San Antonio Tract. Co. v. Davis* (Civ. App.), 101 S. W. 554.

It has been held that the provisions as to obtaining jurymen in civil cases are merely directory. *San Antonio Tract. Co. v. Davis* (Civ. App.), 101 S. W. 554.

Failure of Record to Show That Jury Sworn.—That the record does not show that the jury were sworn is not sufficient to reverse, no question on the subject having been made in the trial court. *Gay Rausch Co. v. Rowland* (Civ. App.), 50 S. W. 1086. See, also, to same effect, *Powell v. Haley*, 28 Tex. 52; *San Antonio Tract. Co. v. Davis* (Civ. App.), 101 S. W. 554.

Failure of record to show that jury were sworn is not ground for reversal, in absence of executions thereto. *Freiberg, etc., Co. v. Lowe*, 61 Tex. 436, 437.

"As to the point made that the record does not show affirmatively that the jury were sworn, it was not saved by bill of exceptions or assigned as error, and it was held to be no ground for reversal in a civil cause in *Clark v.*

Davis, 7 Tex. 556, however much so it might be in a criminal action. There the point was made in the assignment of errors; here it is relied on as a fundamental error. It is not well taken, and the judgment is affirmed." Freiberg, etc., Co. v. Lowe, 61 Tex. 436.

Objections to Form and Manner of Swearing.—Objections to the form and manner in which a jury is sworn should be made at the time, so as to give the court an opportunity to correct the irregularity. *McConnell v. Ryan*, 1 App. Civ. Cases, § 1020.

That Record Shows Names of but Eleven Jurors.—"Another error assigned is that the record shows the names of but eleven jurors. The record states that the parties appeared by their attorneys, and thereupon came a jury of twelve good and lawful men, and names but eleven. After verdict under such circumstances, it is a fair inference that there were, in truth, twelve men on the jury, but that by a mistake of the clerk in entering the names of the jurors the name of one was omitted. The parties made no objection to the jury and received it as a good and lawful one, after verdict and judgment; and no objection appearing to have been made at the time, it will not be noticed in this court." *Foster v. Van Norman*, 1 Tex. 636.

Misconduct of Jury.—See post, "Conduct of Jury," II, J, 10.

J. CONDUCT OF TRIAL.

1. Order of Trial.

Although it be error to enforce the trial of a case, save when called regularly in its order on the docket, yet it is not ground for reversal, unless it is apparent that the case was not tried in its regular order, but was in fact tried at another time, and that such action of the court was at the time excepted to. *Price v. Lauve*, 49 Tex. 74.

2. Conducting Two Trials at Same Time.

While a special judge was engaged

in the courtroom in the trial of a case in which the district judge was disqualified, the district judge, without objection of any of the parties, tried another case in another room in the courthouse. In the latter case on appeal, held, that objection comes too late when made by the losing party after the trial had ended. Such objection does not go to the jurisdiction. *Corsicana v. Kerr*, 75 Tex. 207, 12 S. W. 982.

"Unless it can be shown that a party is deprived of some substantial right by the fact that another trial is being conducted in the district court of the county when his own case is put on trial, we see no reason why the two trials may not be proceeded with at the same time. It is not a jurisdictional question. There may be involved a question of substantial right. If such a question arises it ought to be presented at the earliest opportunity. If not so presented it should be treated as waived. The defendant made an application for a continuance on account of the absence of Stephen Smith and three other witnesses." *Corsicana v. Kerr*, 75 Tex. 207, 12 S. W. 982.

3. Second Trial at Same Term.

No objection to a second trial at the same term can be considered on appeal where no application for continuance was made at the trial. *Texas, etc., R. Co. v. Garcia*, 62 Tex. 285, 289.

4. Placing Party to Suit under Rule.

See, generally, the titles TRIAL; WITNESSES.

A party can not on writ of error complain of the trial court's action in placing him under the rule, thereby preventing him from being present during the trial, where he did not except at the time and save his exception by a proper bill. *Bonneville v. Dum* (Civ. App.), 103 S. W. 431.

5. Exception to Action of Court in Granting a Severance.

Where, in trespass to try title, defendants' vendor was vouched in as a

warrantor, and was granted a severance, the court, in the absence of an exception to the granting of the severance can not say it was reversible error to overrule a motion to set aside the severance. *Logan v. Robertson* (Civ. App.), 83 S. W. 395.

6. Order of Argument.

See, generally, the title OPEN AND CLOSE.

Objections to the order of argument in the court below will not be regarded when urged for the first time on appeal. *Harris v. Musgrove*, 59 Tex. 401.

The appellate court will not notice error in assigning order of argument at trial, in absence of complaint below. *Mutual Life Ins. Co. v. Tillman*, 84 Tex. 31, 37, 19 S. W. 294.

7. Conduct or Remarks of Judge.

There can be no reversal for remarks of the trial judge not excepted to. (Civ. App.), *Ross v. Moskowitz*, 95 S. W. 86, affirmed in 100 Tex. 434, 100 S. W. 768.

Objections to improper remarks of judge on admission of testimony must be taken at once to be available. *Freiberg v. Beach, etc., Co.*, 63 Tex. 449, 455.

Remarks upon the testimony made by the trial judge during the examination of a witness should be excepted to at the time, so as to give opportunity to the court to correct or remedy the injury done. *Sabine, etc., R. Co. v. Brouard*, 75 Tex. 597, 12 S. W. 1126.

Where neither defendant nor his attorney knew that a prejudicial remark of the trial court was heard by the jury, and two of the jurors made affidavit that some of the jurors heard the remark and were prejudiced thereby, the failure of defendant to except to the remark at the time did not prevent a review of the court's refusal to grant a new trial on the ground that the remark was prej-

udicial. *Riddle v. Riddle* (Civ. App.), 62 S. W. 970.

8. Conduct or Remarks of Counsel.

See, generally, the title ARGUMENT OF COUNSEL, vol. 2, p. 42.

a. Objections.

(1) Necessity.

(a) General Rule.

Remarks by counsel in argument before jury, not plainly prejudicial to opposing party, will not require reversal when not objected to at the time. *Gulf, etc., R. Co. v. Greenlee*, 70 Tex. 553, 562, 8 S. W. 129; *Gulf, etc., R. Co. v. Hockaday*, 14 Tex. Civ. App. 613, 620, 37 S. W. 475, affirmed in 93 Tex. 684, no op.; *Jones v. Smith*, 21 Tex. Civ. App. 440, 52 S. W. 561, affirmed in 93 Tex. 665, no op.; *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579, 58 S. W. 614, affirmed in 94 Tex. 700, no op.; *Texas Cent. R. Co. v. Pledger*, 36 Tex. Civ. App. 248, 81 S. W. 755; *Houston, etc., R. Co. v. Rehm*, 36 Tex. Civ. App. 553, 82 S. W. 526; *Missouri, etc., R. Co. v. Nesbit*, 43 Tex. Civ. App. 630, 97 S. W. 825, affirmed in 102 Tex. 588, no op.; *Tyler, etc., Furniture Works v. St. Louis, etc., R. Co.* (Civ. App.), 55 S. W. 350, 353, affirmed in 93 Tex. 697, no op.; *St. Louis, etc., R. Co. v. Martin* (Civ. App.), 87 S. W. 387, affirmed in 101 Tex. 656, no op.; *Hooks v. Pafford* (Civ. App.), 95 S. W. 742; *American, etc., Mortg. Co. v. Brown* (Civ. App.), 101 S. W. 856 (see 102 Tex. 577, no op.); *Galveston, etc., R. Co. v. Worth* (Civ. App.), 107 S. W. 958.

A ground of objection to argument of counsel which is not raised on the trial can not be considered on appeal. *Galveston, etc., R. Co. v. Worth* (Civ. App.), 107 S. W. 958.

Where the bill of exceptions shows that no objection was made to the remarks of the counsel of the successful party in his argument to the jury, the defeated party can not on appeal complain of the counsel's conduct.

Hooks v. Pafford (Civ. App.), 95 S. W. 742.

Impropriety of remarks of counsel can not be urged for first time on appeal. *Gulf, etc., R. Co. v. Hockaday*, 14 Tex. Civ. App. 613, 620, 37 S. W. 475, affirmed in 93 Tex. 684, no op.

Error in counsel's argument to the jury in a civil trial can not be urged on appeal, where it appears the attorneys on the other side responded to it, and that no exception was raised in the court below, nor the court's attention called to the argument by any objection. *American, etc., Mortg. Co. v. Brown* (Civ. App.), 101 S. W. 856 (see 102 Tex. 577, no op.).

In personal injury suit against a carrier exceptions to argument of plaintiff's attorney that defendant had settled with others injured in same accident as plaintiff, but not showing that court's attention was called to it at the time or wherein such argument was improper will not cause reversal. *Gulf, etc., R. Co. v. Brown*, 16 Tex. Civ. App. 93, 102, 40 S. W. 608 (see 93 Tex. 684, no op.).

Where abusive and threatening language of plaintiff and counsel toward defendant and counsel was not excepted to at trial, it is not ground for reversal where verdict is sustained by evidence. *Jones v. Smith*, 21 Tex. Civ. App. 440, 442, 52 S. W. 561, affirmed in 93 Tex. 665, no op.

Repetition by counsel in his argument of evidence which had been excluded is not ground for reversal when no notice of it was taken at the time. *Bender & Son v. Peyton*, 4 Tex. Civ. App. 57, 66, 23 S. W. 222, affirmed in 93 Tex. 635, no op.

Where no exception was taken to the argument of counsel in support of the credibility of a witness at the time, though it was called to the attention of the court after the argument had been concluded, the objection will not be considered on appeal. *Missouri, K. & T. Ry. Co. of Texas v. Nesbit*, 43 Tex. Civ. App. 630, 97 S. W. 825.

(b) Exceptions to Rule.

Remarks of counsel outside the record, which are clearly prejudicial to the rights of the opposite party and intentionally made for the purpose of influencing the jury, are ground for setting aside a verdict, although the remarks were not excepted to at the time they were made. *Houston, etc., R. Co. v. Rehm*, 36 Tex. Civ. App. 553, 82 S. W. 526.

"It seems to have been generally held that where the language complained of is improper only because not strictly confined to the evidence, it must be excepted to at the time it was used, otherwise it will not be a ground for setting aside the verdict; but we think it well settled that when counsel in their address to the jury intentionally go outside of the record and indulge in remarks that are clearly prejudicial to the rights of the opposing side and must have been made for the purpose of influencing the jury, such conduct not only authorizes but requires the trial court to set aside the verdict of the jury, notwithstanding the remarks were not objected to at the time they were made. We think the remarks of counsel set out in the assignment are of the character referred to by Judge Gaines in *Gulf C. & S. F. Ry. Co. v. Greenlee* as being 'so plainly prejudicial to defendant as to demand that the verdict be set aside.' *Willis & Bros. v. McNeill*, 57 Tex. 465; *Prather v. McClelland* (Civ. App.), 26 S. W. 657; *T. & St. Louis R. Co. v. Jarrell*, 60 Tex. 267; *Gulf, etc., R. Co. v. Greenlee*, 70 Tex. 553, 8 S. W. 129; *Willis v. Lowry*, 66 Tex. 540, 2 S. W. 449." *Houston, etc., R. Co. v. Rehm*, 36 Tex. Civ. App. 553, 555, 82 S. W. 526.

Argument of counsel will be reviewed on appeal though no exception was taken thereto, where the trial court had established a rule that he would not sustain an objection to improper argument, and would not instruct the jury to disregard an argu-

ment. *Galveston, H. & S. A. Ry. Co. v. Washington*, 42 Tex. Civ. App. 380, 92 S. W. 1054.

(2) Time, Manner and Sufficiency.

Exceptions to remarks of counsel in argument should be taken at the time. *Gulf, etc., R. Co. v. Hockaday*, 14 Tex. Civ. App. 613, 37 S. W. 475, affirmed in 93 Tex. 684, no op.

Where language used by an attorney for plaintiff in his closing argument to the jury was not called to the attention of the court nor objected to by the defendant until after the case had been decided by the jury, such an objection comes too late. *St. Louis, etc., R. Co. v. Martin* (Civ. App.), 87 S. W. 387, affirmed in 101 Tex. 656, no op. See, also, *Gulf, etc., R. Co. v. Brown*, 16 Tex. Civ. App. 93, 40 S. W. 608 (see 93 Tex. 684, no op.); *Tyler, etc., Furniture Works v. St. Louis, etc., R. Co.* (Civ. App.), 55 S. W. 350, 353, affirmed in 93 Tex. 697, no op.

An objection to improper argument is sufficient, if addressed to the court, though counsel is not interrupted or notified at the time. *Texas Cent. R. Co. v. Pledger*, 36 Tex. Civ. App. 248, 81 S. W. 755.

"It was not necessary for defendant's counsel to interrupt the argument. Timely objection was made to the presiding judge and exception taken to his ruling thereon. This constituted sufficient diligence. In *Gulf, etc., R. Co. v. Hockaday*, 14 Tex. Civ. App. 613, 620, 37 S. W. 475, relied on by appellee, the objection to the argument was not made during the trial, and was first presented in the motion for new trial." *Texas Cent. R. Co. v. Pledger*, 36 Tex. Civ. App. 248, 249, 81 S. W. 755.

In order that the court may review the trial court's ruling as to improper argument, it is not necessary that appellant should have requested a charge to the jury to disregard the argument. *Western Union Tel. Co. v. Perry*, 93

Tex. 645, 69 S. W. 131; *Western Union Tel. Co. v. Perry*, 30 Tex. Civ. App. 243, 70 S. W. 439.

In an action against a railroad company for death of plaintiff's intestate, counsel for plaintiff stated to the jury that it was his judgment, from the evidence, that the widow should receive \$10,000, and each of two children \$5,000; and the jury's verdict corresponded with those amounts. Held, that an exception to such statement on the ground that it was the province of the jury to determine the amount of damages did not preserve for review on a bill of exceptions the question as to whether the statements prejudiced the jury. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.), 57 S. W. 702.

b. Exception to Court's Ruling on Remarks of Counsel.

Under Sayles' Ann. Civ. St. 1897, art. 1360 providing that whenever either party is dissatisfied with any ruling he may except thereto at the time, and at his request time shall be given to embody the same in a written bill, a failure to except to the court's ruling on improper remarks of opposing counsel precludes a review of its action. *International & G. N. R. Co. v. Mercer* (Civ. App.), 78 S. W. 562.

9. Conduct of Parties.

That plaintiff, suing for the death of her husband constantly wept in the sight and hearing of the jury is not available, if at all, as a ground of reversal, unless the same was in some way excepted to. *Warren, C. & P. Ry. Co. v. Shine* (Civ. App.), 105 S. W. 518.

Abusive and threatening language by plaintiff while on the witness stand towards the defendant and his attorneys, with like conduct of his counsel in the argument of the case, however reprehensible, will not of itself warrant a reversal where no objections on this account were made at the time, and the evidence fully sustains the

verdict and judgment. *Jones v. Smith*, 21 Tex. Civ. App. 440, 52 S. W. 561, affirmed in 93 Tex. 665, no op.

10. Conduct of Jury.

Where plaintiff's counsel knew of misconduct on the part of the jury at least an hour before a verdict was returned, but failed to call it to the attention of the trial judge or the opposing counsel until it was alleged as a ground for new trial after verdict for defendant, the misconduct was waived. *Olivares v. San Antonio, etc., R. Co.*, 37 Tex. Civ. App. 278, 84 S. W. 248.

In a suit against a railway for killing plaintiff's child, plaintiff is in no position to complain of the action of the jury in visiting the railway track at a point somewhat similar to that where the accident occurred and making observations and measurements, where he knew of such action at the time but failed to object and took his chances on a verdict in his favor. *Olivares v. San Antonio, etc., R. Co.*, 37 Tex. Civ. App. 278, 84 S. W. 248.

That exhibits of copies of "account sales" detached from a deposition, were by jury taken into jury room, is not ground for reversal, where no objection was taken at the time and facts therein were conclusively shown by other evidence. *Texas, etc., R. Co. v. Robertson* (Civ. App.), 35 S. W. 505, affirmed in 93 Tex. 675, no op.

K. EVIDENCE.

1. Admission of Evidence.

a. Objections.

(1) Necessity.

(a) General Rule Stated and Construed.

Rule Stated.—It is a well-established general rule that objections to the admissibility of evidence will not be entertained for the first time on appeal. *Edwards v. People*, Dallam 359, 360; *Burton v. Anderson*, 1 Tex. 93; *Underwood v. Parrott*, 2 Tex. 168, 172; *Watts v. Johnson*, 4 Tex. 311, 318; *Howard v. North*, 5 Tex. 290, 307; *Wright v.*

Wright, 6 Tex. 3, 24; *Able v. Lee*, 6 Tex. 427, 432; *Fowler v. Stonum*, 6 Tex. 60, 74; *Herndon v. Casiano*, 7 Tex. 322, 333; *Coles v. Perry*, 7 Tex. 109, 143; *Davenport v. Lackie*, 8 Tex. 351; *Leach v. Millard*, 9 Tex. 551; *Hubert v. Bartlett* (note 21), 9 Tex. 97, 102; *McCoy v. Jones*, 9 Tex. 363; *Beardsley v. Hall*, 9 Tex. 119, 122; *Robson v. Watts*, 11 Tex. 764; *Stramler v. Coe*, 15 Tex. 211; *Chapman v. Allen*, 15 Tex. 278, 283; *Hamilton v. Rice*, 15 Tex. 382, 385; *Stone v. Brown*, 16 Tex. 425, 427; *Rector v. Hudson*, 20 Tex. 234; *Nalle v. Gates*, 20 Tex. 315; *McNeally v. Stroud*, 22 Tex. 229; *Hill v. Baylor*, 23 Tex. 261; *Tucker v. Willis*, 24 Tex. 247; *Bird v. Pace*, 26 Tex. 487; *Bohanan v. Hans*, 26 Tex. 445; *Sheegog v. James*, 26 Tex. 501; *Garner v. Cutler*, 28 Tex. 175; *Spurlock v. Sullivan*, 36 Tex. 511; *Collins v. Cook*, 40 Tex. 238; *Ragsdale v. Robinson*, 48 Tex. 379, 395; *Johns v. Northcutt*, 49 Tex. 444; *Piedmont, etc., Life Ins. Co. v. Ray*, 50 Tex. 511; *Mullins v. Thompson*, 51 Tex. 7; *Pool v. Wedemeyer*, 56 Tex. 287, 300; *Waters v. Spofford*, 58 Tex. 115; *Long v. Garnett*, 59 Tex. 229, 231; *Willis v. Donac*, 61 Tex. 588; *Sharp v. Schmidt*, 62 Tex. 263; *Houston, etc., R. Co. v. Adams*, 63 Tex. 206; *Matlock v. Glover*, 63 Tex. 231; *St. Paul, etc., Ins. Co. v. McGregor*, 63 Tex. 399; *Ford v. Cowan*, 64 Tex. 129; *Cook v. Halsell*, 65 Tex. 1, 6; *Cannon v. Cannon*, 66 Tex. 682, 685, 3 S. W. 36; *Still v. Focke*, 66 Tex. 715, 717, 2 S. W. 59; *Watson v. Blymer Mfg. Co.*, 66 Tex. 558, 2 S. W. 353; *Ft. Worth, etc., R. Co. v. Hogsett*, 67 Tex. 685, 4 S. W. 365; *Brown v. Lessing*, 70 Tex. 544, 546, 7 S. W. 783; *Tevis v. Armstrong*, 71 Tex. 59, 9 S. W. 134; *McLane v. Paschal*, 74 Tex. 20, 11 S. W. 837; *Collins v. Panhandle Nat. Bank*, 75 Tex. 254, 11 S. W. 1053; *First Nat. Bank v. Pennington*, 75 Tex. 272, 12 S. W. 1114; *Ellis v. Garvey*, 76 Tex. 371, 372, 13 S. W. 320; *Kimmarle v. Houston, etc., R. Co.*, 76 Tex. 686, 687, 12 S. W. 698;

Shornick *v.* Bennett, 77 Tex. 244, 13 S. W. 982; Maverick *v.* Maury, 79 Tex. 435, 15 S. W. 686; Log *v.* Mad-dock, 81 Tex. 212, 16 S. W. 877; Waller *v.* Leonard, 89 Tex. 507, 35 S. W. 1045; Wheeler *v.* Tyler, etc., R. Co., 91 Tex. 356, 43 S. W. 876, affirming 41 S. W. 517; Galveston, etc., R. Co. *v.* Jackson, 93 Tex. 262, 266, 54 S. W. 1023, affirming 53 S. W. 81; Boyd *v.* St. Louis, etc., R. Co., 101 Tex. 411, 108 S. W. 813; Russell *v.* Nall, 2 Tex. Civ. App. 60, 63, 20 S. W. 1006, 23 S. W. 901; Gregory *v.* South-ern Pac. R. Co., 2 Tex. Civ. App. 279, 280, 21 S. W. 417; Saul *v.* Frame, 3 Tex. Civ. App. 596, 22 S. W. 984; Texas, etc., R. Co. *v.* Barron, 4 Tex. Civ. App. 546, 549, 23 S. W. 537; Wichita Valley, etc., Co. *v.* Hobbs, 5 Tex. Civ. App. 34, 35, 23 S. W. 923; Harrison *v.* Hawley, 7 Tex. Civ. App. 308, 26 S. W. 765; Johnson *v.* Lyford, 9 Tex. Civ. App. 85, 29 S. W. 57; Houx *v.* Blum, 9 Tex. Civ. App. 588, 591, 29 S. W. 1135; Burgher *v.* Henderson, 9 Tex. Civ. App. 521, 526, 29 S. W. 522; Kean *v.* Zundelowitz, 9 Tex. Civ. App. 350, 29 S. W. 930, affirmed in 93 Tex. 665, no op.; Gill *v.* Bickel, 10 Tex. Civ. App. 67, 76, 30 S. W. 919, affirmed in 93 Tex. 640, no op.; Bonnell *v.* Prince, 11 Tex. Civ. App. 399, 403, 32 S. W. 855, affirmed in 89 Tex. 104; Henderson *v.* Albright, 12 Tex. Civ. App. 368, 370, 34 S. W. 992 (see 93 Tex. 731, no op.); Missouri, etc., R. Co. *v.* Edling, 18 Tex. Civ. App. 171, 45 S. W. 406, af-firmed in 93 Tex. 734, no op.; Traylor *v.* State, 19 Tex. Civ. App. 86, 46 S. W. 81, affirmed in 93 Tex. 722, no op.; Phillips *v.* Texas Loan Co., 26 Tex. Civ. App. 505, 63 S. W. 1080, affirmed in 95 Tex. 684, no op.; Ft. Worth, etc., R. Co. *v.* Wright, 27 Tex. Civ. App. 198, 64 S. W. 1001; Barrett *v.* Spence, 28 Tex. Civ. App. 344, 67 S. W. 921, affirmed in 95 Tex. 674, no op.; Pull-man, etc., Co. *v.* Arents, 28 Tex. Civ. App. 71, 66 S. W. 329; Boston *v.* Mc-Menamy, 29 Tex. Civ. App. 272, 68 S.

W. 201; Myers *v.* Menifee & Co., 30 Tex. Civ. App. 28, 68 S. W. 540; Shan-non *v.* Marchbanks, 35 Tex. Civ. App. 615, 80 S. W. 860, affirmed in 98 Tex. 632, no op.; Chicago, etc., R. Co. *v.* Carroll, 36 Tex. Civ. App. 359, 81 S. W. 1020, affirmed in 98 Tex. 611, no op.; Houston *v.* Stewart, 40 Tex. Civ. App. 499, 90 S. W. 449; Missouri, etc., R. Co. *v.* Russell, 40 Tex. Civ. App. 114, 88 S. W. 379, affirmed in 101 Tex. 649, no op.; Kane *v.* Sholars, 41 Tex. Civ. App. 154, 90 S. W. 937; Jones *v.* Neal, 44 Tex. Civ. App. 412, 98 S. W. 417, affirmed in 102 Tex. 582, no op.; McDonald *v.* McCrabb, 47 Tex. Civ. App. 259, 105 S. W. 238; Industrial Lumber Co. *v.* Bivens, 47 Tex. Civ. App. 396, 105 S. W. 831, affirmed, no op.; El Paso, etc., R. Co. *v.* Smith, 50 Tex. Civ. App. 10, 108 S. W. 988; Mc-Fadden *v.* Prater (Sup.), 3 S. W. 306; Ballew *v.* Casey (Sup.), 9 S. W. 189; Galveston, etc., R. Co. *v.* Herring (Civ. App.), 24 S. W. 939, 941; Galveston, etc., R. Co. *v.* McMonigal (Civ. App.), 25 S. W. 341; Busk *v.* Mangham (Civ. App.), 27 S. W. 893; Frankel *v.* Cad-don (Civ. App.), 40 S. W. 638; Pope *v.* Riggs (Civ. App.), 43 S. W. 306; Focke *v.* Garcia (Civ. App.), 48 S. W. 755; Clifton *v.* Hewitt (Civ. App.), 56 S. W. 131; Schoch *v.* San Antonio (Civ. App.), 57 S. W. 893; Bryan Cot-ton-Seed Oil Mill *v.* Fuller (Civ. App.), 57 S. W. 924; Dyer *v.* Pierce (Civ. App.), 60 S. W. 441; White *v.* Pyron (Civ. App.), 62 S. W. 82, af-firmed in 94 Tex. 698, no op.; Brin *v.* McGregor (Civ. App.), 64 S. W. 78; St. Louis, etc., R. Co. *v.* Hughes (Civ. App.), 73 S. W. 976; Altgelt *v.* Alamo Nat. Bank (Civ. App.), 79 S. W. 582, reversed in 98 Tex. 252; Texas, etc., R. Co. *v.* Birdwell (Civ. App.), 86 S. W. 1067; St. Louis, etc., R. Co. *v.* Foster (Civ. App.), 89 S. W. 450; Mullen *v.* Galveston, etc., R. Co. (Civ. App.), 92 S. W. 1000, affirmed in 101 Tex. 650, no op.; Western Union Tel. Co. *v.* Simmons (Civ. App.), 93 S. W. 686,

affirmed in 101 Tex. 666, no op.; *El Paso, etc., R. Co. v. Darr* (Civ. App.), 93 S. W. 166, affirmed in 101 Tex. 635, no op.; *Mings v. Griggsby, etc., Co.* (Civ. App.), 106 S. W. 192; *Compagnie, etc. v. Victoria, etc., Co.* (Civ. App.), 107 S. W. 651; *Dunn v. Taylor* (Civ. App.), 107 S. W. 952; *Wabash R. Co. v. Newton* (Civ. App.), 110 S. W. 992; *Barnes v. Downes*, 2 App. Civ. Cases, § 524; *Porter v. Heath*, 2 App. Civ. Cases, § 124; *Miller v. Wybrants*, 2 Posey 409; *Black v. State*, 1 Tex. Cr. App. 368; *Alderson v. State*, 2 Tex. Cr. App. 10; *Blake v. State*, 3 Tex. Cr. App. 581; *Foster v. State*, 4 Tex. Cr. App. 246; *Walker v. State*, 7 Tex. Cr. App. 245; *Mills v. State*, 4 Tex. Cr. App. 263; *Roberts v. State*, 5 Tex. Cr. App. 141; *Serron v. State*, 31 Tex. Cr. App. 186, 20 S. W. 399, 716.

The rule seems to be established that on appeal only such objections to testimony as have been made and acted on in the court below will be considered. *Ft. Worth, etc., R. Co. v. Wright*, 27 Tex. Civ. App. 198, 201, 64 S. W. 1001; *Ellis v. Garvey*, 76 Tex. 371, 13 S. W. 320; *Kimmarle v. Houston, etc., R. Co.*, 76 Tex. 686, 12 S. W. 698; *Tevis v. Armstrong*, 71 Tex. 59, 9 S. W. 134; *Schoch v. San Antonio* (Civ. App.), 57 S. W. 893, and cases therein cited.

Objections to evidence which were not made in the trial court will be considered as waived. *Hill v. Baylor*, 23 Tex. 261; *Bohanan v. Hans*, 26 Tex. 445; *Johns v. Northcutt*, 49 Tex. 444; *Pool v. Wedemeyer*, 56 Tex. 287, 300.

Objection to admission of incompetent evidence can not be first raised in the supreme court. *St. Paul, etc., Ins. Co. v. McGregor*, 63 Tex. 399, 403.

The fact that original instrument is brought up with the record does not warrant objections to it in appellate court, where none were made below, even though it is manifested from the instrument that the objections exist. *Ragsdale v. Robinson*, 48 Tex. 379, 395.

Objections not urged below will not be considered on appeal though grounds therefor may appear from statement of facts. *Stone v. Brown*, 16 Tex. 425, 427.

It must appear by the transcript that objections to testimony were taken in the court below, or they will not be considered by the supreme court. *Spurlock v. Sullivan*, 36 Tex. 511.

When, on appeal, an assignment of error is predicated upon the admission of testimony, only such objections as were presented in the trial court and stated in the bill of exceptions will be considered. *Austin v. Forbis* (Civ. App.), 86 S. W. 29, 31; *Texas & P. R. Co. v. Birdwell* (Civ. App.), 86 S. W. 1067, 1068; *Missouri, etc., R. Co. v. Russell*, 40 Tex. Civ. App. 114, 88 S. W. 379, affirmed in 101 Tex. 649, no op.; *Phillips v. Texas Loan Co.*, 26 Tex. Civ. App. 505, 63 S. W. 1080, affirmed in 95 Tex. 684, no op.

If there be no exception in the record to the admissibility of the testimony used on the trial, it will be presumed, by the appellate court, after verdict, that proper proof was made, or that its admissibility was waived. *Burton v. Anderson*, 1 Tex. 93.

Rule Applicable Though Trial by Court without Jury.—The fact that a cause is tried without a jury does not vary the rule that error in admitting improper evidence will not be reviewed unless an exception is taken thereto. *Dyer v. Pierce* (Civ. App.), 60 S. W. 441.

Objections to evidence, made for the first time in the appellate court, will not be considered, though the trial below was without a jury. *Myers v. Menifee & Co.*, 30 Tex. Civ. App. 28, 68 S. W. 540.

(b) Applications of Rule.

Failure to Lay Foundation for Admission.—Objection that proper foundation was not laid for admission of declaration to impeach witness' testimony, must be made at the time to be

available on appeal. *Galveston, etc., R. Co. v. Jackson*, 93 Tex. 262, 266, 54 S. W. 1023, affirming 53 S. W. 81.

Admission of Secondary Evidence.

—See, generally, the title BEST AND SECONDARY EVIDENCE, vol. 2, p. 796.

If a party permits secondary evidence to be introduced upon the trial without objection, he can not make the objection for the first time upon appeal. *Underwood v. Parrott*, 2 Tex. 168, 172; *Carter v. Eames*, 44 Tex. 544; *Long v. Garnett*, 59 Tex. 229, 231; *Matlock v. Glover*, 63 Tex. 231; *Brown v. Lessing*, 70 Tex. 544, 7 S. W. 783; *Davis v. Bargas*, 12 Tex. Civ. App. 59, 33 S. W. 548; *McCarty v. Johnson*, 20 Tex. Civ. App. 184, 49 S. W. 1098; *Warren v. Kohr*, 26 Tex. Civ. App. 331, 64 S. W. 62, affirmed in 95 Tex. 689, no op.; *Mensing Bros. v. Cardwell*, 33 Tex. Civ. App. 16, 75 S. W. 347.

Evidence, although not the best procurable, will be admitted if not objected to, and should then be considered by court or jury as though it was the best of which the case was susceptible, and a judgment rendered thereon will not be disturbed because of its admission. *Abee v. Bargas*, 45 Tex. Civ. App. 243, 100 S. W. 191.

Evidence, when once admitted, though not the best evidence of which the matter to be proved is susceptible, yet if competent and not objected to at the time will not be afterwards excluded when the pleadings fully advised both parties of the nature of the evidence on which the party must rely. *Matlock v. Glover*, 63 Tex. 231.

Complaint can not be made in the appellate court for the first time that a contract was proved by secondary evidence. *Mensing Bros. v. Carwell*, 33 Tex. Civ. App. 16, 75 S. W. 347.

Objection to secondary evidence of promissory note can not be first made on appeal. *Long v. Garnett*, 59 Tex. 229, 231.

Objection to introduction in evi-

dence of copies of account books instead of originals can not be first raised on appeal. *Underwood v. Parrott*, 2 Tex. 168, 172.

Objection to land office copy of title should be made at trial. *Hubert v. Bartlett* (note 21), 9 Tex. 97, 102.

The only objections made in the court below to the admission in evidence of a copy of a lost mortgage being that no affidavit of loss had been made and no copy of the mortgage filed three days before trial, the court will not consider an objection, urged first on appeal, that the loss of the mortgage was not alleged. *Watson v. Blymer Mfg. Co.*, 66 Tex. 558, 2 S. W. 353.

In an action to try title to property levied on in the hands of the claimants as belonging to the debtor, where defendants claimed under a prior sale from the debtor, which appeared to have been evidenced by a writing, which was neither produced nor accounted for, but secondary evidence was introduced without objection, an instruction based on the necessity of proof of such sale, by production of the written instrument, was properly refused. *Brown v. Lessing*, 70 Tex. 544, 7 S. W. 783.

A requested instruction that the jury should disregard the evidence of plaintiff's bookkeeper, because the books from which he testified were made up from the books of another person, and those books were not produced, was properly refused where the objection was not made at the time that the bookkeeper was being examined, when the objection could have been obviated, especially where the books of such absent person were not in plaintiff's control. *Maverick v. Maury*, 79 Tex. 435, 15 S. W. 686.

Where testimony is introduced by defendants, without objection from plaintiff, to show the execution, loss, and contents of a certain bond, plaintiff can not afterwards complain of the

refusal of the court to charge that the search made for the supposed bond was not in law sufficient, and that the jury should disregard all evidence relating to it. *Robertson v. Coates*, 1 Tex. Civ. App. 664, 20 S. W. 875.

A witness in his testimony recited entries from Morgan's land book, a book in which Morgan kept an inventory of all lands owned by him; and objection being made that the book itself was the best evidence, it was produced, and its entries read in evidence, without objection, to show that during his lifetime Morgan claimed to be the owner of the land in controversy. Objection being now made that the book was not admissible evidence for that purpose, it is held, that it is too late to make the objection, it not having been made below. *Johnson v. Lyford*, 9 Tex. Civ. App. 85, 29 S. W. 57.

Testimony of an attorney who obtained a judgment in justice court that he issued an execution thereon is sufficient to support a finding that execution was issued, in the absence of an objection that it was not the best evidence. *Warren v. Kohr*, 64 S. W. 62, 26 Tex. Civ. App. 331.

An objection to a certified copy of the record of a deed as evidence, that the original deed was not accounted for and no notice was given of the intent to use copies, is untenable in the appellate court, where no such objection was made at the trial. *Moody v. Ogden*, 31 Tex. Civ. App. 395, 72 S. W. 253, affirmed in 97 Tex. 642, no op.

A certificate of a county clerk, attached to an abstract of judgment, which recited that it was duly recorded in his office at a specified time and entered on the judgment index, admitted in evidence without objection, though it showed on its face that better evidence was obtainable, must be weighed as though it was the best evidence, and a judgment rendered for or against it as its sufficiency might determine was

proper. *Abee v. Bargas*, 45 Tex. Civ. App. 243, 100 S. W. 191.

Where a will is introduced in evidence by the devisee, she can not object that it is not the best evidence of the adoption of a child. *White v. Holman*, 60 S. W. 437, 25 Tex. Civ. App. 152.

An objection to the admission of a certified copy of a deed only calls in question its admissibility in the first instance, and does not bring up for review the sufficiency of the evidence to authorize its consideration as a copy after its admission. *Folts v. Ferguson* (Civ. App.), 24 S. W. 657.

Admission of Parol Evidence.—Objections to the admission of parol evidence can not be raised for the first time on appeal. *Alley v. Bailey* (Civ. App.), 47 S. W. 821; *Levy v. Maddox*, 81 Tex. 210, 16 S. W. 877.

Where parol testimony to a sale of land was given without objection and is undisputed the court on appeal will consider the sale as proved. *Ballard v. Carmichael*, 83 Tex. 355, 18 S. W. 734.

When rights involved in a sale are fixed by written contract between the parties which is not produced on the trial, and the sale is proved by parol without objection, the failure to produce the written contract of sale becomes immaterial. *J. S. Brown & Co. v. Lessing, Solomon & Rosenthal*, 70 Tex. 544, 7 S. W. 783.

A party can not complain on appeal that a written contract was proved by parol evidence where no objection to such evidence was made below. *Mensing Bros. v. Cardwell*, 33 Tex. Civ. App. 16, 75 S. W. 347.

Where adverse title was proved by parol without objection in the lower court, judgment will be affirmed. *Johnson v. Nash*, 15 Tex. 419, 421.

Admission of oral evidence of payments, although better evidence was available, is not reversible error where objections were not made at time.

Matlock v. Glover, 63 Tex. 231, 235.

Record book containing the entry, or a certified copy thereof, is the best evidence of the recordation of a chattel mortgage, but objection to proof thereof by parol can not be first made on appeal. *Cook v. Halsell*, 65 Tex. 1, 6.

If no objection is made to parol evidence of an agreement, its admissibility is acquiesced in, and such evidence may be considered to prove the agreement. *Hunt v. Siemers*, 53 S. W. 387, 22 Tex. Civ. App. 94.

It is not error to refuse to exclude oral testimony of the contents of letters, where no objection was made when the evidence was introduced. *Atchison, T. & S. F. R. Co. v. Bryan* (Civ. App.), 37 S. W. 234.

In an action for the price of cotton seed sold and delivered, defendant pleaded that the vendor agreed to deliver cotton seed that was sound, merchantable, and suitable for the manufacture of prime cotton-seed oil, but that the seed delivered was unsound and damaged, and unfit for the use named; and evidence was introduced, without objections, showing that, while the contract was silent as to the character of the seed to be furnished, both parties understood that the seed was to be merchantable and suitable for the manufacture of cotton-seed oil. Held, that since said evidence was admitted without the objection that it showed only an implied warranty, and it appeared therefrom that the minds of the parties met as to the quality of the seed to be furnished, it would be considered on appeal as proof of an express warranty, and therefore an instruction to the jury which ignored such evidence was reversible error. *Bryan Cotton-Seed Oil Mill v. Fuller* (Civ. App.), 57 S. W. 924.

Admission of Hearsay Evidence.—Hearsay testimony, admitted without objection, must be considered. (Civ.

App.), *Western Union Tel. Co. v. Brown*, 75 S. W. 359; (Civ. App.), *Western Union Tel. Co. v. L. Hirsch*, 84 S. W. 394; *Hatch v. Pullman Sleeping Car Co.* (Civ. App.), 84 S. W. 246; *Moore v. Supreme Assembly of Royal Soc. of Good Fellows*, 93 S. W. 1077, 42 Tex. Civ. App. 366.

Admission of Expert and Opinion Evidence.—The objection that the proper predicate was not laid for expert testimony, if not urged when the testimony was offered, need not be considered on appeal. *Gulf, etc., R. Co. v. Matthews*, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788.

Expert testimony, admitted without objection, should not be subsequently set aside, though the witness failed to qualify himself. *Western Union Tel. Co. v. Gibson* (Civ. App.), 53 S. W. 712.

Where a party agrees that the opinion of a physician regarding the physical condition of a slave be received in evidence, he waives all after-objections to same. *Edwards v. Peoples, Dallam* 359, 360.

Uncontradicted testimony that "M. went into possession of the land soon after G. left it," followed by the statement that "the land in controversy has been continuously occupied since 1881, when G. took possession, up to the present time," is sufficient to support a finding that the land had been continuously occupied during that time, where such testimony, though objectionable as a conclusion of the witness, is not objected to at the trial. *Spicer v. Henderson* (Civ. App.), 43 S. W. 27.

A party can not permit a witness to testify to conclusions and reserve his objection in order to have the benefit of it in instructions to the jury when it is too late for the other party to obviate the objection by a more particular examination of the witness. *Robson v. Watts' Heirs*, 11 Tex. 764.

A witness testified that certain persons were the heirs of a certain other person deceased, and no objection was made at the time, and the witness was not cross-examined as to the grounds of his statement, which was a conclusion of law and fact. Held that the opposing counsel could not take advantage of the objectionable character of the evidence, in instructions to the jury, or later. *Robson v. Watts' Heirs*, 11 Tex. 764.

Admission of Instruments in Evidence.—In General.—Objections to reception of instrument in evidence not made below are not available on appeal, though apparent on original instrument sent up with record. *Ragsdale v. Robinson*, 48 Tex. 379, 395.

Deeds.—Objection to authentication of deed for record can not be questioned for first time on appeal. *McNeally v. Stroud*, 22 Tex. 229.

An objection to the authentication of a deed because of a discrepancy of names is not entitled to favorable consideration when first made in a motion for new trial. *Waters v. Spofford*, 58 Tex. 115.

Where a deed by a guardian is offered for the purpose of showing that title passed thereby, but the authority of the guardian to execute it is not shown, and counsel for the opposite party withdraws his objection that such authority is not shown, he can not afterwards claim that the deed does not pass the title for want of such authority. *Brown v. O'Brien*, 11 Tex. Civ. App. 459, 33 S. W. 267.

"A recovery of title upon a deed executed after the institution of suit is not fundamentally erroneous, unless the defendants urged objections thereto at the proper time. It was an error that could waive, if they so desired. They should have objected to this deed when it was offered, or, at least, should have called the trial court's attention to the error in this respect by a motion for a new trial,

which was not done, and there is no bill of exception in the record raising this question in any manner. Therefore we think that the error was waived, if in fact the deed was executed subsequent to the time of the institution of suit. We find no error in the record, and the judgment is affirmed." *Pope v. Riggs* (Civ. App.), 43 S. W. 306.

Claim Verified by Affidavit as an Account.—A claim verified by affidavit as an account under art. 2266, Rev. Stat., but which claim was not an account within the meaning of that article, was read in evidence, without objection, on the trial. Held, that, although it was incompetent evidence, objection to it can not be entertained in the appellate court, it not having been objected to in the court below. *Porter v. Heath*, 2 App. Civ. Cases, § 124.

Admission of Assessment Roll in Action by City for Taxes.—In an action by a city for taxes, an objection to the manner in which the assessment rolls had been prepared should have been made to their introduction in evidence, and not to the testimony of the assessor, identifying the rolls. *City of Houston v. Stewart*, 90 S. W. 49, 40 Tex. Civ. App. 499.

Admission of Municipal Ordinances.—Plaintiff alleged the occurrence to have been in a certain city, and pleaded ordinances which were introduced in evidence without objection, but on the hearing of a motion for a new trial, defendant presented an affidavit of an engineer to the effect that the point where the collision occurred was not within the city. Held, that the affidavit came too late and instructions on the evidence introduced were proper. *Dallas Consol. Electric St. Ry. Co. v. Ely* (Civ. App.), 91 S. W. 887.

Where a petition alleged that the injury occurred within the corporate limits of a city, and that under the law and ordinances of the city it was the

duty of defendant railroad to operate its trains within the limits of the city at a rate of speed not to exceed six miles per hour, and not to move the same in any direction without continuously ringing the bell, and the only exception to the petition was a general demurrer, which was overruled, and the ordinances mentioned in the petition were read in evidence without exception being taken to their introduction, and no contention was made on the trial that the city had no authority to enact the ordinances, it was not error for the court to submit the effect of the ordinances to the jury. *Trinity & B. V. Ry. Co. v. Simpson* (Civ. App.), 86 S. W. 1034.

Where in an action for injuries on a railroad track, the authenticity of a city ordinance book was not disputed, it could not be first contended on appeal that the ordinance was not shown to have been in force at the time of the accident. *Missouri, etc., R. Co. v. Owens* (Civ. App.), 75 S. W. 579, affirmed in 97 Tex. 641, no op.

Admission of Abandoned Pleadings of Adversary.—Where defendant attempted to introduce in evidence plaintiff's abandoned pleadings containing certain admissions, and plaintiff did not object that it must be shown that the pleading was made with plaintiff's knowledge, and not merely by his attorney, such objection can not be raised on appeal. *Ft. Worth, etc., R. Co. v. Wright*, 27 Tex. Civ. App. 198, 64 S. W. 1001.

Where plaintiff read to jury abandoned answer of defendant to obtain advantage of admissions, defendant can not claim for first time on appeal that entire answer should have been taken as evidence. *Coles v. Perry*, 7 Tex. 109, 143.

Admission of Depositions.—Objection to admission of deposition can not be made for first time on appeal. *Beardsley v. Hall*, 9 Tex. 119, 122. See the title DEPOSITIONS AND INTERROGATORIES, vol. 6, p. 326.

(c) Necessity for Renewal of Objection, Notwithstanding Previous Unsuccessful Objection.

Where defendant desired to preserve for review objections to the admission of evidence, he should have objected to its admission, though he had previously unsuccessfully objected to the admission of a report containing the same objectionable matter. *McDonald v. McCrabb*, 47 Tex. Civ. App. 259, 105 S. W. 238.

"Notwithstanding the previous ruling of the court, upon the motion to reject the report and upon the objection to its introduction in evidence, it was incumbent upon appellant to object to the same evidence when offered in the testimony of Henderson. The court could not properly make the objection for him. The fact that the evidence was first offered in the written official report, and next in the testimony of the witness, would not take the question out of the operation of the general rule." *McDonald v. McCrabb*, 47 Tex. Civ. App. 259, 105 S. W. 238.

(d) Necessity for Further Objection Where First Obviated.

When objection to evidence is obviated and no further objection made, the point is not considered on appeal. *Willis & Bros. v. McNeil*, 57 Tex. 465, 474.

"Rule 58 for the government of the district courts provides that 'exceptions to the admission of evidence, where the ground of objection is assigned, shall be considered in reference to the objections made to it, and the objection shall be stated in the bill of exceptions taken to its admission or exclusion.' This bill of exceptions shows that the objection raised was obviated, and that no further objection was made. Under the circumstances the appellants can not complain, and particularly as the testimony was subsequently withdrawn by the court from the jury." *Willis & Bros. v. McNeill*, 57 Tex. 465.

(3) Time and Manner of Making.**(a) In General.**

To Be Made When Evidence Offered.—It is a general rule that objections to the admissibility of evidence should be made at the time such evidence is offered. *McCoy v. Jones*, 9 Tex. 363; *Hunter v. Waite*, 11 Tex. 85; *Nalle v. Gates*, 20 Tex. 315; *Bohanan v. Hans*, 26 Tex. 445; *Bath v. Houston*, etc., R. Co., 34 Tex. Civ. App. 234, 78 S. W. 993; *Collins v. Cook*, 40 Tex. 238; *Ann Berta Lodge v. Leverton*, 42 Tex. 18; *Waters v. Spofford*, 58 Tex. 115; *Willis v. Donac*, 61 Tex. 588; *Watson v. Blymer Mfg. Co.*, 66 Tex. 558, 2 S. W. 353; *Missouri Pac. R. Co. v. Mitchell*, 75 Tex. 77, 12 S. W. 810; *Maverick v. Maury*, 79 Tex. 435, 15 S. W. 686; *Missouri*, etc., R. Co. *v. Edling*, 18 Tex. Civ. App. 171, 45 S. W. 406, affirmed in 93 Tex. 734, no op.; *International*, etc., Co. *v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93; *Ft. Worth*, etc., R. Co. *v. Andrews* (Civ. App.), 29 S. W. 920; *White v. Pyron* (Civ. App.), 62 S. W. 82, affirmed in 94 Tex. 698, no op.; *Altgelt v. Alamo Nat. Bank* (Civ. App.), 79 S. W. 582, judgment reversed in 98 Tex. 252, 83 S. W. 6; *St. Louis*, etc., R. Co. *v. Foster* (Civ. App.), 89 S. W. 450; *El Paso*, etc., R. Co. *v. Darr* (Civ. App.), 93 S. W. 166, affirmed in 101 Tex. 635, no op.; *Western Union Tel. Co. v. Simmons* (Civ. App.), 93 S. W. 686, affirmed in 101 Tex. 666, no op.; *Metler v. Wybrants*, 2 Posey 409; *Western Union Tel. Co. v. Ward*, 4 App. Civ. Cases, § 317, 19 S. W. 898; *Berry v. State*, 4 Tex. Cr. App. 492; *Blake v. State*, 3 Tex. Cr. App. 581.

Unless the objection is so made it can not be urged on appeal. *Maverick v. Maury*, 79 Tex. 435, 15 S. W. 686; *Watson v. Blymer Mfg. Co.*, 66 Tex. 558, 2 S. W. 353; *Bath v. Houston*, etc., R. Co., 34 Tex. Civ. App. 234, 78 S. W. 993.

Objection should be made as soon

as the inadmissibility of testimony is disclosed by the examination of the witness. *Maverick v. Maury*, 79 Tex. 435, 15 S. W. 686.

Though the exclusion by the charge of irrelevant testimony may render its admission harmless error, the better practice is to object thereto when offered. *Missouri Pac. Ry. Co. v. Mitchell*, 75 Tex. 77, 12 S. W. 810.

Objections to the admission of secondary evidence must be made when such evidence is offered. *Hunter v. Waite*, 11 Tex. 85.

Where no bill of exceptions was taken to testimony when offered, an objection to a discussion of the evidence by the counsel of the party offering it will not relieve the adverse party of the failure to present proper objections to the evidence when offered. *Western Union Telegraph Co. v. Simmons* (Civ. App.), 93 S. W. 686.

The denial of a motion to exclude all of a party's evidence, made after his witness have testified, will not be reversed where no reason is given why the objection was not made when the evidence was offered. *Ft. Worth & R. G. Ry. Co. v. Andrews* (Civ. App.), 29 S. W. 920.

Must Be Made before Evidence Has Gone to Jury.—Objections to the mode of proof, or of the introduction thereof, must be made before the evidence has gone to the jury; otherwise they will be deemed to have been waived. *Bohanan v. Hans*, 26 Tex. 445.

Objection too Late after Verdict.—An objection to the admission of evidence comes too late if made in the first instance after verdict. *Collins v. Cook*, 40 Tex. 238.

Objection Can Not Be First Raised by Request for Instructions.—Where no objection was interposed to testimony when admitted, the objection comes too late when interposed in the form of a request for instructions to the jury. *Nalle v. Gates*, 20 Tex. 315; *Bohanan v. Hans*, 26 Tex. 445; *Ann*

Berta Lodge v. Leverton, 42 Tex. 18; *Maverick v. Maury*, 79 Tex. 435, 15 S. W. 686; *White v. Pyron* (Civ. App.), 62 S. W. 82, affirmed in 94 Tex. 689, no op.

Improper evidence admitted without objection can not be controlled by a special charge. *Missouri, K. & T. Ry. Co. v. Edling*, 45 S. W. 406, 18 Tex. Civ. App. 171.

Where no objection was made to testimony when it was admitted, and no motion made to strike it out, a request for a charge excluding such evidence was too late. (Civ. App.), *St. Louis & S. W. Ry. Co. of Texas v. Foster*, 89 S. W. 450; *El Paso S. R. Co. v. Darr* (Civ. App.), 93 S. W. 166.

An expert, while testifying as to an injury received by plaintiff, testified without objection that plaintiff assured him he had never suffered with sore eyes or been injured in his eyes. Held, that it was proper to refuse a request to charge the jury not to consider evidence of symptoms of injury not testified to by plaintiff, but stated by him to his physician, as the objection to the evidence came too late. *Missouri Pac. Ry. Co. v. Mitchell*, 75 Tex. 77, 12 S. W. 810.

Too Late on Motion in Arrest of Judgment.—An objection to the admissibility of evidence, first made on a motion in arrest of judgment, is not entitled to consideration. *McCoy's Heirs v. Jones*, 9 Tex. 363.

Too Late on Motion for Rehearing or New Trial.—A special objection to the admission of evidence raised for the first time on a motion for a rehearing will not be considered. (Civ. App.), *Altgelt v. Alamo Nat. Bank*, 79 S. W. 582, judgment reversed 83 S. W. 6, 98 Tex. 252.

"No objection upon this ground was offered to the deed when it was introduced, and not until the motion for new trial was made does the matter seem to have been presented to the

court. As thus presented, the objection is not entitled to receive the favorable consideration to which it might have been entitled if presented at a time when the seeming discrepancy might have been explained." *Waters v. Spofford*, 58 Tex. 115.

As a general rule, if no objection be made to evidence when offered, and no motion to exclude it from the jury be made, the admissibility of the evidence can not be questioned in the motion for new trial, nor on appeal. *Blake v. State*, 3 Tex. Cr. App. 581.

Confessions made in custody are not exceptions to the rule that objections to the admissibility of evidence must be interposed when it is offered, and are not primarily available by motion for a new trial, or on appeal. *Berry v. State*, 4 Tex. Cr. App. 492.

Objection to Testimony Admitted without Objection in Another Part of Examination.—An objection can be taken to testimony though it has been already admitted without objection in another part of the examination. *McLane v. Paschal*, 74 Tex. 20, 11 S. W. 837.

(b) Practice Where Evidence Already Admitted.

To obtain the benefit on appeal of an objection to evidence already admitted, there must be a motion to strike it out. *Dunn v. Taylor* (Civ. App.), 107 S. W. 952.

Where an answer is given before an objection is made, the proper practice is to move to strike it out, not to interpose an objection. *Collins v. Cook*, 40 Tex. 238.

Where a party has not requested the exclusion of incompetent evidence, he can not complain of the court's failure of its own motion to exclude such evidence. *Wichita Valley, etc., Co. v. Hobbs*, 5 Tex. Civ. App. 34, 35, 23 S. W. 923.

Where evidence is admissible as preliminary proof of a matter, and no further evidence is offered, the ad-

verse party can not complain of its admission in the absence of a motion for its withdrawal from the jury. *Citizens' Telephone Co. v. Thomas*, 45 Tex. Civ. App. 20, 99 S. W. 879.

Where illegal testimony has been admitted, though without objection, in connection with an issue not raised by the pleadings, and manifestly unjust to the party complaining, the court should exclude it on motion, after the evidence has closed, and instruct the jury to disregard it. *Galveston, H. & S. A. Ry. Co. v. Scott*, 44 S. W. 589, 18 Tex. Civ. App. 321.

In an action for injuries, defendant's motion to have the jury instructed to disregard certain testimony was sustained, but upon plaintiff's offer to supply certain preliminary proof the court left the testimony in temporarily. No motion was subsequently made by defendant to exclude the testimony. Held, that the refusal to withdraw the testimony from the jury was not error, in the absence of a renewal of the motion and exception taken. *Galveston, H. & S. A. Ry. Co. v. Janert*, 49 Tex. Civ. App. 17, 107 S. W. 963.

Where the incompetency of evidence of a conversation varying the terms of a written contract did not appear until after it had been admitted, and was developed by cross-examination, a motion, timely made, to exclude the testimony, should have been granted. (Civ. App.), *Wolf Cigar Stores Co. v. Kramer*, 89 S. W. 995, judgment reversed *Kramer v. Wolf Cigar Stores Co.*, 91 S. W. 775, 99 Tex. 597.

(3) Requisites and Sufficiency.

(a) Necessity for Specific Objections Stating Grounds.

aa. General Rule.

Rule Stated.—An objection to the admission of evidence must as a general rule be specific, and state the grounds of the objection. *Cheatham v. Riddle*, 8 Tex. 162; *Croft v. Rains*, 10 Tex. 520; *Haggerty v. Scott*, 10 Tex.

525; *Cobb v. Norwood*, 11 Tex. 556; *Ryan v. Jackson*, 11 Tex. 391; *Norton v. Mitchell*, 13 Tex. 47, 51; *Hamilton v. Rice*, 15 Tex. 382; *Stiles v. Giddens*, 21 Tex. 783; *Tucker v. Willis*, 24 Tex. 247; *Bohanan v. Hans*, 26 Tex. 445; *Frizzell v. Johnson*, 30 Tex. 31, 32; *De Garcia v. Galvan*, 55 Tex. 53; *Young v. O'Neal*, 54 Tex. 544, 548; *Endick v. Endick*, 61 Tex. 559; *Keowne v. Love*, 65 Tex. 152; *Rio Grande, etc., R. Co. v. Cross*, 5 Tex. Civ. App. 454, 459, 23 S. W. 529, affirmed in 93 Tex. 648, no op.; *San Antonio v. Potter*, 31 Tex. Civ. App. 263, 71 S. W. 764, affirmed in 97 Tex. 629, no op.; *Kesterson v. Bailey*, 35 Tex. Civ. App. 235, 80 S. W. 97, affirmed in 98 Tex. 622, no op.; *Hibernia Ins. Co. v. Starr* (Sup.), 13 S. W. 1017; *Houston, etc., R. Co. v. Williams* (Civ. App.), 31 S. W. 556; *Perkins v. Buaas* (Civ. App.), 32 S. W. 240; *McDannell v. Horrell*, 1 Posey 521, 524.

Where an objection is made to the admissibility of evidence, the grounds of the objection should be stated to make the objection available on appeal. *Norton v. Mitchell*, 13 Tex. 47, 51; *Kesterson v. Bailey*, 35 Tex. Civ. App. 235, 80 S. W. 97, affirmed in 98 Tex. 622, no op.

"Covert, obscure objections to evidence should receive no countenance. They ought to be sufficiently clear to enable the opposite party to obviate the objection, if in his power." *Cobb v. Norwood*, 11 Tex. 556.

The court's ruling on an objection to evidence where the ground of objection is not stated will not be revised, unless it relates to the relevancy or competency of the evidence offered. *McDannell v. Horrell*, 1 Posey, Unrep. Cas. 521.

"An objection which does not state the reasons for the rejection of the testimony, if, under any contingency, the evidence offered would be properly admitted, will not be considered on appeal. Rule 57, Sayles' Practice,

593; *Stiles v. Giddens*, 21 Tex. 783; *Trigg v. Moore*, 10 Tex. 199, 200." *De Garcia v. Galvan*, 55 Tex. 53.

Where objections to evidence are such as a party, by his silence, may be deemed to have waived, they will not be considered in the appellate court, unless the ground of the objection was stated at the time of making it. *Croft v. Rains*, 10 Tex. 520; *Haggerty's Ex'rs v. Scott*, 10 Tex. 525.

Where objections to evidence do not go to the relevancy or sufficiency of evidence proposed, to establish fact in issue, they will not be considered on appeal unless the ground of objection is assigned at time of making it. *Croft v. Rains*, 10 Tex. 520, 524.

A general objection to a question will not be considered by the appellate court, unless it be one to which any response would be illegitimate. (Civ. App.), *Paris & G. N. Ry. Co. v. Calvin*, 103 S. W. 428, judgment affirmed in 101 Tex. 291, 106 S. W. 879.

A party objecting to written evidence for any cause not going to its relevancy or competency, but only to the manner of its authentication or proof, must specially assign the grounds of his objection at the trial. *Ryan v. Jackson*, 11 Tex. 391.

If the ground of objection to evidence is that it is secondary, it should be stated at the time when the objection is made. *Croft v. Rains*, 10 Tex. 520.

Where a Mexican title was offered in evidence, and the adverse party objected, but the ground of the objection did not appear, the objection could not be made on appeal that the officer who issued the concession had no authority by virtue of his office to grant land. *Norton v. Mitchell*, 13 Tex. 47.

In a personal injury case, a physician was asked whether, from his examination of plaintiff, plaintiff impressed him as a temperate or intemperate man. Defendant's counsel said: "I object to that. I don't think it is a

proper question." Held, that it was not error to overrule the objection; no ground therefor being stated. *City of San Antonio v. Potter*, 71 S. W. 764, 31 Tex. Civ. App. 263.

Objection to admission of deed because defectively acknowledged, will not be noticed on appeal in absence of exception showing specific defect. *Perry v. Stephens*, 77 Tex. 246, 249, 13 S. W. 984.

Where, in trespass to try title, certain deeds which were admissible as ancient instruments were objected to generally, plaintiffs could not claim on appeal that the deeds were not admissible as duly recorded deeds to affect defendants' defense of limitations. *Flack v. Braman*, 45 Tex. Civ. App. 473, 101 S. W. 537.

Where evidence, though not competent, was relevant, an objection to its relevancy only was properly overruled. *Postal Telegraph-Cable Co. v. Sunset Const. Co.* (Civ. App.), 109 S. W. 265.

Reasons for Rule.—A party objecting to evidence ought to state his objection clearly and specifically, so that it may be understood by the court, and obviated by the opposing party if it be capable of being removed by the production of other evidence. *Bohanan v. Hans*, 26 Tex. 445; *Croft v. Rains*, 10 Tex. 520; *Cobb v. Norwood*, 11 Tex. 556.

"When an objection to the admissibility of evidence is made, the grounds of objection should be distinctly stated, or there will be nothing to revise. If this rule is not observed, the revising court would often be revising a question on evidence that had not been raised and decided in the court below. Again, whenever there is an objection made to evidence offered, the party offering should have an opportunity to remove the objection, or to supply his cause with other evidence. He could not do this if any general objection was allowed to be sufficient. (*Fowler v. Stonum*, 6 Tex.

60; 11 Wheat R., 199; *Hubert v. Bartlett* (note 21), 9 Tex. 97; *Leach v. Millard*, 9 Tex. 551; *Davenport v. Lackie*, 8 Tex. 351.)" *Norton v. Mitchell*, 13 Tex. 47.

"A party objecting to written evidence, for any cause not going to its relevancy or competency, but only to the manner of its authentication or proof, must specially assign the grounds of his objection at the trial; for the party offering the evidence might then have it in his power to meet and obviate the objections by other evidence; and, moreover, the court, as has been said, in deciding upon questions arising at the trial, is not bound to do more than respond to the questions raised, in the terms in which they are propounded. (*Houston v. Perry*, 5 Tex. 462, 467; *Bailey v. Knight*, 8 Tex. 68, 162; *Hubert v. Bartlett* (note 21), 9 Tex. 97; *Croft v. Rains*, 10 Tex. 520.)" *Ryan v. Jackson*, 11 Tex. 391.

Objections on Appeal Must Rest on Same Grounds as Those below.—

Where an objection is made to evidence on a certain ground, a different ground of objection can not be alleged on appeal. *Bailey v. Knight*, 8 Tex. 58; *Chapman v. Allen*, 15 Tex. 278; *Rector v. Hudson*, 20 Tex. 234; *Sharp v. Schmidt*, 62 Tex. 263, 266; *Cannon v. Cannon*, 66 Tex. 682, 685, 3 S. W. 36; *Blanton v. Ray*, 66 Tex. 61, 17 S. W. 264; *Ft. Worth, etc., R. Co. v. Hogsett*, 67 Tex. 685, 4 S. W. 365; *Texas, etc., R. Co. v. Barron*, 4 Tex. Civ. App. 546, 549, 23 S. W. 537; *Johnson v. Lyford*, 9 Tex. Civ. App. 85, 29 S. W. 57; *Kean v. Zundelowitz*, 9 Tex. Civ. App. 350, 29 S. W. 930, affirmed in 93 Tex. 665, no op.; *Traylor v. State*, 19 Tex. Civ. App. 86, 46 S. W. 81, affirmed in 93 Tex. 722, no op.; *Bludworth v. Poole*, 21 Tex. Civ. App. 551, 53 S. W. 717; *Smithers v. Lowrance*, 35 Tex. Civ. App. 25, 79 S. W. 1088; *Missouri, etc., R. Co. v. Russell*, 40 Tex. Civ. App. 114, 88 S. W. 379,

affirmed in 101 Tex. 649, no op.; *Galveston, etc., R. Co. v. McMonigal* (Civ. App.), 25 S. W. 341; *House v. Security, etc., Co.* (Civ. App.), 38 S. W. 227; *Minor v. Powers* (Civ. App.), 38 S. W. 400; *Frankel v. Caddon* (Civ. App.), 40 S. W. 638; *St. Louis, etc., R. Co. v. Ratley* (Civ. App.), 87 S. W. 407, affirmed in 101 Tex. 656, no op.; *El Campo Rice Milling Co. v. Montgomery* (Civ. App.), 95 S. W. 1102. See the title ASSIGNMENTS OF ERROR, vol. 2, p. 185.

As a general rule the superior court, in reviewing the decision of the inferior court in admitting evidence, will confine itself to the specific objections raised in the inferior court. *Fowler v. Stonum*, 6 Tex. 60.

Objections to evidence different from those heard in the trial court can not be considered on appeal. *House v. Security, etc., Co.* (Civ. App.), 38 S. W. 227.

New grounds of objection to evidence are not considered for the first time on appeal. *Ford v. Cowan*, 64 Tex. 129, 130.

The particular objection to the admission of evidence urged on appeal not having been presented to the court below will not be considered, although the evidence was objected to there on other grounds. *Cannon v. Cannon*, 66 Tex. 682, 3 S. W. 36.

A party is confined to the specific objections to evidence made at the trial; an objection on the score of interest in the subject matter does not allow him to avail himself, in the appellate court, of the witness' contingent liability for costs. *Tucker v. Willis*, 24 Tex. 247.

Where the only objection stated to the admission of a witness' testimony as to the value of rice was his lack of knowledge, the further objection that evidence of the market value of rice at the time stated by the witness was immaterial can not be raised on appeal. *El Campo Rice Milling Co. v.*

Montgomery (Civ. App.), 95 S. W. 1102.

Objection to admission of record of former judgment in evidence being taken only as to competency, objection to authentication thereof can not be first heard on appeal. *Bailey v. Knight*, 8 Tex. 604.

When the objection in the court below to evidence of a witness appears affirmatively from the bill of exceptions to have been based on specific grounds, which did not involve an objection to witness giving his opinion that ground of objection will not be heard for the first time on appeal. *Houston & T. C. R. Co. v. Knapp*, 51 Tex. 569.

On appeal by defendants in an action for the recovery of personal property, an assignment of error that certain evidence was inadmissible on the issue of value, because the value could be determined only by proof of the market value, would not be considered, where in the trial court the only objection was that the testimony was incompetent, irrelevant, and inadmissible. *Hammond v. Decker*, 46 Tex. Civ. App. 232, 102 S. W. 453.

Where evidence as to the competency of a fellow servant was objected to as calling for an opinion of the witness, and because evidence of physical defects was not evidence of incompetency, such objection was insufficient to present the question on appeal that the testimony was inadmissible because the act of incompetency alleged was the negligent act of such fellow servant in withdrawing a hammer handle from a plate, as to which evidence of physical defects or inability of the helper was irrelevant. *Kansas City Consol. Smelting & Refining Co. v. Taylor*, 48 Tex. Civ. App. 605, 107 S. W. 889.

The point that statements by a person injured in a railroad collision as to a pain in his back made to his physician while in the physician's office for

examination and treatment were made during the course of an examination arranged for the purpose of making the declaration was not raised by an objection "that the time intervening between the accident and the occasion of the complaint was too remote, and that any statement that the plaintiff may have made at the time would be a mere self-serving declaration, and the same was irrelevant, immaterial, and incompetent." *El Paso & S. W. R. Co. v. Polk*, 49 Tex. Civ. App. 269, 108 S. W. 761.

An objection to testimony of a medical expert as to any indications of suffering pain given by plaintiff while such expert was examining him to qualify himself as a witness does not entitle the party to complain of only the part of the answers which were mere declarations of pain and not involuntary shrinkings therefrom by the plaintiff. *Consumers, etc., Oil Co. v. Jonte*, 36 Tex. Civ. App. 18, 80 S. W. 847, affirmed in 101 Tex. 632, no op.

Where, in an action for damages to cattle, evidence of a witness on the issue of damages was objected to on the ground that the witness was testifying to his opinion and not as to facts, such objection did not sustain the contention, first made on appeal, that it was error for the court to permit the witness to testify what the market value of the cattle would be if in good condition, for the reason that defendant was not responsible for the depreciation in weight and appearance of the cattle naturally resulting from being transported. *Missouri, etc., R. Co. v. Russell*, 40 Tex. Civ. App. 114, 88 S. W. 379, affirmed in 101 Tex. 649, no op.

Where it appeared by the bill of exceptions that the defendant had resisted an objection to the admission of a deposition, on the ground that it was filed only a few minutes before the trial, it was held that he could not plead, on appeal, that no notice was

given him before the trial. *Chapman v. Allen*, 15 Tex. 278.

An objection taken in trial court to a paper offered in evidence can not be enlarged on appeal. *Cannon v. Cannon*, 66 Tex. 682, 685, 3 S. W. 36.

The ruling excluding the testimony of witness as to the condition of stock before shipment in action against a carrier for damage in transit was not relieved of error by the explanation of the trial judge that there was no offer to show that the witness was a stockman, etc.; the only objection to his evidence being that he had not identified the cattle as plaintiff's. *Texas & P. Ry. Co. v. Coggin*, 90 S. W. 523, 40 Tex. Civ. App. 583.

Objections Held Too General.—An objection to evidence as being incompetent is too general. *Perkins v. Buaas* (Civ. App.), 32 S. W. 240.

"Evidence that is not admissible for any reason may be said to be incompetent. Therefore, when evidence is objected to, the particular ground of objection should be stated." *Perkins v. Buaas* (Civ. App.), 32 S. W. 240.

An objection to evidence on the formal ground that it was irrelevant, incompetent, and immaterial, can not be considered on appeal. (Tex. Cr. App.), *Leftwich v. State*, 55 S. W. 571; *Whittle v. State*, 66 S. W. 771, 43 Tex. Cr. App. 468.

An objection to testimony that it was "immaterial and irrelevant" is too general to place before the court the question whether there was an allegation in the petition under which the testimony was admissible. *Galveston, H. & S. A. Ry. Co. v. Powers* (Civ. App.), 101 S. W. 250, judgment reversed 101 Tex. 161, 105 S. W. 491.

The objection to testimony that it is "incompetent, immaterial, and irrelevant" is not specific enough to raise any question on appeal, unless the real nature of the objection is so plain that nothing more specific is necessary. *El Paso & S. W. Ry. Co. v. Smith*, 50 Tex. Civ. App. 10, 108 S. W. 988.

Where objection is made to the writing of the name of a witness twice on a piece of paper, in the presence of the jury, for the purpose of comparing his handwriting, by stating "that the introduction of the instrument was incompetent, irrelevant, and immaterial, and handwriting can not be proved by comparison," the objection is not sufficient to raise the objection that handwriting can not be proved by comparison with other papers, claimed to have been signed by the witness, which were not relevant to any issue in the cause. *Wade v. Galveston, H. & S. A. Ry. Co.* (Civ. App.), 110 S. W. 84.

An objection to the acknowledgment of a deed sought to be introduced in evidence, on the ground that it "was not acknowledged as required by law," is too general. *Leon & H. Blum Land Co. v. Dunlap*, 4 Tex. Civ. App. 315, 23 S. W. 473.

An objection to the introduction of a written assignment of the cause of action on the ground that no predicate had been laid to authorize its admission was too indefinite to raise any question. *Pecos & N. T. Ry. Co. v. Evans-Snyder-Buel Co.*, 93 S. W. 1024, 42 Tex. Civ. App. 60, judgment affirmed *Same v. Evans-Snyder-Buel Co.*, 97 S. W. 466, 100 Tex. 190, 42 Tex. Civ. App. 60.

Sureties can not object on appeal that evidence was introduced that was admissible against the principal or his personal representatives, but not admissible against the sureties, where they merely objected generally to its introduction, without asking an instruction that such evidence should not be considered against them. *Keowne v. Love*, 65 Tex. 152.

Objections Held Sufficiently Specific.—An objection to evidence that defendant railroad company, after an accident caused by a defective coupling pin, used another kind, on the ground that it was not competent, is sufficiently specific. *Texas & P. Ry. Co. v. Gay*, 88 Tex. 111, 30 S. W. 543.

Objection by plaintiff, in an action against G. and L., to testimony of M., agent of L., consisting of conversations between M. and agents of G., "plaintiff objects to what occurred between witness and G.'s representatives," is sufficient. *Trammell & Lane v. J. M. Guffey Petroleum Co.*, 94 S. W. 104, affirming 42 Tex. Civ. App. 60, 93 S. W. 102.

An objection to evidence of a conversation, that defendants were not bound by "any statement made by an employee long after the accident happened, and that they would not be bound by statements made between two agents," was sufficient to present the objection that the declarations of mere agents of the defendants, made after the accident, were inadmissible against them. Judgment (Civ. App.), 86 S. W. 29, reversed. *City of Austin v. Forbis*, 89 S. W. 405, 99 Tex. 234.

An objection to evidence as being hearsay is sufficient when the evidence does not, upon its face, come within the exceptions to the general rule excluding hearsay evidence; and it is incumbent on the party offering it to show its admissibility as being within one of the exceptional cases in which hearsay evidence is admissible. *Johns v. Northcutt*, 49 Tex. 444.

Objection Construed.—In an action for personal injuries, an objection to evidence as to what plaintiff's earning capacity was 20 years before as being "too remote" will be taken to mean that the time and place of such earning are too distant in time and space from where he was injured to have any relevancy to the issue as to impairment of earning capacity by reason of his injuries. *El Paso Electric Ry. Co. v. Murphy*, 49 Tex. Civ. App. 586, 109 S. W. 489.

bb. Exceptions to Rule.

A party who objects to evidence must, in general, state the ground of his objection. But there may be exceptions to this rule depending on the

character of the proposed evidence; a general objection may be sufficient, where it is manifestly incompetent to prove the proposed fact, or its inadmissibility is apparent. *Cheatham v. Riddle*, 8 Tex. 162.

Objections which go to the competency of evidence and which need not be specially taken below, appear to be objections which show, not merely that the evidence is not the best evidence, but that it is not admissible under any circumstances. *Ryan v. Jackson*, 11 Tex. 391. See, also, *De Garcia v. Galvan*, 55 Tex. 53.

When testimony is objected to, but no reason is assigned, the appellate court will revise the ruling of the court below only when the testimony is irrelevant or incompetent. *Stiles v. Giddens*, 21 Tex. 783.

(b) Insufficiency of General Objection to Evidence, Any Portion of Which Is Admissible.

A general objection to evidence will not avail, where any part of such evidence is not subject to the objection. *Houston v. Perry*, 5 Tex. 462.

An objection to evidence as a whole is not tenable where part of it is admissible. *Goodloe v. Goodloe*, 47 Tex. Civ. App. 493, 105 S. W. 533; *Wandelohr v. Grayson County Nat. Bank* (Civ. App.), 106 S. W. 413, judgment affirmed, 102 Tex. 20, 108 S. W. 1154.

Where a portion of evidence objected to as a whole is admissible, the objection is properly overruled. *Galveston, etc., R. Co. v. Gormley*, 91 Tex. 393, 43 S. W. 877, reversing *Same v. Burnett* (Civ. App.), 42 S. W. 314; *Missouri, etc., R. Co. v. Johnson*, 95 Tex. 409, 67 S. W. 768, affirming (Civ. App.), 67 S. W. 769; *Jamison v. Dooley*, 98 Tex. 206, 82 S. W. 780, affirming 34 Tex. Civ. App. 302, 79 S. W. 71; *Pecos, etc., R. Co. v. Evans-Snyder-Buel Co.*, 100 Tex. 190, 97 S. W. 466, affirming 42 Tex. Civ. App. 60, 93 S. W. 102; *Rio Grande R. Co. v. Cross*, 5 Tex. Civ. App. 454, 23 S. W. 529, af-

firmed in 93 Tex. 648, no op.; *Holt v. Hunt*, 18 Tex. Civ. App. 363, 44 S. W. 889; *Wren v. Howland*, 33 Tex. Civ. App. 87, 75 S. W. 894, affirmed in 97 Tex. 652, no op.; *Consumers, etc., Oil Co. v. Jonte*, 36 Tex. Civ. App. 18, 80 S. W. 847, affirmed in 101 Tex. 632, no op.; *Sun, etc., Co. v. Egbert*, 37 Tex. Civ. App. 512, 84 S. W. 667; *Texas R. Co. v. Powell*, 38 Tex. Civ. App. 157, 86 S. W. 21, affirmed in 101 Tex. 662, no op.; *Field v. Field*, 39 Tex. Civ. App. 1, 87 S. W. 726, affirmed in 101 Tex. 635, no op.; *Gulf, etc., R. Co. v. Tullis*, 41 Tex. Civ. App. 219, 91 S. W. 317; *Goodloe v. Goodloe*, 47 Tex. Civ. App. 493, 105 S. W. 533, affirmed in 102 Tex. 583, no op.; *International, etc., R. Co. v. Cuneo*, 47 Tex. Civ. App. 622, 108 S. W. 714, affirmed, no op.; *Fant v. Willis* (Civ. App.), 23 S. W. 99; *Keating, etc., Co. v. Erie City Iron Works* (Civ. App.), 63 S. W. 546; *Rhodes, etc., Furniture Co. v. Henry* (Civ. App.), 67 S. W. 340; *St. Louis, etc., R. Co. v. Frazier* (Civ. App.), 87 S. W. 400, affirmed in 101 Tex. 655, no op.; *Wandelohr v. Grayson County Nat. Bank* (Civ. App.), 106 S. W. 413, affirmed in 102 Tex. 20, 108 S. W. 1154.

The overruling of a general objection to evidence can not be assigned as error though a portion of such evidence was inadmissible. *Consumers' Cotton Oil Co. v. Jonte*, 80 S. W. 847, 36 Tex. Civ. App. 18.

If a part of the evidence relating to a transaction is admissible, though a part is not, a general objection to the entire evidence is properly overruled. *International & G. N. R. Co. v. Cuneo*, 47 Tex. Civ. App. 622, 108 S. W. 714.

Where testimony is admitted in connection with inadmissible testimony by the same witness, and the objection is made to the evidence as a whole, error can not be predicated on the action of the court in overruling such objection. *Fant v. Willis* (Civ. App.), 23 S. W. 99.

In an action for personal injuries,
7 Tex—4

a witness testified as to six certificates as to plaintiff's disability, supposed to have been made by a doctor, who testified that he had given but two certificates. There was testimony to show that the doctor had given at least four certificates. Held, that a motion to strike out the testimony regarding all six certificates was properly refused, since it is not error to overrule an objection which is invalid in part. *Galveston, H. & S. A. Ry. Co. v. Janet*, 49 Tex. Civ. App. 17, 107 S. W. 963.

A bill of exception complaining of all of the evidence, some of which is admissible, presents nothing for review. *Dolan v. Meehan* (Civ. App.), 80 S. W. 99.

Where a statement of facts was agreed on by the parties, and when offered on trial defendant objected to it as an entirety, the objections not showing the particular parts deemed objectionable, the action of the trial court in overruling the objections will not be reviewed on appeal. *Rio Grande R. Co. v. Cross*, 5 Tex. Civ. App. 454, 23 S. W. 529, 1004.

Where any part of the statement of a witness is admissible, an objection to the admission of the statement as a whole does not apply to any portion of it. *Sullivan v. Fant*, 51 Tex. Civ. App. 6, 110 S. W. 507.

In an action between applicants for the purchase of public lands, where plaintiff on the trial objected to the admission in evidence of the whole of a certificate of the commissioner of the land office issued to defendant, he could not, on appeal urge that a portion of such certificate should be excluded. *Winans v. McCabe*, 41 Tex. Civ. App. 99, 92 S. W. 817.

Where objection is made to the introduction of a statement in a deed as a whole, such objection is not sufficient to raise the question of the admissibility of a specific part of the statement, and it was not error to admit the entire statement, if any part

thereof was proper evidence. *Wren v. Howland*, 75 S. W. 894, 33 Tex. Civ. App. 87.

In an action for damages for delay in shipment of cattle, testimony as to market value derived from information received from salesmen of commission houses was hearsay and inadmissible, but testimony based on information obtained from newspaper market reports was properly admitted. Held, that objection being made to all the testimony, the judgment would not be reversed for admission of the improper portion. *St. Louis, I. M. & S. Ry. Co. v. Gunter*, 39 Tex. Civ. App. 129, 86 S. W. 938.

Where plaintiff, in an action for injuries, introduced as a witness upon the extent of his injuries a physician who had examined him solely for the purpose of qualifying himself to testify upon the subject, a general objection to such witness' testifying to anything plaintiff said or did while being so examined, made before the witness had given any testimony at all, was insufficient to raise any question as to the admissibility of the testimony, since some of such declarations might be admissible, and the court could not pass upon them until it knew what they were. *Missouri, K. & T. Ry. Co. of Texas v. Johnson*, 67 S. W. 768, 95 Tex. 409, affirming judgment (Civ. App.), 67 S. W. 769.

Sustaining interrogatories to witnesses containing admissible matter is not error when the objections fail to separate the proper from the objectionable portions. *Goodloe v. Goodloe*, 47 Tex. Civ. App. 493, 105 S. W. 533, affirmed in 102 Tex. 583, no op.

Where an objection extends to only a part of an answer of a witness in a deposition, the objector should separate the admissible part from the inadmissible, and it is not error to overrule his objection to the entire answer. *Galveston, etc., R. Co. v. Gormley*, 91 Tex. 393, 43 S. W. 877, reversing 42 S. W. 314.

(4) Waiver of Objections to Evidence Admitted over Objection.

See, generally, the title APPEAL AND ERROR, vol. 1, p. 313.

A party can not complain of the admission of evidence over his objection where he later permits similar evidence to be introduced without objection. *City of San Antonio v. Potter*, 71 S. W. 764, 31 Tex. Civ. App. 263; *Galveston, H. & S. Ry. Co. v. Baumgarten*, 72 S. W. 78, 31 Tex. Civ. App. 253.

Where the plaintiff offered a testimony in evidence and defendant objected on the ground that its execution and the authority of the commissioner were not proved and afterwards plaintiff introduced in evidence, without objection, a translation from the land office of the protocol, the objection to the admission of the plaintiff's evidence of title was thereby removed. *Howard v. Richeson*, 13 Tex. 553.

Where a deed was admitted in evidence, over the objection of defendant, the subsequent introduction in evidence by him of same deed was a waiver of such objection. *Dohoney v. Womack*, 1 Tex. Civ. App. 354, 19 S. W. 883, 20 S. W. 950.

A party can not object to the introduction of a record after he has agreed that it might be used. *Kempner v. Beaumont Lumber Co.*, 49 S. W. 412, 20 Tex. Civ. App. 307.

A party who, after the admission of testimony over his objection, requires the witnesses on cross-examination to repeat the testimony, with a view of defeating the force thereof by experimenting to see whether the witnesses will not impeach themselves by giving their testimony differently, can not claim that the testimony was in evidence over his objection. *Sullivan v. Fant*, 51 Tex. Civ. App. 6, 110 S. W. 507.

Testimony improperly admitted is not rendered admissible, because the party objecting filed cross interroga-

tories to the witness touching the matters to which the objection related. *Siebert v. Lott*, 20 Tex. Civ. App. 191, 193, 49 S. W. 783. See the title EVIDENCE, vol. 6, p. 1098.

b. Exceptions.

(1) Necessity.

In order to save for review a ruling of the court upon the admission of evidence, an exception should be taken to such ruling. *Western Union Tel. Co. v. Johnsey*, 49 Tex. Civ. App. 487, 109 S. W. 251, affirmed, no op.

Objection should be made as soon as the inadmissibility of testimony is disclosed by the examination of the witness. It should then be insisted on, and if it be not sustained exception should be reserved. *Maverick v. Maury*, 79 Tex. 435, 15 S. W. 686.

The admission of evidence against objections will not be considered on appeal when the record fails to show that any exceptions were taken to such ruling. *Bast v. Alford*, 22 Tex. 399; *Mullins v. Thompson*, 51 Tex. 7, 12; *Orr, etc., Shoe Co. v. Ferrell*, 68 Tex. 638, 5 S. W. 490; *Collins v. Panhandle Nat. Bank*, 75 Tex. 254, 11 S. W. 1053; *Blum v. Jones*, 86 Tex. 492, 495, 25 S. W. 694; *Texas Loan Agency v. Fleming*, 92 Tex. 458, 49 S. W. 1039, reversing 18 Tex. Civ. App. 668, 46 S. W. 63; *Wells v. Burts*, 3 Tex. Civ. App. 430, 22 S. W. 419; *Saul v. Frame*, 3 Tex. Civ. App. 596, 22 S. W. 984; *Foley v. Houston, etc., R. Co.*, 50 Tex. Civ. App. 218, 108 S. W. 169, 110 S. W. 96; *McFadden v. Prater (Sup.)*, 3 S. W. 306; *Ballero v. Casey (Sup.)*, 9 S. W. 189; *Spicer v. Taylor (Civ. App.)*, 21 S. W. 314; *Western Union Tel. Co. v. Smith (Civ. App.)*, 33 S. W. 742; *Walker v. State*, 7 Tex. Cr. App. 245.

Where the record does not show that objection was made and exception reserved to the admission of evidence in the court below, the admissibility of the evidence can not be considered on appeal. *Ballew v. Casey (Sup.)*, 9 S. W. 189.

"There are no findings of fact filed by the court, and we are not able to determine what particular testimony the court considered or what weight was given to any particular part of it. The proper method of presenting the question intended is to object to the testimony, and save a bill of exceptions if the objections should be overruled; it can not be done by assignment of error to the consideration of the testimony by the court. It would be presumed, in the absence of something to the contrary, that the court gave to the evidence its legal and proper effect only." *Wells v. Burts*, 3 Tex. Civ. App. 430, 22 S. W. 419.

Error in admitting a document in evidence on trial will not be considered on appeal, where the bill of exceptions does not show that any exception was taken to the ruling admitting the evidence. *Foley v. Houston Belt & Terminal Ry. Co.*, 50 Tex. Civ. App. 218, 110 S. W. 96.

(2) Time of Taking.

An exception to the ruling of the court, on any question of evidence, must be taken during the trial. *Jones v. Thurmond's Heirs*, 5 Tex. 318.

"The supreme court will not revise the action of the trial court in admitting or excluding evidence unless excepted to at the time." *Collins v. Panhandle Nat. Bank*, 75 Tex. 254, 11 S. W. 1053.

A party can not, after verdict, complain that objectionable matter in a pleading was read to the jury, no exception having been taken at the time. *Western Union Tel. Co. v. Smith (Civ. App.)*, 33 S. W. 742.

Action of court in overruling motion to suppress deposition will not be reviewed on appeal in absence of exception taken at time. *Blum v. Jones*, 86 Tex. 492, 495, 25 S. W. 694.

2. Exclusion of Evidence.

a. Necessity for Exception to Ruling.

In General.—Alleged error of the trial court in excluding evidence can

not be reviewed in the appellate court unless the ruling excluding such evidence was duly excepted to below. *Fulton v. Bayne*, 18 Tex. 50, 56; *Bast v. Alford*, 20 Tex. 226; *Orr, etc., Shoe Co. v. Ferrell*, 68 Tex. 638, 5 S. W. 490; *Collins v. Panhandle Nat. Bank*, 75 Tex. 254, 11 S. W. 1053; *Texas Loan Agency v. Fleming*, 92 Tex. 458, 49 S. W. 1039, reversing 18 Tex. Civ. App. 668, 46 S. W. 63; *Fox v. Brady*, 1 Tex. Civ. App. 590, 20 S. W. 1024; *Saul v. Frame*, 3 Tex. Civ. App. 596, 22 S. W. 984; *Western Union Tel. Co. v. Johnsey*, 49 Tex. Civ. App. 487, 109 S. W. 251; *McFadden v. Prater* (Sup.), 3 S. W. 306; *Ballew v. Casey* (Sup.), 9 S. W. 189; *Spicer v. Taylor* (Civ. App.), 21 S. W. 314.

Unless an exception was reserved to the ruling of a trial court in rejecting evidence, its action will not be reviewable on appeal. *Durham v. Atwell* (Civ. App.), 27 S. W. 316.

Objections to exclusion of evidence, not made below and shown of record can not be heard on appeal. *Fulton v. Bayne*, 18 Tex. 50, 57.

A defendant who was not present at the trial, either in person or by attorney, can not, on appeal, object to the suppression of a deposition at the trial on motion of plaintiff. *Brooks v. Pegg* (Sup.), 8 S. W. 596.

Necessity That Exceptions Be Made Part of Record by Bill of Exceptions.—The admission or exclusion of evidence can not be reviewed where no exceptions are taken at the time and made part of the record by bill of exceptions. *Saul v. Frame*, 22 S. W. 984, 3 Tex. Civ. App. 596. See the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL.

b. Time of Taking.

The ruling of the trial court excluding evidence must be excepted to at the time. *Collins v. Panhandle Nat. Bank*, 75 Tex. 254, 11 S. W. 1053; *Saul v. Frame*, 3 Tex. Civ. App. 596, 22 S. W. 984.

c. Showing as to Nature of Evidence Proposed to Be Introduced, etc.

An exception to the exclusion of evidence should plainly show the nature of the evidence proposed to be introduced in order to determine its admissibility. *Gulf, Colorado & S. F. Ry. Co. v. Locker*, 78 Tex. 279, 14 S. W. 611.

The court's rejection of evidence can not be reviewed in the absence of an offer presenting to the court what was expected to be proved by the witness. *Galveston, etc., R. Co. v. Dehnisch* (Civ. App.), 57 S. W. 64.

In the absence of a showing what the answer of a witness would have been to a question to which an objection was sustained, the court on appeal can not assume that the answer would have been of benefit to the party complaining or that its exclusion was harmful to him. *Goldstein v. Susholtz*, 46 Tex. Civ. App. 582, 105 S. W. 219, affirmed in 102 Tex. 583, no op.

An exception to exclusion of evidence is too vague and uncertain that does not show the evidence offered with sufficient certainty to enable the appellate court to perceive that the testimony if it had been allowed would have been material. *Vance v. Saathoff*, 2 Posey 658, 662.

"The general rule is, that in order to entitle a party to a revision of the ruling of the lower court in refusing to allow him to propound a question to a witness, he must show what answer he expected to elicit, in order that the court may see that he has been deprived of legitimate evidence. This rule applies mainly to a case where a party is seeking to introduce original evidence, the nature of which he should be expected to know before he offers the same, and is not applicable to a case where the party is cross-examining the witness of his adversary, with whose knowledge of the case he is not supposed to be familiar. In this class of cases we think the better rule is, that if the question appears on its face

to be calculated to elicit competent testimony, it is error to refuse the same, although counsel may not be able to state to the court the answer intended or expected to be elicited. To exact such a statement would be to require counsel either to speculate upon the answer of an adverse witness, or deal unfairly with the court." *Cunningham v. Austin*, etc., R. Co., 88 Tex. 534, 31 S. W. 629.

An exception to the refusal of the court to require a witness to answer a question, where the record does not show what the answer would have been, will not be considered. *Lockhart v. Keller* (Sup.), 9 S. W. 179.

"It is incumbent upon the party who complains of the rejection of evidence to show in some way what the rejected evidence was, that this court may know whether he was injured by the ruling. A question may be proper; but, if the reply to it would have been of no value to the party propounding it, he has suffered no injury. *Mathews v. State*, 44 Tex. 376; *Griffin v. Chadwick*, 44 Tex. 406; *Burleson v. Hancock*, 28 Tex. 82; *Styles v. Gray*, 10 Tex. 503; *King v. Gray*, 17 Tex. 62, 71; *McKay v. Overton*, 65 Tex. 82, 85; *Milliken v. Smoot*, 64 Tex. 171." *Pennington v. McQueen* (Sup.), 3 S. W. 315, 316.

Exceptions to a ruling excluding a document should set out the document and the reasons why it was excluded. *Watson v. Mathews*, 36 Tex. 278.

An assignment of error complaining of the rejection of the testimony of a witness is not open to consideration on appeal, where the bill of exceptions does not disclose what the witness would have testified to, nor what objections were presented to the testimony. *Ramm v. Galveston*, etc., R. Co. (Civ. App.), 92 S. W. 426, affirmed in 101 Tex. 653, no op. See the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL.

3. Questions and Answers.

a. Questions.

Necessity for Objections Generally.

—When a question is propounded to a witness which may elicit incompetent evidence, the adverse party must promptly object to the question, and if, having the opportunity to object, he fail to do so before the question is answered, he can not complain that the answer of the witness is incompetent. A party will not be permitted to speculate on the answer of a witness. *Gonzalez v. State*, 30 Tex. Cr. App. 203, 16 S. W. 978.

An objection to a question indicated by appellant's "remarks" under his assignment of error, not having been made in the trial court, can not be considered on appeal. *United States Gypsum Co. v. Shields* (Civ. App.), 106 S. W. 724.

The supreme court will not review exceptions to interrogatories to witnesses as being leading where not taken in court below. *Mann v. Falcon*, 25 Tex. 271, 274.

Right of Party Offering Witness to Object to Improper Questions.—A party who offers a witness for a certain purpose has a right to object to improper questions, the answers to which might affect his credibility. *Kruger v. Spachek*, 54 S. W. 295, 22 Tex. Civ. App. 307.

Necessity for Stating Ground of Objection.—The court may in its discretion refuse to entertain an objection to a question unless the ground thereof is stated but sustaining a general objection would not be ground for reversal if no substantial error is committed. *Flanagan v. Womack*, 54 Tex. 45.

Shifting Grounds of Objection in Appellate Court.—Where on the voir dire certain questions of defendant were objected to and overruled on the ground "that the statute allowed no such question," plaintiff can not, in the appellate court, change his position,

and object to these questions as "prematurely asked." *Houston & T. C. Ry. Co. v. Terrell*, 69 Tex. 650, 7 S. W. 670.

Scope and Effect of General Objection.—A general objection will not raise the point that a question is leading. *Waller v. Leonard*, 89 Tex. 507, 35 S. W. 1045.

Objections going to a question to and answer of a witness as a whole do not entitle appellant to complain of the admission of a part of the answer, only a part of it being objectionable. *Consumers, etc., Oil Co. v. Jonte*, 36 Tex. Civ. App. 18, 80 S. W. 847, affirmed in 101 Tex. 632, no op.

"The balance of the testimony was possibly not admissible, but a part of it being admissible and the objection being to the whole, the appellant is in no condition to complain. It should have urged its objections to the objectionable portion of the evidence, or should have requested an instruction to the effect that it be not considered." *Consumers, etc., Oil Co. v. Jonte*, 36 Tex. Civ. App. 18, 23, 80 S. W. 847, affirmed in 101 Tex. 632, no op.

Objection to Leading Question Not Waived by Witness' Reiteration of Matter Suggested.—Where a witness has been asked leading questions, which are objected to, her reiteration of the matter suggested, without objection, is not a waiver of the error. *Ft. Worth & R. G. Ry. Co. v. Jones*, 85 S. W. 37, 38 Tex. Civ. App. 129.

Objection Held Inapplicable and Properly Overruled.—In an action for injuries received in a collision between a street car and a railway train, a witness was asked to state whether or not, in his experience as a railroad man, when a railroad train is approaching a crossing, and a street car is approaching the same crossing, so that it would appear that one or the other must stop, he ever knew the train to stop to let the street car pass. The question was objected to on the

ground that the witness had shown that he did not see the car until it had passed, and therefore he could not answer the question. Held, that the objection was inapplicable and properly overruled. *Northern Texas Traction Co. v. Caldwell*, 44 Tex. Civ. App. 374, 99 S. W. 869.

b. Answers.

Necessity for Objection to Answer.

—An objection to the answer of a witness to an interrogatory, not made at the trial, will not be considered on appeal. *Houston, etc., R. Co. v. Bath*, 40 Tex. Civ. App. 270, 90 S. W. 55, affirmed in 101 Tex. 641, no op.

Objection to use of answers to interrogatories as not responsive must be taken when offered in evidence and can not be first raised on appeal. *Handley v. Leigh*, 8 Tex. 129, 130.

Generally, as to objections to questions asked in depositions, see the title DEPOSITIONS AND INTERROGATORIES, vol. 6, p. 326.

Operation of Objection to Question as Objection to Answer.—An objection to allowing a witness to answer a question asked on his examination is practically an objection to the answer, and sufficient for the purpose of review on appeal. *Judgment (Civ. App.)*, 101 S. W. 250, reversed. *Galveston, H. & S. A. Ry. Co. v. Powers*, 101 Tex. 161, 105 S. W. 491.

An objection to a question which is proper does not operate as an objection to incompetent evidence embraced in the answer to such question. *Galveston, H. & S. A. Ry. Co. v. Hertzog*, 3 Tex. Civ. App. 296, 22 S. W. 1013.

Objection to Introduction of Suppressed Answer in Deposition.—Where the court, on the motion of a party, suppressed an answer in a deposition, an objection to the admissibility of the answer on the ground that it is hearsay raises no question for review; it being the duty of the party to object to the introduction of the answer

on the ground that it has been suppressed. *Gulf, C. & S. F. Ry. Co. v. Luther*, 40 Tex. Civ. App. 517, 90 S. W. 44.

Practice in Case of Failure to Promptly Object to Reading of Answer.—Where counsel fails to promptly object to the reading by opposing counsel of an answer of a witness to a question asked in a deposition, he should, in order to raise the question of error in reading the same, move to exclude the answer and request that the jury be directed not to consider it. (Civ. App.), *Gulf, C. & S. F. Ry. Co. v. Matthews*, 89 S. W. 983, reversed 93 S. W. 1068, 100 Tex. 63.

Necessity for Motion to Strike Out Answer Not Responsive to Question.—Where the court rebuked a witness for making an answer which was not in response to the question asked, and the party complaining did not move to strike out the answer, the answer was not reversible error. *Western Union Telegraph Co. v. Johnsey*, 49 Tex. Civ. App. 487, 109 S. W. 251.

Necessity for Motion to Strike Out Answer to Question Objected to.—Where a defendant objected to a question propounded to a witness without moving the court to strike out the answer thereto, an assignment that the court erred in admitting the evidence was not well taken. *St. Louis S. W. Ry. Co. v. Stonecypher*, 63 S. W. 946, 25 Tex. Civ. App. 569.

Necessity for Exception to Designate Objectionable Part of Answer.—An interrogator's exception to an answer must designate with certainty the precise error or part relied on as defective. *Burleson v. Hancock*, 28 Tex. 81.

"The party to a suit to whom interrogatories may be propounded by the opposite party, under art. 447, O. & W. Dig., shall simply confess or deny the fact concerning which he has been interrogated, but has the right to state such other facts, tending to his defense, as are closely connected with the

fact on which he has been interrogated. But, 'if the answer contain other testimony than that permitted, the court, upon exception being made thereto in writing, will cause the same to be stricken out.' O. & W. Dig., art. 477; Pas. Dig., art. 3750, note 854. 'The rule in taking exceptions is, that it must be so specific as to point to the precise error intended to be relied upon; for the courts, in their decisions upon questions arising at the trial, are not bound to do more than respond to the motion in the terms in which it is made; they are not bound to modify the propositions of counsel, so as to make them fit the case.' *Houston v. Perry*, 5 Tex. 462; 8 Wend. 109; 6 Mo. 187. The written exception made to the answer of Hancock, to the second interrogatory propounded to him, does not designate with sufficient certainty the part objected to, and we are of opinion that the judge, under the rule above stated, did not correctly overrule the exception. It might be urged, with much plausibility, that the whole of the answer of Hancock to the second interrogatory propounded to him is responsive directly or closely connected with the fact on which he was interrogated, but we do not now decide the question. *Graham v. Stephen*, 15 Tex. 88; *Foster v. Spear*, 22 Tex. 226; *Herbert v. Butterworth*, 23 Tex. 250." *Burleson v. Hancock*, 28 Tex. 81.

Where answers to interrogatories are excepted to on the ground that they contain matters not responsive or pertinent under the statute, the objectionable parts of the answers should be designated by the exceptions. *Ford v. Clements*, 13 Tex. 592.

Effect of Exceptions Applicable to All Answers to Interrogatories.—Where exceptions to the answers to interrogatories propounded to a party apply to all the answers, and are not well founded as to some, it is not error to overrule them entirely. *Ford v. Clements*, 13 Tex. 592.

Objection to Answer to Be Determined without Reference to Other Answers.—An objection to certain answers of a witness must be determined without reference to other answers. *Kansas City Consol. Smelting & Refining Co. v. Taylor*, 48 Tex. Civ. App. 605, 107 S. W. 889.

Objection Properly Overruled Where Answer Confined to Relevant Matters.—Where a question was asked about an entire conversation, part of which was irrelevant, but the witness confined himself to the relevant portion, the overruling of an objection to the answer was not error. *Paul v. Chenault* (Civ. App.), 44 S. W. 682.

c. Objections on Ground of Surprise at Witness' Testimony.

Where a party has taken his chances for a verdict before the jury, it is too late on appeal to claim that he was surprised by the testimony introduced on the trial. *Texas, etc., R. Co. v. Porter* (Civ. App.), 41 S. W. 88.

Appellant can not complain of judgment on the ground of surprise at witness' testimony, when he did not request a continuance of the case on account of such surprise. *Gregory v. Southern Pac. R. Co.*, 2 Tex. Civ. App. 279, 280, 21 S. W. 417. See the title CONTINUANCES, vol. 4, p. 482.

4. Insufficiency of Evidence.

a. Necessity for Raising Question below by Motion for New Trial.

(1) General Rule.

See, generally, the titles APPEAL AND ERROR, vol. 1, p. 313; NEW TRIALS.

The sufficiency of the evidence to sustain the verdict or judgment will not be considered on appeal, where not properly presented to the court below in a motion for a new trial. *Daniels v. Creekmore*, 7 Tex. Civ. App. 573, 27 S. W. 148; *Valentine v. Sweatt*, 34 Tex. Civ. App. 135, 78 S. W. 385, affirmed in 98 Tex. 636, no op.; *Herring v. Herring* (Civ. App.), 51 S. W.

865, affirmed in 93 Tex. 663, no op.; *Western Union Tel. Co. v. Mitchell*, 89 Tex. 441, 35 S. W. 4, affirming 33 S. W. 1016, 12 Tex. Civ. App. 262; *McFadden v. Missouri, etc., R. Co.*, 41 Tex. Civ. App. 350, 92 S. W. 989.

Where an assignment as to the insufficiency of the evidence upon a special issue was not called to the attention of the trial court on motion for new trial, it will not be considered by the appellate court. *Clark v. Pearce*, 80 Tex. 146, 15 S. W. 787; *Gulf, etc., R. Co. v. Montier*, 61 Tex. 122; *White v. Wadlington*, 78 Tex. 159, 14 S. W. 296; *Degener v. O'Leary*, 85 Tex. 171, 19 S. W. 1004; *Ft. Worth, etc., R. Co. v. Osborne* (Civ. App.), 26 S. W. 274; *Suggs v. Terry* (Civ. App.), 34 S. W. 354; *San Antonio, etc., R. Co. v. Ilse* (Civ. App.), 59 S. W. 564.

Where the motion for a new trial did not raise the question of the sufficiency of the evidence to support the verdict on an issue, the assignment of error that the evidence was insufficient could not be considered by the supreme court. *Ellis v. Brooks*, 101 Tex. 591, 102 S. W. 94.

Question as to the sufficiency of evidence to show plaintiff's title to property for the injury to which he sues must be raised on motion for new trial, in order to make it cause for reversal. *San Antonio, etc., R. Co. v. Jones*, 30 Tex. Civ. App. 316, 70 S. W. 349.

Where an objection that the evidence of defendant's intention to dispose of his property with intent to defraud plaintiff and other creditors was insufficient to sustain an attachment on such ground was not presented to the trial court in defendant's motion for a new trial, its sufficiency will not be reviewed on appeal. *Dodd v. Presley* (Civ. App.), 86 S. W. 73.

Failure to prove the market value of a carriage injured by a collision with defendant's train is not ground for reversal where not called to the atten-

tion of the court in a motion for a new trial. *Missouri Pac. Ry. Co. v. Peay*, 7 Tex. Civ. App. 400, 26 S. W. 768.

An objection that the judgment is not supported by the evidence will not be considered on appeal unless made a ground for a new trial in the trial court. *Hausmann v. Trinity, etc., R. Co.* (Civ. App.), 82 S. W. 1052, affirmed in 98 Tex. 619, no op.

The question that the judgment sought to be vacated was not authorized by any evidence introduced at the trial can not be raised where no sufficient reason is shown why it was not urged upon the trial of the case. *Bankers Union v. Nabors*, 36 Tex. Civ. App. 38, 81 S. W. 91, affirmed in 98 Tex. 610, no op.

An assignment of error based on the insufficiency of the evidence to support a finding will not be reviewed unless made a ground for new trial. *Childress v. Smith* (Civ. App.), 37 S. W. 1076, reversed in 90 Tex. 610.

An assignment of error that the court, in an action against the initial and connecting carriers for delay in the shipment of perishable freight, erred in its conclusion of law holding the connecting carrier liable, because the undisputed evidence showed that the shipment was transported to the point of destination in less than the customary time, and that the shipper failed to give to the connecting carrier directions for icing, is a complaint based on the insufficiency of the evidence, and will not be considered where the only exception is a general one to the judgment. *St. Louis, I. M. & S. Ry. Co. v. White* (Civ. App.), 103 S. W. 673.

In order to challenge in the appellate court the sufficiency of the evidence to support the findings the party aggrieved should file his motion in the trial court to set such findings aside, and obtain a ruling thereon. *Armstrong v. Elliott*, 48 S. W. 605, 49 S. W. 635, 20 Tex. Civ. App. 41.

As to necessity for exceptions to findings of court in order to question on appeal the sufficiency of the evidence to sustain the findings, see post, "To Correctness or Sufficiency of Finding," II, O, 3.

On appeal in suit for specific performance of conditions of bond for title, sufficiency of proof of contents can not be attacked for the first time. *Vardeman v. Lawson*, 17 Tex. 10, 15.

Where plaintiffs claim land as heirs of intestate, and their evidence of intestate's identity was not rebutted, sufficiency of proof of identity can not be first raised on appeal. *Holstein v. Adams*, 72 Tex. 485, 487, 10 S. W. 560.

Sufficiency of evidence to sustain verdict in action of trespass to try title can not be raised for the first time on appeal. *Eastham v. Sims*, 11 Tex. Civ. App. 133, 137, 138, 32 S. W. 359.

(3) Exceptions to Rule.

Where No Evidence to Support Verdict and Judgment.—In the total absence of evidence to support the verdict and judgment, the rule requiring the question to be raised in the trial court can not be applied. *Parham v. Shockler* (Civ. App.), 73 S. W. 839.

The petition in an action for wrongful arrest by defendant P. alleged that he was marshaled and had executed bond, with defendants S. and T. as sureties. The answer admitted that P. was marshaled, pleaded the general issue, and did not mention the bond. Held, that judgment against S. and T. could not be sustained on appeal, there being no evidence that they were such sureties, though the question was not raised in the trial court. *Parham v. Shockler* (Civ. App.), 73 S. W. 839.

"The error in rendering judgment against the alleged sureties, without any proof whatever tending to establish liability is fundamental in its nature." *Parham v. Shockler* (Civ. App.), 73 S. W. 839.

Where Trial before Court and Judgment Is Excepted to.—See post,

"Where Judgment Excepted to," II, O, 3, b, (1).

b. Specification of Particulars Wherein Evidence Insufficient.

Error is not well assigned to a ruling on the sufficiency of the evidence to support the verdict unless the court's action thereon has been invoked by a motion for a new trial specifically stating the grounds for which the verdict is sought to be annulled. *Texas & P. Ry. Co. v. Norman* (Civ. App.), 91 S. W. 594.

A verdict will not be reviewed on appeal on the ground that it is not supported by the evidence, unless the question is presented in the trial court by motion for new trial, and the particulars wherein the evidence is insufficient are particularly pointed out, and hence a motion for new trial on the ground that the verdict is contrary to the law and the evidence, and is not supported by the evidence, is too general, and will not be considered on appeal. *Liljeblad v. Sasse & Powell*, 49 Tex. Civ. App. 512, 108 S. W. 787.

"In *Clark v. Pearce*, 80 Tex. 146, 15 S. W. 789, Justice Gaines says: 'That before it can be claimed that there is error in the ruling of the court upon the sufficiency of the evidence to support the finding of the jury, the action of the court upon the matter should be invoked by a motion for a new trial, which states specifically the grounds for which the verdict is sought to be annulled.' The grounds for new trial are too generally stated, and the assignments will not be considered. *Branch v. Simons* (Civ. App.), 48 S. W. 40 (see 93 Tex. 636, no op.); *Degener v. O'Leary*, 85 Tex. 171, 19 S. W. 1004." *Texas, etc., R. Co. v. Norman* (Civ. App.), 91 S. W. 594.

Error assigned to insufficiency of evidence, which was only urged on motion for new trial by a complaint that verdict was against the weight of evidence, which was too general to be

considered, can not be revised. *St. Louis, etc., R. Co. v. Bland* (Civ. App.), 34 S. W. 768, 769.

A complaint in a motion for new trial that the verdict is contrary to and against the law and the evidence, and is unsupported thereby, is too general to present any question for review by the trial court, or on appeal. *International & G. N. R. Co. v. Vandeventer*, 48 Tex. Civ. App. 366, 107 S. W. 560.

Where a motion for new trial is not on the ground that the evidence was insufficient to warrant the verdict but that it is insufficient in certain particulars which are not important and the assignment of error is simply that the court erred in overruling the motion for a new trial, the appellate court will not inquire whether the evidence is insufficient to sustain the verdict in particulars not stated in the motion for new trial. *King v. Gray*, 17 Tex. 62.

5. Variance.

See, generally, the title VARIANCE.

To be available, an objection because of a variance must be taken at the trial to the admission of evidence on that ground, where the variance is not such as to make a different cause of action. *Western Union Tel. Co. v. Trice* (Civ. App.), 48 S. W. 770.

The rule that an objection that the verdict is contrary to the evidence will be deemed as waived if not called to the attention of the court below in a motion for a new trial applies where the objection is that the proof offered by a party is variant from the allegation in his pleading. *Missouri, etc., R. Co. v. Ball*, 25 Tex. Civ. App. 500, 61 S. W. 327.

Where evidence is admitted without objection, the question of variance between the pleading and the proof can not be raised by instructions. *International Harvester Co. of America v. Campbell*, 96 S. W. 93, 43 Tex. Civ. App. 421.

Where the petition alleges title in

the plaintiff in general terms, and a deed to the plaintiff's wife is offered in evidence, the objection is at most a variance (the presumption being that the property is community) and can not be raised in the instructions to the jury. *Moffatt v. Sydnor*, 13 Tex. 628.

The admission of evidence of limitation without being pleaded is not an error which can be urged on appeal, in the absence of an exception below to the pleadings or any objection to the admission of the evidence. *Dunn v. Taylor* (Civ. App.), 107 S. W. 952.

Pleadings and evidence in a suit on a building contractor's bond held not to be construed as variant, when that question was first raised on appeal. *Brown Iron Co. v. Templeman*, 30 Tex. Civ. App. 50, 69 S. W. 249, affirmed in 97 Tex. 627, no op.

Objection that a judgment introduced in evidence was rendered in the county court, instead of the district court, as alleged in the pleading, first raised after verdict, is untenable. *Jones v. Meyer Bros. Drug Co.*, 25 Tex. Civ. App. 234, 61 S. W. 553, affirmed in 94 Tex. 710, no op.

Where plaintiff did not object to the introduction of evidence on the ground that it was not sustained by the pleadings he can not ask a new trial on the ground that its admission operated as a surprise. *Bailey v. Hicks*, 16 Tex. 222.

L. WITNESSES.

See, generally, the title WITNESSES.

1. Objection That Witness Was Not Sworn.

Permitting unsworn witness to testify without objection is waiver of objection to evidence based on failure to swear him. *Trammell v. Mount*, 68 Tex. 210, 215, 4 S. W. 377.

2. Objections as to Qualifications and Competency of Witness.

Necessity.—An objection to the competency of a witness to testify as an

expert can not be raised for the first time on appeal. *Texas, etc., R. Co. v. Warner*, 42 Tex. Civ. App. 280, 93 S. W. 849, affirmed in 101 Tex. 664, no op.

In suit for legal services, tried by court without jury, objection that trial judge was the only witness called as expert on value of the legal services, comes too late when made for first time in the appellate court. *Wright v. McCampbell*, 75 Tex. 644, 649, 13 S. W. 293.

A party to a suit and interested therein can not testify to sustain his interest, but if one joint defendant is called by the other and testifies and no objection is taken, on appeal such objection will be deemed waived. *Legg v. McNeil*, 2 Tex. 428, 430.

In a suit for damages to live stock for failure to furnish cars on time, an objection to testimony that such cattle sold for three dollars and sixty cents per hundred pounds at St. Louis, on the ground that the witness was in Texas at time of such sale, can not be first raised on motion for a new trial, since it goes to his competency. *Texas, etc., R. Co. v. Jones*, 23 Tex. Civ. App. 551, 553, 58 S. W. 174.

Time of Taking.—Objection to the competency of a witness ought generally to be taken before he is examined in chief. A party aware of the interest will not be permitted to examine the witness and then object to his competency, if he dislike his testimony. *Johnson v. Alexander*, 14 Tex. 382.

Form and Sufficiency.—An objection that certain testimony was "an opinion" did not raise a question as to the qualification and competency of a witness to testify as an expert. *Texas, etc., R. Co. v. Warner*, 42 Tex. Civ. App. 280, 93 S. W. 849, affirmed in 101 Tex. 664, no op.

The question whether a witness was qualified to testify as to the value of certain property could not be con-

sidered on appeal, where his testimony was objected to merely as irrelevant and immaterial. *Hammond v. Decker*, 46 Tex. Civ. App. 232, 102 S. W. 453.

M. INSTRUCTIONS.

See, generally, the title INSTRUCTIONS.

1. Erroneous Charge.

a. Necessity for Objections below to Appear of Record.

(1) In General.

Rule Stated.—A charge to the jury, in itself erroneous, will not, in a civil case, be sufficient ground for a reversal, when no exception is taken or countercharge asked, unless it clearly appear that the jury were misled by the charge given and complained of. *Davis v. Loftin*, 6 Tex. 489; *Thatcher v. Mills*, 14 Tex. 13; *Earle v. Thomas*, 14 Tex. 583; *Mills v. Ashe*, 16 Tex. 295; *Case v. Jennings*, 17 Tex. 661; *Farquhar v. Dallas*, 20 Tex. 200; *Thompson v. Payne*, 21 Tex. 621; *Hubby v. Stokes*, 22 Tex. 217, 220; *Vaughn v. State*, 21 Tex. 752; *Powell v. Haley*, 28 Tex. 52; *Cook v. Wootters*, 42 Tex. 294; *Beazley v. Denson*, 40 Tex. 416; *Peregoy v. Kottwitz*, 54 Tex. 497; *Texas, etc., R. Co. v. Casey*, 52 Tex. 112; *Atchison, etc., R. Co. v. Worley* (Civ. App.), 25 S. W. 478; *Atchison, etc., R. Co. v. Bryan* (Civ. App.), 28 S. W. 98; *Mexican Cent. R. Co. v. Lauricella* (Civ. App.), 26 S. W. 301, affirmed in 87 Tex. 277; *San Antonio v. Wildenstein*, 49 Tex. Civ. App. 514, 109 S. W. 231, affirmed, no op.; *Wisconsin v. Baird*, 1 App. Civ. Cases, § 709; *Cheveral v. Bowman*, 2 App. Civ. Cases, § 114. And see the title APPEAL AND ERROR, vol. 1, p. 313.

It seems that if a party is not satisfied with a charge asked by the adverse party and given by the court, he should state his objection at the time, and cause the record to show the objection taken. *Thatcher v. Mills*, 14 Tex. 13.

It is well settled by decisions prior to the Revised Statutes that an erroneous

charge would not, in a civil case, be sufficient ground for reversal, when no exception was taken to it nor additional nor counter charges asked, unless it clearly appeared that the jury were misled by the charge given and complained of. *Landes v. Eichelberger*, 2 App. Civ. Cases, § 133.

"Where the general charge fails to cover the whole law of the case, or is correct in its application to the particular case, or where the jury could not have been influenced or mistaken by the charge, objection must be made at the time it is given, otherwise this court will not revise the judgment." *Beazley v. Denson*, 40 Tex. 416.

The appellate court can consider instructions with reference only to the specific objections made thereto, not with reference to objections not urged. *Laughlin v. Schnitzer* (Civ. App.), 106 S. W. 908.

In passing on charges given, only objections made thereto, and not others which might have been made, will be considered on appeal. *Yoakum v. Mettash* (Civ. App.), 26 S. W. 129, affirmed in 93 Tex. 698, no op.

Objection to a charge, as being on the weight of the evidence, should be made in the lower court. *Atchison, etc., R. Co. v. Worley* (Civ. App.), 25 S. W. 478.

Objection that charge was too general can not be first raised on appeal. *Davis v. Roosevelt*, 53 Tex. 305, 317.

Omission of charge in a suit for damages, to confine estimate of compensation for mental and physical suffering to the case made by the evidence, can not be complained of on appeal where not excepted to at the time. *Missouri Pac. Ry. v. Jarrard*, 65 Tex. 560.

The fact that a charge embraced the subject of both actual and exemplary damages and purported to lay down some measure of damages is not ground for a reversal of the judgment, though it is objectionable for not de-

fining the difference between punitive and actual damages, etc., where the attention of the court was not called to the alleged error either by exception or by the asking of a proper charge. *Texas & P. R. Co. v. Casey*, 52 Tex. 112.

Where no complaint is made in the trial court of that part of a charge which allows plaintiff to recover an item of damage not proved, and the evidence justifies a verdict for an amount much larger than is awarded, plaintiff will be allowed, on appeal, to remit the amount of such erroneous item of damage. *Galveston, etc., R. Co. v. Neel* (Civ. App.), 26 S. W. 788. See the title REMITTITUR.

A carrier, not having objected to an instruction requiring it to exercise the highest degree of care to protect its passengers from insult from fellow passengers, held not entitled to object to a request which imposed only the exercise of ordinary care. *St. Louis, etc., R. Co. v. Duck* (Civ. App.), 69 S. W. 1027, affirmed in 97 Tex. 645, no op.

Rule Construed.—A party wishing to take advantage of any error in the charge of the court must except, but by this it is not intended that he shall take a bill of exceptions. He may attain the same purpose by asking such instruction as will place the law of the case in a proper light before the jury, which, if refused, will have the effect of a bill of exceptions. *Earle v. Thomas*, 14 Tex. 583.

(2) When Unnecessary.

Though an appellant who has failed to object to instructions on the trial can not generally avail himself of error in the charge on appeal, yet when the verdict of the jury has been made to turn upon an erroneous charge, and the judgment upon the merits is thus founded in error, it will be reversed, though the charge was not complained of at the time. *Beazley v. Denson*, 40 Tex. 416.

Though the defendant should have

asked proper instructions to correct the error in the charge, the vice in the charge being manifest, and tending to mislead the jury, may be urged on appeal. *Bergstroem v. State*, 58 Tex. 92. See, also, *Cook v. Wootters*, 42 Tex. 294.

Where the error is a positive one it is assignable without the request of a special charge. *San Antonio, etc., Co. v. White*, 94 Tex. 468, 61 S. W. 706.

Reversal will be had for erroneous charge, although no instructions were requested in relation thereto. *Chamblee v. Tarbox*, 27 Tex. 139, 146.

Where a charge contains positive error, it is not necessary to ask a special charge curing such error to entitle the party to complain of such charge on appeal. *International, etc., R. Co. v. Kuehn*, 11 Tex. Civ. App. 21, 23, 31 S. W. 322.

Where a charge excludes material conclusions to be deduced from the evidence, it is reversible error, though no exceptions are taken thereto. *Stude v. Saunders*, 2 Posey Unrep. Cas. 122.

A charge permitting a recovery for medical expenses and for loss of earning power in a greater sum than the respective sums alleged in the petition under those items of damage, and permitting recovery for all the injuries shown by the evidence, where the evidence showed more extensive injuries than those alleged in the petition, was reversible error, though defendant did not ask a charge correcting the defective charge, and no objection was made to the evidence, and the charge was not objected to in defendant's motion for a new trial. *Rapid Transit Ry. Co. v. Strong* (Civ. App.), 108 S. W. 394.

Where several issues were raised by the pleadings and the evidence, a charge directing the jury to consider only one of them was reversible error, though no charge was requested. *Eppstein & Co. v. Thomas*, 16 Tex. Civ. App. 619, 620, 44 S. W. 893, citing

Chamblee v. Tarbox, 27 Tex. 139, 147.

In a suit against the indorser of a note, not brought at either the first or second term after its maturity, the allegation that the maker was notoriously insolvent, relied on to prevent discharge of the indorser by such delay, presented a material issue which, where the evidence did not preclude a finding in defendant's favor, it was error to withdraw from the jury. A charge to the jury, in such case, to find for the plaintiff, unless they found for defendant under the second clause of the charge, which second clause did not submit the issue of the principal's insolvency, was ground for reversal. It was not necessary to request an instruction submitting the issue, since such charge, if asked, would have been in direct conflict with that given. *Smith v. Richardson Lumber Co.*, 92 Tex. 448, 49 S. W. 574, reversing 47 S. W. 386, 753.

Where the court has given an incorrect charge on the measure of damages as to the item submitted, this is error, and a special charge seeking to correct it is not essential in order to raise the objection to the charge. *Terry v. Gulf, etc., R. Co.*, 14 Tex. Civ. App. 451, 37 S. W. 234.

Where the charge complained of was misleading, and as matter of law erroneous when applied to the contract and facts on which plaintiff based his claim, it is not incumbent on defendants to ask a charge correcting it. That is necessary only when the charge is correct as far as it goes, but does not present the law fully on some phase of a case. *Alexander v. Robertson*, 86 Tex. 511, 26 S. W. 41, reversing 24 S. W. 680.

On issue of usury, though original contract was shown to be usurious, if valid agreement was pleaded and proved, which purged the original contract of its illegality, a charge that the contract was usurious was affirmative

error, and no request for special instruction was necessary in order to raise the question on appeal. *Cotton, etc., Building Co. v. Jones*, 94 Tex. 497, 501, 62 S. W. 741.

(3) Charge Considered as Excepted to under Present Statute and Reviewable without Bill of Exceptions.

Under the present Revised Statutes, charges given by the court are regarded as excepted to in all cases, and subject to revision for errors therein, without bill of exceptions thereto. Rev. Stat., Art. 1318 (*Sayles' Civ. Stat.*, Art. 1361). *International, etc., R. Co. v. Welch*, 86 Tex. 203, 24 S. W. 390; *Alexander v. Robertson*, 86 Tex. 511, 516, 26 S. W. 41; *Landes v. Eichelberger*, 2 App. Civ. Cases, § 133; *Missouri Pac. R. Co. v. Rabb*, 3 App. Civ. Cases, §§ 37, 39; *Missouri Pac. R. Co. v. Martin*, 2 App. Civ. Cases, §§ 655, 656.

Article 1318, Rev. Stat., does not require a bill of exception to be taken to the charge, but it is filed and constitutes a part of the record, and is regarded as excepted to and subject to revision for errors therein. *Atchison, etc., R. Co. v. Click*, 5 Tex. Civ. App. 224, 23 S. W. 833.

In an action by a passenger against a carrier for personal injuries, an instruction that the carrier must use "all possible care" for a safe conveyance is not merely a defective statement of the law, but is a positive error, and, as such, stands excepted to, under Rev. St. art. 1361, and no request for a special charge in respect to it is necessary. *International & G. N. R. Co. v. Welch*, 86 Tex. 203, 24 S. W. 390.

Under Rev. St. art. 1318, providing that the court's charge shall be filed, and shall constitute part of the record, and be deemed excepted to, and subject to revision, without a bill of exceptions, an instruction on a matter not in issue is ground for reversal, when it was assigned below on motion

for new trial, though it was not excepted to, nor a countercharge requested. *Atchison, T. & S. F. R. Co. v. Click*, 5 Tex. Civ. App. 224, 23 S. W. 833.

Under Rev. St. art. 1318, providing that the charges given by the court are to be regarded as excepted to without the necessity of taking a bill of exceptions, an erroneous charge which has no bearing on the issue of damages, and which may have influenced the verdict of the jury, is cause for reversal, though it was not specially excepted to. *Landes v. Eichelberger*, 2 Willson, Civ. Cas. Ct. App. § 133.

b. Time of Making.

In General.—An objection to instructions should be interposed at the time the instructions are given. *Hall v. Stancell*, 3 Tex. 400; *Beazley v. Denson*, 40 Tex. 416, 434; *Wright v. Donnell*, 34 Tex. 291, 305; *Owens v. Missouri Pac. R. Co.*, 67 Tex. 679, 4 S. W. 593; *Texas, etc., Co. v. Walters* (Civ. App.), 43 S. W. 548.

Where a jury could not have been misled by a charge, objection to it must be made at the time it is given to warrant reversal. *Beazley v. Denson*, 40 Tex. 416, 434.

Exceptions to a charge not taken when the charge is given can not be considered in the supreme court. *Hall v. Stancell*, 3 Tex. 400.

Objections to instructions, not made at the trial, will not be reviewed on appeal. *Converse & Co. v. McKee*, 14 Tex. 20, 30.

A charge on the weight of evidence must be excepted to at the trial. *Robinson v. State*, 24 Tex. 152, 154.

It will be in time to except to anything in the charge of the court as soon as the jury shall have retired. *Jones v. Thurmond's Heirs*, 5 Tex. 318.

The proper time to except to the charge of the court is at the trial, and before the jury retire, so that the court may have an opportunity of correcting

errors or supplying omissions in its charge. *Williams v. State*, 4 Tex. Cr. App. 5.

Too Late after Verdict or Trial.—Exceptions to the giving or refusal of instructions, first taken after verdict or trial, will not be considered. *Hall v. Stancell*, 3 Tex. 400.

Reduction to Writing and Signature at Any Time during Term.—Exceptions to the charge may be reduced to writing and signed by the judge at any time during the term. *Jones v. Thurmond*, 5 Tex. 318. See the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL.

c. Requisites and Sufficiency.

Error in a charge excepted to must be specifically pointed out. *Cook v. Hughes*, 37 Tex. 343, 345.

An exception generally to the charge of the court is insufficient. An exception to the charge, to be entitled to notice on appeal, must point out the objection. *Thompson v. State*, 32 Tex. Cr. App. 265, 22 S. W. 979.

Where an exception to a charge does not state the objection to the charge and no additional charge was asked, an assignment of error complaining of such charge will not be considered by the appellate court. *Garner v. Butcher*, 1 Posey 430.

"The sixth paragraph of the charge given by the court states properly a definition of a general agency. The exception to the charge does not state the point of objection to it, nor is a countercharge on that subject matter asked by the plaintiff; and we need not notice an assignment which complains simply that the giving it in charge was error, without indicating the ground of objection. It may be remarked, however, that the evidence does not appear to warrant a charge based on the hypothesis that Yantes was a general agent of the plaintiff. The charge was calculated to mislead

the jury." *Garner v. Butcher*, 1 Posey 430.

d. Attacking Charge on Certain Grounds as Waiver of Other Objections.

In General.—The fact that an instruction was not attacked in a motion for a new trial on a certain ground, though attacked on others, was no waiver of the objection not made. *Northern Texas Traction Co. v. Jamison*, 38 Tex. Civ. App. 55, 85 S. W. 305.

"It is next insisted by appellee that, inasmuch as the appellant in its motion for a new trial did not make this particular objection to the court's charge, but did attack it for other reasons, that it has waived the error and can not be heard to complain in this court. While a number of the authorities cited seem to support this contention nevertheless the rule, as thus contended for, if it ever existed under our supreme court decisions, has been abrogated by the decisions in *Clark v. Pearce*, 80 Tex. 146, 15 S. W. 787; *Western Union Tel. Co. v. Mitchell*, 89 Tex. 441, 35 S. W. 4, affirming 33 S. W. 1016, 12 Tex. Civ. App. 262, and *Greer v. Featherston*, 95 Tex. 654, 69 S. W. 69. In the case first cited, Justice Gaines says: 'In regard to the rulings of the court upon exceptions to the pleadings, the admission of evidence, and in the giving or refusal of instructions, a different rule prevails. Having once acted, it is not to be presumed that the judge will change his rulings; and, hence, in order to appeal from such action, it is not necessary that it be made ground for a new trial. But it is always optional and proper to do so.' This language is quoted with approval in the second case cited. We can conceive of no reason for holding that appellant is precluded from assigning error to a charge of the court which under the statute is regarded as excepted to, merely because he has seen fit to at-

tack other parts of the charge, or the same part for a different reason, in his motion for a new trial in the court below. In attacking the charge in the motion for a new trial, the appellant does nothing inconsistent with his right to assign errors upon the charge for each and every reason he may consider the same to be erroneous. While he may ask the trial court to review errors in the charge, he nevertheless is not compelled to do so." *Northern Texas Trac. Co. v. Jamison*, 38 Tex. Civ. App. 55, 85 S. W. 305.

Unnecessary to Direct Attention of Trial Court by Motion for New Trial.—See, generally, the title NEW TRIALS.

The refusal of instructions may be reviewed on appeal, notwithstanding the attention of the trial court was not directed thereto by motion for a new trial. *McFadden v. Missouri, K. & T. Ry. Co. of Texas*, 41 Tex. Civ. App. 350, 92 S. W. 989.

Where on appeal it appears that appellant, on his motion for a new trial, made no objection to the charge on the ground that it was verbal, it may be inferred that a written charge was waived. *Schwartzlose v. Mehlitz* (Civ. App.), 81 S. W. 68.

2. Omissions or Defects in Charge.

a. General Rule as to Duty of Parties to Request Additional Instructions.

Rule Stated.—Mere error of omission in a charge to a jury is not ground for reversal, where the complaining party made no effort to have it corrected below. *Barrett v. Featherstone*, 89 Tex. 567, 573, 35 S. W. 11, 36 S. W. 245, affirming 35 S. W. 11; *Western Union Tel. Co. v. Johnson*, 9 Tex. Civ. App. 48, 51, 28 S. W. 124, affirmed in 93 Tex. 743, no op.; *Van Zandt v. Brantley*, 16 Tex. Civ. App. 420, 427, 42 S. W. 617; *Witt v. Repey*, 2 Posey 654, 657, affirmed in 93 Tex. 742, no op.; *Templeton v. Green* (Civ. App.), 25 S. W. 1073, 1074; *Gulf*, etc.,

R. Co. v. Moody (Civ. App.), 30 S. W. 574, 575; Austin Rapid Trans. R. Co. v. Groethe (Civ. App.), 31 S. W. 197, 198; Shilling v. Shilling (Civ. App.), 35 S. W. 420; Burkitt v. Twyman (Civ. App.), 35 S. W. 421, 422, affirmed in 93 Tex. 656, no op.; Stephens v. Anderson (Civ. App.), 36 S. W. 1000, affirmed in 93 Tex. 739, no op.

It is the duty of parties to ask additional instructions to supply any deficiency in the instructions as given by the court, and where a party, at the trial in the court below, made no effort to cure defects in the charge by requesting appropriate instructions, he will not be heard to complain on appeal of any defects in the charge short of essential and positive error. Robinson v. Varnell, 16 Tex. 382, 387; Cole v. Cole, 17 Tex. 4; Bast v. Alford, 20 Tex. 226; Berry v. Donley, 26 Tex. 737, 748; Farris v. Bennett, 26 Tex. 568; Tynan v. Paschal, 27 Tex. 286, 296; Peeler v. Guilkey, 27 Tex. 355; Robinson v. Davenport, 40 Tex. 333; Hughes v. Roper, 42 Tex. 116, 127; Keys v. Mason, 44 Tex. 140; Houston, etc., R. Co. v. Harn, 44 Tex. 628, 630; Ford v. McBryde, 45 Tex. 498; Hall v. O'Malley, 49 Tex. 70; Hamilton v. Brooks, 51 Tex. 142, 146; Van Alstyne v. H. & T. C. R. Co., 56 Tex. 373; T. P. R. Co. v. O'Donnell, 58 Tex. 27; Endick v. Endick, 61 Tex. 559; Block, etc., Co. v. Sweeney, 63 Tex. 419, 427; Belo & Co. v. Wren, 63 Tex. 686, 727; I. G. N. R. Co. v. Leak, 64 Tex. 654; San Antonio St. R. Co. v. Helm, 64 Tex. 147; Queens Ins. Co. v. Jefferson Ice Co., 64 Tex. 578; Cockrill v. Cox, 65 Tex. 669; Edwards v. Dickson, 66 Tex. 613, 2 S. W. 718; Hays v. Hays, 66 Tex. 606, 1 S. W. 895; Gallagher v. Bowie, 66 Tex. 265, 17 S. W. 407; Walker v. Brown, 66 Tex. 556, 1 S. W. 797; Smyth v. Caswell, 67 Tex. 567, 4 S. W. 848; Half v. Curtis, 68 Tex. 640, 5 S. W. 451; Tucker v. Smith, 68 Tex. 473, 3 S. W. 671; Neyland v. Bendy, 69 Tex. 711, 7 S. W. 497;

7 Tex—5

French v. McGinnis, 69 Tex. 19, 9 S. W. 323; Beeks v. Adom, 70 Tex. 183, 187, 7 S. W. 702; Edwards v. Smith, 71 Tex. 156, 160, 9 S. W. 77; Weaver v. Nugent, 72 Tex. 272, 10 S. W. 458; Ramsay v. Hurley, 72 Tex. 194, 201, 12 S. W. 56; Trinity, etc., R. Co. v. Schofield, 72 Tex. 496, 10 S. W. 575; Odom v. Woodward, 74 Tex. 41, 11 S. W. 916; Currie v. Gunter, 77 Tex. 490, 14 S. W. 127; Lagow v. Glover, 77 Tex. 448, 14 S. W. 141; Hedrick v. Smith, 77 Tex. 608, 14 S. W. 197; Texas, etc., R. Co. v. Brown, 78 Tex. 397, 401, 14 S. W. 1034; Wichita Land, etc., Co. v. State, 80 Tex. 684, 16 S. W. 649; Mayer v. Walker, 82 Tex. 222, 17 S. W. 505; Stephens v. Motl, 82 Tex. 81, 18 S. W. 99; McKinney v. Nunn, 82 Tex. 44, 17 S. W. 516; McDonald v. International, etc., R. Co., 86 Tex. 1, 22 S. W. 939; Texas, etc., R. Co. v. Gay, 86 Tex. 571, 26 S. W. 599; Burnham, etc., Co. v. Logan, 88 Tex. 1, 29 S. W. 1067; Barrett v. Featherstone, 89 Tex. 567, 35 S. W. 11, 36 S. W. 245; Security Co. v. Panhandle Nat. Bank, 93 Tex. 575, 57 S. W. 22, reversing 54 S. W. 916; Harlan v. Baker, Dallam 578, 580; Dean v. Ingle, 1 Posey 186, 190; Chalk v. Foster, 2 Posey 701; Gulf, etc., R. Co. v. Shearer, 1 Tex. Civ. App. 343, 351, 21 S. W. 133, affirmed in 93 Tex. 662, no op.; Gulf, etc., R. Co. v. Jones, 1 Tex. Civ. App. 372, 21 S. W. 145; New York, etc., Co. v. Island City, etc., Ass'n, 2 Tex. Civ. App. 490, 21 S. W. 1007; Eddy v. Still, 3 Tex. Civ. App. 346, 22 S. W. 525; Gulf, etc., R. Co. v. Humphries, 4 Tex. Civ. App. 333, 23 S. W. 556; Gulf, etc., R. Co. v. Fink, 4 Tex. Civ. App. 269, 23 S. W. 330; Taylor v. Callaway, 7 Tex. Civ. App. 461, 27 S. W. 934 (see 93 Tex. 740, no op.); Missouri, etc., R. Co. v. Peay, 7 Tex. Civ. App. 400, 403, 26 S. W. 768; Missouri, etc., R. Co. v. Cook, 8 Tex. Civ. App. 382, 27 S. W. 769, affirmed in 93 Tex. 690, no op.; Galveston, etc., R. Co. v. Parr, 8 Tex. Civ. App. 280, 28 S. W. 264; International,

etc., *R. Co. v. Beasley*, 9 Tex. Civ. App. 569, 29 S. W. 1121; *Ft. Worth St. R. Co. v. Ferguson*, 9 Tex. Civ. App. 610, 29 S. W. 61, affirmed in 93 Tex. 660, no op.; *Chesher v. Clamp*, 10 Tex. Civ. App. 350, 30 S. W. 466; *Missouri, etc., R. Co. v. Thompson*, 11 Tex. Civ. App. 658, 33 S. W. 718; *St. Louis, etc., R. Co. v. Byas*, 12 Tex. Civ. App. 657, 35 S. W. 22; *Texas Land, etc., Co. v. Watkins*, 12 Tex. Civ. App. 603, 34 S. W. 996; *Terry v. Gulf, etc., R. Co.*, 14 Tex. Civ. App. 451, 37 S. W. 234; *Texas, etc., R. Co. v. Bingle*, 16 Tex. Civ. App. 653, 41 S. W. 90, affirmed in 91 Tex. 287; *O'Brien v. Seale*, 16 Tex. Civ. App. 260, 41 S. W. 150; *Peoples' Bldg. Ass'n v. Dailey*, 17 Tex. Civ. App. 38, 2 S. W. 364; *St. Louis, etc., R. Co. v. Freedman*, 18 Tex. Civ. App. 553, 46 S. W. 101, affirmed in 93 Tex. 738, no op.; *Missouri, etc., R. Co. v. Settle*, 19 Tex. Civ. App. 357, 47 S. W. 825, affirmed in 93 Tex. 647, no op.; *Texas, etc., R. Co. v. Morrison, etc., R. Co.*, 20 Tex. Civ. App. 144, 48 S. W. 1103, affirmed in 93 Tex. 722, no op.; *Arkansas, etc., Co. v. Eugene*, 20 Tex. Civ. App. 601, 50 S. W. 736; *Haverman v. Fort Worth, etc., R. Co.*, 20 Tex. Civ. App. 610, 50 S. W. 155, affirmed in 93 Tex. 663, no op.; *Harris v. Flowers*, 21 Tex. Civ. App. 669, 52 S. W. 1046; *Galveston, etc., R. Co. v. Ford*, 22 Tex. Civ. App. 131, 54 S. W. 37, affirmed in 93 Tex. 706, no op.; *Texas, etc., R. Co. v. Black*, 23 Tex. Civ. App. 119, 57 S. W. 330, affirmed in 93 Tex. 673, no op.; *Missouri, etc., R. Co. v. Ferris*, 23 Tex. Civ. App. 215, 55 S. W. 1119, affirmed in 93 Tex. 690, no op.; *Shelton v. Willis*, 23 Tex. Civ. App. 547, 58 S. W. 176; *Gulf, etc., R. Co. v. Gray*, 25 Tex. Civ. App. 99, 63 S. W. 927, affirmed in 95 Tex. 693, no op.; *Galveston, etc., R. Co. v. Buck*, 27 Tex. Civ. App. 283, 65 S. W. 681, affirmed in 93 Tex. 678, no op.; *Red River, etc., R. Co. v. Reynolds*, 38 Tex. Civ. App. 505, 85 S. W. 1169, affirmed in 101 Tex. 654, no op.; *Bourland v. Schulz*, 39 Tex. Civ. App. 572, 87 S. W. 1167; *Reed v. Hardeman* (Sup.), 5 S. W. 505; *Robinson v. McIver* (Civ. App.), 23 S. W. 915; *Gulf, etc., R. Co. v. Vinson* (Civ. App.), 24 S. W. 956; *Willis v. Lockett* (Civ. App.), 26 S. W. 419; *Hargadine v. Davis* (Civ. App.), 26 S. W. 424; *Mexican Cent. R. Co. v. Lauricella* (Civ. App.), 26 S. W. 301, affirmed in 87 Tex. 277; *Brentham v. Logan* (Civ. App.), 30 S. W. 97; *Producers Marble Co. v. Bergen* (Civ. App.), 31 S. W. 90, affirmed in 93 Tex. 737, no op.; *Reichstetter v. Bostwick* (Civ. App.), 33 S. W. 158; *Stephens v. Anderson* (Civ. App.), 36 S. W. 1000, affirmed in 93 Tex. 739, no op.; *Thompson v. Hawkins* (Civ. App.), 39 S. W. 187; *Comanche v. Zettlemeyer* (Civ. App.), 40 S. W. 641; *Sanger v. Warren* (Civ. App.), 40 S. W. 840; *Shetburn v. McCrocklin* (Civ. App.), 42 S. W. 329; *Bruner v. Bruner* (Civ. App.), 43 S. W. 796; *Ellis v. Hudson* (Civ. App.), 44 S. W. 550, affirmed in 93 Tex. 638, no op.; *Allgeyer v. Rutherford* (Civ. App.), 45 S. W. 628; *Stubblefield v. Stubblefield* (Civ. App.), 45 S. W. 965, affirmed in 93 Tex. 696, no op.; *Hurst v. McMullen* (Civ. App.), 47 S. W. 666, affirmed in 93 Tex. 687, no op.; *Schwartzman v. Cabell* (Civ. App.), 49 S. W. 113; *Oak Cliff College, etc. v. Armstrong* (Civ. App.), 50 S. W. 610; *Halff v. Wangemann* (Civ. App.), 54 S. W. 937, affirmed in 93 Tex. 640, no op.; *Missouri, etc., R. Co. v. Jordan* (Civ. App.), 56 S. W. 619; *Martin v. St. Louis, etc., R. Co.* (Civ. App.), 56 S. W. 1011; *Klatt v. Houston, etc., St. R. Co.* (Civ. App.), 57 S. W. 1112; *San Antonio, etc., R. Co. v. Ilse* (Civ. App.), 59 S. W. 564; *Paul v. Chevauit* (Civ. App.), 59 S. W. 579; *Hargrave v. Western Union Tel. Co.* (Civ. App.), 60 S. W. 687, affirmed in 94 Tex. 690, no op.; *Schneider v. Sanders*, 26 Tex. Civ. App. 169, 61 S. W. 727; *Lindsey v. White* (Civ. App.), 61 S. W. 438; *Trinity Val. R. Co. v. Stewart* (Civ. App.), 62 S. W. 1085; *Helsell v. McCutchen* (Civ. App.), 64 S. W. 72; *Moore v. Brown*, 27 Tex. Civ. App. 208, 64 S. W. 946;

Brin v. McGregor (Civ. App.), 64 S. W. 78; *International, etc., R. Co. v. Harris* (Civ. App.), 65 S. W. 885, affirmed in 95 Tex. 346; *Hillie v. Hetlech* (Civ. App.), 65 S. W. 491; *Missouri, etc., R. Co. v. Dilworth* (Civ. App.), 65 S. W. 502, affirmed in 95 Tex. 327; *Abilene Cotton Oil Co. v. Briscoe* (Civ. App.), 66 S. W. 315, affirmed in 95 Tex. 673, no op.; *Dunn v. Newberry* (Civ. App.), 86 S. W. 626; *Ramm v. Galveston, etc., R. Co.* (Civ. App.), 92 S. W. 426; affirmed in 101 Tex. 653, no op.; *Missouri, Pac. R. Co. v. Martin*, 2 App. Civ. Cases, § 655; *Robinson v. Bogarden*, 2 App. Civ. Cas., § 828; *Taul v. Shanklin*, 1 App. Civ. Cases, § 1135.

When an instruction is complained of as being too general, but is correct as far as it goes, the attention of the court below should be called to the point, so that the omission can be corrected, if proper. *Robinson v. Davenport*, 40 Tex. 334.

Where the defect complained of in an instruction is such that it should have been called to the attention of the court and an appropriate charge for curing the defect requested, the defect will not be considered on appeal if the error is not pointed out to the trial court and the appropriate charge requested. *Galveston, H. & S. A. Ry. Co. v. Parr*, 8 Tex. Civ. App. 280, 28 S. W. 264.

Where a party failed to present to the court the instructions he wished to be given to the jury, he can not complain of the court's refusal to give the same. *Farris v. Bennett's Executors*, 26 Tex. 568.

Rule Not Altered by Fact That Charges Given Are Regarded as Expected to.—The fact that charges given by the court are to be regarded as expected to, does not relieve a party from the duty of requesting additional instructions, if, in his opinion, those given are not full enough. *M., P. R. Co. v. Martin*, 2 App. Civ. Cases, §§ 655, 656.

When Request Unnecessary.—Where it is apparent that the court would refuse a charge, error is considered, though the charge was not asked. *I. & G. N. R. Co. v. Underwood*, 64 Tex. 463, 467. And see *St. Louis, etc., R. Co. v. McArthur*, 31 Tex. Civ. App. 205, 72 S. W. 76, affirmed in 97 Tex. 645, no op.

b. Applications of Rule.

When Charge Correct but Not Sufficiently Full.—Where charge is correct but not full enough, error can not be first raised on appeal. *San Antonio St. Co. v. Helm*, 64 Tex. 147, 148.

If the charge is correct, but does not fully present the case, error is raised by asking the proper charge and assigning its refusal as error. *I. & G. N. R. Co. v. Leak*, 64 Tex. 654, 659. See, also, *Weaver v. Nugent*, 72 Tex. 272, 278, 10 S. W. 458; *Wichita Land, etc., Co. v. State*, 80 Tex. 684, 688, 16 S. W. 649; *Lindsey v. White* (Civ. App.), 61 S. W. 438.

One who does not regard the charge of the court as sufficiently full should call attention to the fact by presenting and asking a charge supplying the supposed defect; failing to do this, he can not urge the defect for the first time on appeal. *Endick v. Endick*, 61 Tex. 559.

Failure to Instruct as to All Facts Which Should Have Been Considered.

—After general verdict on issue of *devisavit vel non*, party failing to ask for further instructions can not complain on appeal that charge failed to instruct as to all facts which should have been considered. *Tynan v. Paschal*, 27 Tex. 286, 296.

The omission of the court to charge on certain points can not be considered on appeal, unless the party complaining, by asking a special instruction, shows that he is not speculating on the chances of a favorable verdict. *Cockrill v. Cox*, 65 Tex. 669, 676.

Where defendant failed to request an instruction on a certain point, the

failure of the court to instruct on such point can not be assigned as error. *McKinney v. Nunn*, 82 Tex. 44, 17 S. W. 516.

In the absence of a requested instruction the failure of the court to instruct on a given point is not such error as entitles appellant to a reversal of the judgment. *Stephens v. Motl*, 82 Tex. 81, 18 S. W. 99.

Failure to Charge All Law Applicable to Case.—Judgment will not be reversed for failure to charge all the law applicable to the case, when the attention of the trial court was not called to the omission. *Edwards v. Smith*, 71 Tex. 156, 9 S. W. 77. See, also, *Chalk v. Foster*, 2 Posey 701, 707; *Robinson v. Varnell*, 16 Tex. 382, 387; *Texas, etc., R. Co. v. Black*, 23 Tex. Civ. App. 119, 57 S. W. 330, affirmed in 93 Tex. 673, no op.; *Stephens v. Anderson* (Civ. App.), 36 S. W. 1000, 1002, affirmed in 93 Tex. 739, no op.; *Missouri, Pac. R. Co. v. Martin*, 2 App. Civ. Cases, § 655.

A charge, correct so far as it applies to the facts but omitting to state the law, furnishes no ground for reversal, unless proper instructions relating to the matter omitted be asked and refused. *Texas & P. Ry. Co. v. Gay*, 86 Tex. 571, 26 S. W. 599.

When a charge, though correct, is, by reason of its general terms, defective in not embracing a full presentation of the law applicable to the case, it is too late to urge for the first time after appeal, objections to it. *Davis v. Roosevelt*, 53 Tex. 305.

Where the charge is defective merely in not more fully and definitely stating the law, the appellant should have sought to cure the defect by requesting a correct charge from the court, and having failed to do so, he will not be heard to complain of the charge in this respect upon appeal. *Texas, etc., R. Co. v. Bingle*, 16 Tex. Civ. App. 653, 41 S. W. 90, affirmed in 91 Tex. 287.

Insufficient Statement, by Court below, of Cause of Action, or Nature of Defense.—When the statement of the cause of action and of the nature of the defense, made by the court below, was not full, and appellant did not ask for a charge giving a fuller statement, he can not complain for the first time on appeal. *San Antonio St. Ry. Co. v. Helm*, 64 Tex. 147.

Where an appellant fails to request a special charge embodying all the facts essential to its case in the court below, it can not object on appeal that the court's general charge, in grouping the facts constituting its defense, omitted an essential one. *Galveston, etc., R. Co. v. Buch*, 27 Tex. Civ. App. 283, 65 S. W. 681.

A defendant who asks for no special charges can not object, on appeal, that the charge presents matters of defense in a negative instead of an affirmative manner. *Mexican Cent. R. Co. v. Lauricella* (Civ. App.), 26 S. W. 301, affirmed in 87 Tex. 277.

Failure to Charge on Any Particular Phase of Case.—It is well settled in Texas, in civil cases, that in order to take advantage of the failure of the court to charge on any particular phase of the case, the party desiring such a charge must ask it of the court below; otherwise an assignment complaining of the omission will not be noticed on appeal. *Peoples' Bldg., etc., Ass'n v. Dailey*, 17 Tex. Civ. App. 38, 42 S. W. 364. See, also, *Van Alstyne v. H. & T. C. R. Co.*, 56 Tex. 373; *Security Co. v. Panhandle Nat. Bank*, 93 Tex. 575, 57 S. W. 22, reversing 54 S. W. 916; *Berry v. Donley*, 26 Tex. 737.

Omission to present one of several phases of a case (a right to marshal securities) is not reversible error in the absence of a request for an instruction presenting such issue. *Security Co. v. Panhandle Nat. Bank*, 93 Tex. 575, 57 S. W. 22, reversing 54 S. W. 916.

Where the charge of the court states

one phase of the question upon which a verdict should have been found for defendant and there was another phase of the same question upon which the verdict should have been for defendant, failure to charge thereon is not reversible error where no charge was requested on that point. *Harris v. Flowers*, 21 Tex. Civ. App. 669, 672, 52 S. W. 1046.

Failure to Submit Defendants' Theory of the Case.—Failure to submit defendant's theory of the case is not ground for reversal, in the absence of his request for proper charges on the subject. *San Antonio, etc., R. Co. v. Jones*, 30 Tex. Civ. App. 316, 317, 70 S. W. 349.

Failure to Charge upon Hypothesis Supported by Evidence.—Where pleadings are sufficient to support judgment, failure to give a charge upon a hypothesis supported by evidence, where such charge was not requested, is not cause for reversal. *Block, etc., Co. v. Sweeney*, 63 Tex. 419, 427.

Omission to Give Definitions or Explain Phrases Used.—When appellant did not request a charge defining agency, he can not complain of the court's failure to do so. *Arkansas, etc., Co. v. Eugene*, 20 Tex. Civ. App. 601, 602, 50 S. W. 736.

In a suit involving a question of acquiescence in boundary line, while the charge failing to define acquiescence is defective, it is not ground for reversal where a definition was not requested. *Lagow v. Glover*, 77 Tex. 448, 451, 452, 14 S. W. 141.

Assignment of error to failure of the court to define the words of the statute "control, command, and direction" in the law of fellow servants, is not well taken where the appellant made no request for more explicit instructions. *Galveston, etc., R. Co. v. Ford*, 22 Tex. Civ. App. 131, 133, 54 S. W. 37, affirmed in 93 Tex. 706, no op.

Where an appellant does not request a definition, he can not complain of

the court's failure to explain the words "prima facie" in an instruction stating that certain facts constituted a prima facie case of negligence. *San Antonio, etc., R. Co. v. Ilse* (Civ. App.), 59 S. W. 564.

A mere defect in a charge, in failing to explain an expression used in it, can not avail an appellant who did not ask an appropriate instruction at the trial. *Texas & P. Ry. Co. v. O'Donnell*, 58 Tex. 27.

Duty to Request Needed Explanation or Qualification.—If a charge needs explanation or qualification, the party complaining should have requested a special charge and failing to do so can not complain on appeal. *Gallagher v. Bowie*, 66 Tex. 265, 17 S. W. 407.

A party dissatisfied with a charge, who fails to ask the necessary qualification by special instructions, can not avail himself of an omission in such charge by merely assigning same as error. *French v. McGinnis*, 69 Tex. 19, 22, 9 S. W. 323.

An appellant can not complain that certain instructions were not sufficiently explained, where he made no request for special instructions. *Bruner v. Bruner* (Civ. App.), 43 S. W. 796.

Limitation of Evidence to Particular Purpose.—Unless a special charge is asked, appellant can not complain that the court did not charge that testimony, admissible for one purpose, was inadmissible for another. *Walker v. Brown*, 66 Tex. 556, 558, 1 S. W. 797.

Where evidence is admissible on a certain issue, and will affect no other, and there is no request for an instruction limiting its operation, an assignment of error in its admission will be overruled. *Brin v. McGregor* (Civ. App.), 64 S. W. 78.

Where evidence is admissible against one party, another party, as to whom it is incompetent, can not complain, in the absence of a request to the court to limit the effect of the evidence.

Shelburn v. McCrocklin (Civ. App.), 42 S. W. 329.

Omission to Instruct as to Effect of Certain Evidence.—Mere omission from the charge to state what a grant is prima facie evidence of, can not be complained of on appeal, no special charge to that effect having been asked and refused. *Paul v. Chenault* (Civ. App.), 59 S. W. 579.

Failure to Give Rules for Determining What Constitute Fixtures.—The failure of the court to give rules to determine whether improvements were nonseverable fixtures is harmless error in the absence of a request for such instruction. *Shelton v. Willis*, 23 Tex. Civ. App. 547, 550, 58 S. W. 176.

Defective Instruction in Action for Wrongful Attachment.—Where a charge in an action for wrongful attachment did not restrict the jury, in finding the value of the goods, to the value at the place of seizure, defendants should have asked a special charge on such point, in order for it to be available error on appeal. *Ellis v. Hudson* (Civ. App.), 44 S. W. 550, affirmed in 93 Tex. 638, no op.

Failure to Charge upon Laws of Sister State.—Where an action against a railroad for injuries sustained by brakeman in Kansas is brought in Texas, defendant can not complain on appeal of failure of court to charge upon laws of Kansas unless he has requested a charge on the subject. *Missouri, etc., R. Co. v. Thompson*, 11 Tex. Civ. App. 658, 667, 33 S. W. 718.

Failure to Charge as to Assumption of Risk.—In an action for personal injury, the court's failure to charge that plaintiff assumed risk incident to his employment is not ground for reversal, where defendant asked no special charge thereon. *International, etc., R. Co. v. Beasley*, 9 Tex. Civ. App. 569, 571, 29 S. W. 1121.

Instruction as to Degree of Care.—If plaintiff considered an instruction relative to the degree of care required

of a telegraph company as not sufficiently full, he should have requested a fuller one, to entitle him to complain of the instruction on appeal. *Hargrave v. Western Union Tel. Co.* (Civ. App.), 60 S. W. 687, affirmed in 94 Tex. 690, no op.

Duty to Request Special Instructions as to Relation of Carrier and Passenger.—Where defendant did not request a special instruction limiting the rights of deceased because of the nature of the train on which he was riding when killed, it can not raise the objection on appeal that the deceased was not entitled to the rights of a passenger. *Trinity Val. R. Co. v. Stewart* (Civ. App.), 62 S. W. 1085.

Insufficient Charge as to Contributory Negligence.—An objection to charge on contributory negligence, that it is too general and does not particularize the acts and omissions complained of, can not be held ground for reversal in absence of special requested charges upon the point. *Missouri, etc., R. Co. v. Settle*, 19 Tex. Civ. App. 357, 362, 47 S. W. 825, affirmed in 93 Tex. 647, no op.

A charge in contributory negligence at railway crossing that if decedent failed "to look and listen," and under the circumstances a person of ordinary prudence would have done so, such failure "to look and listen" would constitute negligence, though incomplete, is not ground for reversal in the absence of a request supplying the omission. *Missouri, etc., R. Co. v. Ferris*, 23 Tex. Civ. App. 215, 218, 55 S. W. 1119, affirmed in 93 Tex. 690, no op.

Where, in an action for injuries, contributory negligence is urged as a defense, and plaintiff fails to request an instruction that the burden of proving that defense is on defendant, he can not complain on appeal of a failure to so instruct. *Martin v. St. Louis, etc., R. Co.* (Civ. App.), 56 S. W. 1011.

In suit by employee against a railway company for personal injuries,

where the court charged that the burden was on plaintiff to make out his case, he could not complain of failure to charge that burden was on defendant to make out its defense of contributory negligence, in absence of request for such charge. *Haverman v. Fort Worth, etc., R. Co.*, 20 Tex. Civ. App. 610, 612, 50 S. W. 155, affirmed in 93 Tex. 663, no op.

Failure to Charge as to Effect of Agreements.—Omission to charge a jury as to the effect of agreement of settlement as to boundaries, is not reversible error, where the complaining party did not request an additional charge. *Stephens v. Motl*, 82 Tex. 81, 18 S. W. 99.

Failure to Charge on Constructive Fraud in Absence of Request Therefor.—Charge allowing defense of fraud if statements were knowingly false, is not ground for reversal, where the issue was as to the making of representations, and there was no request for a charge on constructive fraud. *Barrett v. Featherstone*, 89 Tex. 567, 573, 35 S. W. 11, 36 S. W. 245.

Omissions in Instructions as to Damages—As to Measure and Elements.—Where no special charge was asked defining measure and elements of damage in action of tort, defendant can not complain of it on appeal. *Gulf, etc., R. Co. v. Vinson* (Civ. App.), 24 S. W. 956.

Where an instruction on damages was correct as far as it went, could not have been misleading, and defendant requested no further instruction in respect thereto, he was not entitled to complain that the court did not submit the proper measure of damages. *Missouri, etc., R. Co. v. Jordan* (Civ. App.), 56 S. W. 619.

Appellant can not complain that a charge on the measure of damages was not sufficiently specific where he did not request a fuller one. *Fort Worth St. R. Co. v. Ferguson*, 9 Tex. Civ. App. 610, 617, 29 S. W. 61, affirmed in 93 Tex. 660, no op.

In an action for personal injuries, where the court had charged correctly, in general terms, on the measure of damages, a failure to explain fully how the damages for permanent injuries were to be measured was not available error to a party who requested no further instruction on the subject. *Red River, etc., R. Co. v. Reynolds*, 38 Tex. Civ. App. 505, 85 S. W. 1169, affirmed in 101 Tex. 654, no op.

In a suit against a carrier for the killing of a horse while in transitu, where the court submits the value of the horse at the point of destination as the basis of damages, the omission to state that such value should be estimated at the time the horse was killed is harmless in absence of a request for such instruction. *Missouri, etc., R. Co. v. Cook*, 8 Tex. Civ. App. 376, 382, 27 S. W. 769, affirmed in 93 Tex. 690, no op.

In a suit against a city for damages resulting from a defective gutter, omission to charge that damage done more than two years before suit could not be considered was not reversible error, in the absence of a request for such a charge. *Comanche v. Zettlemoyer* (Civ. App.), 40 S. W. 641.

Failure to present elements of damages separately in a charge is not ground for reversal, in the absence of a request for a special charge. *Heiligmann v. Rose*, 81 Tex. 222, 224, 16 S. W. 931.

Failure to Charge Jury to Separate Exemplary and Actual Damages.—Where no objection was made in the lower court to neglect to charge the jury to separate exemplary and actual damages, it can not be made on appeal. *Belo & Co. v. Wren*, 63 Tex. 686, 727.

It is the proper practice in cases for recovery for actual and exemplary damages to instruct the jury to find separate verdicts, one as to the actual, and the other as to the exemplary damages, but a failure to do so, when not

excepted to, and when a proper instruction is not asked, will not of itself be sufficient to reverse the judgment. *Texas & P. R. Co. v. Casey*, 52 Tex. 112.

Submission of exemplary damages to a jury is not considered in the absence of objection below, where verdict is not excessive as actual damages. *Brooke v. Clark*, 57 Tex. 105, 113.

Failure to Include All Items Claimed.—Failure to include in the charge as to damages all the items claimed, the charge being correct as to those embraced in it, will not be ground for reversal unless instructions remedying omission are asked. *Terry v. Gulf, etc., R. Co.*, 14 Tex. Civ. App. 451, 37 S. W. 234.

Failure to Charge as to Means for Ascertaining Damages.—Where the court errs in failure to charge the means of assessing damages, after giving the correct measure of such damages, appellant should supply the omission by requesting a special instruction. *Gulf, etc., R. Co. v. Jones*, 1 Tex. Civ. App. 372, 375, 21 S. W. 145.

Where the court in a suit for destruction of pasture fences correctly charged the jury as to damages recoverable, but omitted to charge as to the means to ascertain it, appellant can not complain where he failed to request a special instruction covering the omission. *Gulf, etc., R. Co. v. Jones*, 1 Tex. Civ. App. 372, 375, 21 S. W. 145.

Failure to Instruct as to Right to Recover Interest on Damages Allowed.—In a suit for damages, failure of the court to instruct that plaintiff could recover interest on damages allowed, is not available to appellant when no request for such charge was made. *Gulf, etc., R. Co. v. Fink*, 4 Tex. Civ. App. 269, 271, 23 S. W. 330.

Failure to Require Itemized Verdict.—A failure of the charge to require the jury to itemize their verdict can not be complained of where such

a charge was not requested, and the record shows no objection to the verdict made below on that account. *Jones v. Roach*, 21 Tex. Civ. App. 301, 51 S. W. 549, affirmed in 93 Tex. 665, no op.

3. Objections Relating to Submission of Issues.

a. That Charge Was Erroneous in Submitting Issue.

If a party objects to the court's charge for submitting to the jury an issue which he deems to have been established as matter of law, he should prepare on request a special charge presenting his view. *Reichert v. International, etc., R. Co.* (Civ. App.), 72 S. W. 1031.

Where a party fails to request the withdrawal of an issue of fact from the jury on the ground that it has been established by the evidence beyond question, he can not complain on appeal of the court's failure to withdraw such issue. *International, etc., R. Co. v. Vanlandingham*, 38 Tex. Civ. App. 206, 85 S. W. 847, affirmed in 101 Tex. 644, no op.

"If appellant deemed that the evidence was such as warranted its withdrawal, as an issue of fact, from the jury, it should have by a special charge requested the court to do so. Having failed to do this, the main charge being a correct enunciation of the law, it is in no attitude to complain." Appellant asked no special charge giving its view of the testimony, and is therefore in no position to complain." *International, etc., R. Co. v. Vanlandingham*, 38 Tex. Civ. App. 206, 85 S. W. 847, affirmed in 101 Tex. 644, no op.

In the absence of a request to withdraw an issue of contributory negligence from the jury, defendant can not object on appeal that the charge of the court was erroneous in submitting such issue. *Galveston, H. & S. A. Ry. Co. v. Pendleton*, 70 S. W. 996, 30 Tex. Civ. App. 431.

Any error in submitting the case on special issues, and refusing a requested general charge covering all issues, is waived, exception not having been taken at the time. *Bourland v. Schulz*, 39 Tex. Civ. App. 572, 87 S. W. 1167.

b. To Form of Submission.

The form of submission of issues may not be complained of for the first time on appeal. *Stahl v. Askey* (Civ. App.), 81 S. W. 79.

Complaint of the general way in which the court submitted the issues to the jury is not available on appeal where the complaining party failed to request appropriate instructions. *Bowden v. Crow*, 2 Tex. Civ. App. 591, 21 S. W. 612.

c. For Failure to Properly State or Submit Issues Involved.

(1) General Rule as to Necessity for Request for Special Charge.

Rule Stated.—Where a party desires a fuller and more complete statement of the issues evolved from the pleading and evidence than is given in the general charge, he should request special charges covering the desired matter, or else the omission will not constitute reversible error. *Johnson v. International, etc.*, R. Co., 24 Tex. Civ. App. 148, 57 S. W. 869, affirmed in 94 Tex. 706, no op.

A failure to enumerate all the issues in the statement of the case made by the judge in his charge, or a like omission in the body of the charge, must be noted in the trial court by request that the omission be supplied. Such defect can not be the subject of complaint for the first time in the appellate court. *Missouri, etc., R. Co. v. Peay*, 7 Tex. Civ. App. 400, 26 S. W. 768.

Failure of court in preliminary part of the charge to state fully the issues is not reversible error where no special charge correcting the omission is asked and the charge given covers every material issue. *Missouri, etc.,*

R. Co. v. Kirkland, 11 Tex. Civ. App. 528, 530, 32 S. W. 588, affirmed in 93 Tex. 691, no op.

Where a charge undertaking to state the issues made by the pleadings is erroneous in omitting a part of them, the error is not generally reversible unless a proper charge was requested. *Galveston, etc., R. Co. v. Lynch*, 22 Tex. Civ. App. 336, 338, 55 S. W. 389.

Where appellant has not asked the trial court for a more specific presentation of the issues to the jury than is made in the general charge, he can not complain, on appeal, that the charge was not prefaced by a special enumeration of the issues. *Galveston, etc., R. Co. v. Buch*, 27 Tex. Civ. App. 283, 65 S. W. 681, affirmed in 95 Tex. 678, no op.

An omission by the court below to charge fully upon issues made in the pleadings and evidence will not be grounds of reversal unless the omission was called to the attention of the trial judge by asking additional instructions. *Currie v. Gunter*, 77 Tex. 490, 14 S. W. 127. See, also, *Galveston, etc., R. Co. v. Daniels*, 1 Tex. Civ. App. 695, 20 S. W. 955; *Shumard v. Johnson*, 66 Tex. 70, 17 S. W. 398; *Texas, etc., R. Co. v. Gay*, 86 Tex. 571, 609, 26 S. W. 599; *Johnson v. Granger*, 51 Tex. 42; *Milmo v. Adams*, 79 Tex. 526, 530, 15 S. W. 690; *Harrell v. Houston*, 66 Tex. 278, 280, 17 S. W. 731.

If a charge given by the court to the jury be thought by the plaintiff or defendant to be not sufficiently full, or as not covering all the issues in the case, it is their duty to ask such additional instructions as they believe are necessary for its proper determination, and having failed to do this they can not complain on appeal. *Berry v. Donley*, 26 Tex. 737.

Mere failure to submit an issue made by pleadings and evidence can not be urged as ground for reversal by party not requesting submission. *Wilkinson v. Johnson*, 83 Tex. 392, 395,

18 S. W. 746; *Lindsley v. Sparks*, 20 Tex. Civ. App. 56, 48 S. W. 204, affirmed in 93 Tex. 666, no op.

Where a charge is correct as far as it goes, judgment will not be reversed because issue properly raised was not submitted, in absence of a request for a further charge. *Pace v. American, etc., Mortg. Co.*, 17 Tex. Civ. App. 506, 510, 43 S. W. 36.

Where the court's charge is correct as far as it goes, the judgment will not be reversed because of a failure to charge on an issue made by the pleadings and evidence, unless special instructions were asked to supply the deficiency. *Myer v. Fruin* (Sup.), 16 S. W. 868.

It is not reversible error to fail to charge, on an issue tendered by the answer, where no special charge is requested by defendant. *Rees v. Clark* (Civ. App.), 39 S. W. 160.

Where an action is submitted by the court on one issue only, though two are involved, and defendant asks no charge on the issue not submitted, but takes his chances on the case as submitted, held, a verdict against him will not be reversed. *Behrends v. Crenshaw* (Civ. App.), 53 S. W. 586.

Applications of Rule.—Assignment of error that the court failed to submit issue of limitations can not be considered on appeal where appellant did not request the submission of such issue. *Armstrong v. Elliott*, 20 Tex. Civ. App. 41, 46, 48 S. W. 605, 49 S. W. 635, affirmed in 93 Tex. 654, no op.

Error assigned of court's failure to submit a special defense to the jury will not avail when appellant asked for no such charge. *Missouri, etc., R. Co. v. Witherspoon*, 18 Tex. Civ. App. 615, 617, 45 S. W. 424.

Jury's omission to allow interest can not be complained of on appeal, where no request was made to submit that issue. *Smith v. Smith*, 10 Tex. Civ. App. 485, 486, 32 S. W. 28, affirmed in 93 Tex. 671, no op.

Where defendant in an action on a note did not request a charge on the question of the vendor's fraud in inducing a sale of land for which it was executed, he can not on appeal complain that the court erred in not submitting that issue. *Hurst v. McMullen* (Civ. App.), 47 S. W. 666, affirmed in 93 Tex. 687, no op.

Where, in action on insurance policy, the court did not submit the question of total destruction, but rendered judgment for the full amount, and no request was made to submit such issue, which the evidence sustained, the judgment will not be disturbed, under Laws of 1897, page 15. *Phoenix Ins. Co. v. Moore* (Civ. App.), 46 S. W. 1131, affirmed in 93 Tex. 717, no op.

Where plaintiff, in an action for the death of a servant, failed to request the submission of a certain issue of negligence, and acquiesced in its being withheld from the jury, he could not complain on appeal of the failure to submit it. *Ramm v. Galveston, etc., R. Co.* (Civ. App.), 92 S. W. 426, affirmed in 101 Tex. 653, no op.

(2) Necessity for Request Though Case Submitted on Special Issues.

Under art. 1331, Rev. Stat., the omission to submit an issue is not ground for reversal unless it has been requested, notwithstanding fact that the case is submitted on special issues. *Galveston, etc., R. Co. v. Botts*, 22 Tex. Civ. App. 609, 611, 55 S. W. 514. See, also, as to necessity for request where case submitted on special issues, the following cases: *Galveston, etc., R. Co. v. Cody*, 92 Tex. 632, 51 S. W. 329, affirming 50 S. W. 135; *Texas Loan Agency v. Fleming*, 18 Tex. Civ. App. 668, 672, 46 S. W. 63; *Armstrong v. Elliott*, 20 Tex. Civ. App. 41, 46, 48 S. W. 605, 49 S. W. 635, affirmed (see 93 Tex. 654, no op.).

Under amended art. 1331, Rev. Stat., failure to submit an issue is not

ground for reversal upon appeal or writ of error, unless a written request therefor is made by the party complaining. *Armstrong v. Elliott*, 20 Tex. Civ. App. 41, 46, 48 S. W. 605, 49 S. W. 635 (see 93 Tex. 654, no op.).

Under Sayles' Civ. St. 1888-89, art. 1331, providing that the failure to submit an issue is not ground for reversal of the judgment on appeal unless its submission was requested by the party complaining of the judgment, where an immaterial issue is submitted but not answered by the jury, and is in effect withdrawn, and the answers to the material issues are received by the court, the refusal of a new trial, for failure of the jury to find on such issue, on application of a party who did not request the submission of the issue nor except to the action of the court in regard to it, is not ground for reversal of the judgment. *Mabry v. Citizens' Lumber Co.*, 47 Tex. Civ. App. 443, 105 S. W. 1156.

"Prior to 1897 it was the rule that when a case was submitted on special issues all the issues of fact made by the pleading must be submitted and determined by the jury before a valid judgment could be rendered, but art. 1331, Rev. Stat., was passed to remove the rigor of the rule, and it was provided that the omission to submit an issue should not be ground for reversal unless it had been requested by a party to the cause." *Galveston, etc., R. Co. v. Botts*, 22 Tex. Civ. App. 609, 610, 55 S. W. 514.

Where special issues are submitted to a jury, a party can not complain for the first time in the supreme court that an issue raised by him in the pleadings was omitted. *De Caussey v. Baily*, 57 Tex. 665.

Where party fails to ask special charge or fails to intimate necessity for giving charge on certain issues, the cause will not be reversed for lack of such charge. *State v. Bender*, 68 Tex. 676, 5 S. W. 674.

(3) When Request Unnecessary.

It is not necessary, after the court has charged, withholding issue from the jury, that the aggrieved party should ask for an instruction submitting such issue, in order to retain the right of appeal. *Smith v. Richardson Lumber Co.*, 92 Tex. 448, 451, 49 S. W. 574, affirming 47 S. W. 386, 753.

Where bill of exceptions taken to rejection of testimony on certain issue shows that the court ruled that there was no such issue in the case, the defendant was excused from the necessity of asking submission of issue as a prerequisite to assign its non-submission as error. *Myar v. El Paso Grocery Co.* (Civ. App.), 63 S. W. 337.

(4) Necessity for Written Request.

Failure to submit any issue to jury shall not be deemed ground for reversal of judgment upon appeal or writ of error, unless its submission has been requested in writing by the party complaining of judgment. *Breneman v. Mayer*, 24 Tex. Civ. App. 164, 178, 179, 58 S. W. 725, affirmed in 94 Tex. 703, no op.; *Armstrong v. Elliott*, 20 Tex. Civ. App. 41, 48 S. W. 605, 49 S. W. 635, affirmed (see 93 Tex. 654, no op.).

(5) Time for Request for Submission upon Special Issues.

Request for submission upon special issues should, in order to enable review of refusal, appear to have been made before the main charge. *Galveston, etc., R. Co. v. Cody*, 92 Tex. 632, 633, 51 S. W. 329, affirming 50 S. W. 135.

N. VERDICT.

See, generally, the title VERDICT.

1. Necessity for Objections below.

a. Defects or Omissions.

(1) Formal Defects or Irregularities.

In General.—The judgment of an inferior court, based on a verdict defective in form only, will not be reversed for that cause when no objection was urged in the court below. *De Montel v. Speed*, 53 Tex. 339.

Objection to an irregularity affecting the validity of a verdict can not be first raised on appeal. *Burton v. Bondies*, 2 Tex. 203, 204.

Verdict by Less than Twelve Jurors.—The objection that a verdict was made by only eleven jurors can not be first raised on appeal. *Flanagan v. Pearson*, 61 Tex. 302, 308.

Signature by Foreman Only.—The objection that a verdict was signed only by a foreman can not be first raised on appeal. *Flanagan v. Pearson*, 61 Tex. 302, 308.

"It is assigned as error that 'the judgment recites that only eleven jurors made the verdict, and the verdict was only signed by its foreman, and not by the eleven, which verdict will not support the judgment.' It does not appear that any objection was made to the form of the verdict or to the manner of signing it in the court below, and, failing to do so, it will not be heard. *Williams v. Mudgett*, 2 Tex. Law Review 339 (consent case, decided by commissioners of appeals, Tyler term, 1883). See *Hansborough v. Towns*, 1 Tex. 58; *Farley v. Deslonde*, 58 Tex. 588." *Flanagan v. Pearson*, 61 Tex. 302.

Failure of Jury to Apportion Damages among Several Plaintiffs.—That the jury in a verdict for damages failed to apportion the amount found among the several plaintiffs as allowed by Paschal's Dig., 16, is no ground for reversal of a judgment rendered upon it in the absence of objection to such omission. *March v. Walker*, 48 Tex. 372.

Failure of Jury to Discriminate as to Character of Damages.—Though the proper practice, when actual and exemplary damages are claimed, is to

require the jury to discriminate as to the character of damages found in their verdict, a failure to do this will not, of itself, authorize the reversal of the judgment when the point is for the first time raised in the supreme court. *Texas, etc., R. Co. v. Casey*, 52 Tex. 112.

Notwithstanding the better practice is to separate the actual from the vindictive damages in the petition as well as in the verdict, if this be not done, the informality of the verdict in this respect can not be taken advantage of for the first time on appeal. *Moehring v. Hall*, 66 Tex. 240, 1 S. W. 258.

Failure of Jury to Estimate Value of Confederate Money at Time Note Executed.—In an action on a note where the defense is that it was the intention of the parties that it should be paid in confederate currency, the objection that the jury did not estimate the value of confederate money at the date of the execution of the note can not be heard when raised for the first time in the case in the supreme court, since it does not go to the foundation of the action. *Johnson v. Blount*, 48 Tex. 38.

Where Case Submitted on Special Issues.—Where a case is submitted to the jury on special issues, and no complaint is made in motion for new trial or otherwise in the court below of the verdict, it becomes, under the statute, conclusive as to the facts found. Rev. Stat., art. 1332. *Robertson v. Kirby*, 25 Tex. Civ. App. 472, 61 S. W. 967, affirmed in 94 Tex. 696, no op.

(2) Defects of Substance.

Failure of Jury to Find the Issue.—Where the jury did not find the issue, but only an agreement of the parties, not in issue, from which it appeared that the matters in controversy were not to be determined in the district court until after the appellate court should have decided the question of title in favor of the plaintiff,

held, that this was not a legal verdict, upon which the district court could give final judgment. Although the parties acquiesce in such verdict, both in the district and appellate court, this does not cure the objection, or authorize the latter to proceed to the adjudication and disposition of the case, as contemplated by the agreement. *Phillips v. Hill*, 3 Tex. 397.

Special Verdict Defective for Failure to Find Every Fact Essential to Support Judgment.—Defect in special verdict in failing to find every fact necessary to support the judgment, may be raised for first time on appeal, except where every fact essential to support the judgment is in the record—though not in special verdict. *Armstrong v. Elliott*, 20 Tex. Civ. App. 41, 48 S. W. 605, 49 S. W. 635, affirmed (see 93 Tex. 654, no op.).

Verdict Founded upon Answer Presenting No Defense Sustained by Evidence.—"It has often been held that a verdict can not be sustained, when founded upon an answer that presents no defense to the action which has been sustained by the evidence. (*Borden et al. v. Houston*, 2 Tex. 594, 615; *Locketts v. Townsend*, 3 Tex. 119, 133; *Patterson v. Goodrich*, 3 Tex. 331; *Ford v. Taggart*, 4 Tex. 492.)" *Johnson v. Blount*, 48 Tex. 38.

b. Excessiveness or Inadequacy.

See, generally, the title NEW TRIALS.

Excessive Verdict.—Where no complaint is made, by motion for a new trial, that the damages are excessive, the question can not be raised on appeal. (Civ. App.), *Galveston, H. & S. A. Ry. Co. v. Zantzinger*, 49 S. W. 677, affirmed 53 S. W. 379, 93 Tex. 64.

A judgment will not be reversed for error in overruling objections to leading questions which only tended to show the duration of plaintiff's injuries, when no objection was made

that the verdict was excessive. *International, etc., R. Co. v. Bibolet*, 24 Tex. Civ. App. 4, 57 S. W. 974, affirmed in 94 Tex. 691, no op.

An excess in a verdict of one-fourth of one per cent of the recovery, and not brought to the attention of the court below, on appeal will be considered immaterial and is no ground for reversal. *Schuster v. Frendenthal & Co.*, 74 Tex. 53, 11 S. W. 1051.

c. Failure to Direct Verdict.

Defendant can not complain of failure to instruct the jury to return a verdict for it where no such instruction was requested. *Cook Bros. Carriage Co. v. National Bank*, 38 Tex. Civ. App. 441, 85 S. W. 1169.

A party who does not move for the direction of a verdict is thereby precluded from contending on appeal that there is no evidence to support the verdict. *People's Building, Loan & Saving Ass'n v. Dailey*, 42 S. W. 364, 17 Tex. Civ. App. 38.

2. Time of Taking.

In the absence of exceptions taken on the trial, the right to object to the verdict must be considered as waived. *Mann v. Thruston*, Dall. Dig. 370.

"The record in this case shows no intimation that the appellant was dissatisfied with the judgment, save the simple act of appealing, which was granted as a privilege of right. No objection was made to the evidence, if any was introduced, and if the judgment was permitted to go by default, or upon the statement of the appellee's counsel, the appellant must suffer by her supineness. The defendant in the court below can not come up here to show wrong in the plaintiff, when she was more in error herself. The right to attain the verdict must be considered as waived by the omission of the plaintiff in error to file her exceptions in the court below at the time of the rendition of the judgment." *Mann v. Thruston*, Dallam 370.

3. Manner, Form and Sufficiency.

Necessity for Urging Objections in Motion for New Trial.—See, generally, the title NEW TRIALS.

In order to raise an objection to the verdict and judgment where the case is tried before a jury, on the ground that it is not supported by the evidence, or is against the evidence, there must be a motion for a new trial made in the court below, raising that particular question. *Texas, etc., R. Co. v. Story* (Civ. App.), 43 S. W. 933.

An objection that the verdict was against the weight of the evidence, and that it disclosed that the jury was actuated by prejudice against appellant because of the fact that he was a negro, could not be considered on appeal where not urged in a motion for a new trial. *Friar v. Orange & N. W. Ry. Co.*, 45 Tex. Civ. App. 564, 101 S. W. 274.

Specification of Defects.—It is the rule that obtains in Texas that an objection to the verdict and the judgment, urged in the motion for a new trial only upon the ground that it is contrary to the evidence, without stating the particulars wherein it is against the evidence, is not sufficient upon which to base assignments of error. *Texas, etc., R. Co. v. Story* (Civ. App.), 43 S. W. 933; *Clark v. Pearce*, 80 Tex. 146, 15 S. W. 787; *Texas, etc., R. Co. v. Commander* (Civ. App.), 29 S. W. 263; *Texas & P. R. Co. v. Lancaster* (Civ. App.), 30 S. W. 490, affirmed in 93 Tex. 574, no op.

If a party desires to have a verdict set aside he must in his motion for a new trial specifically point out wherein the verdict is not supported by testimony, and on appeal he is limited to the particular objection thus made, and will not be heard to complain that the verdict is unsupported in other respects. *San Antonio v. Thigpen* (Civ. App.), 75 S. W. 836, affirmed in 97 Tex. 646, no op., citing *Clark v. Pearce*, 80 Tex. 146, 15 S. W. 787.

Where a motion for a new trial stated that the verdict was contrary to the law and evidence, without specifying the particular defects, such statement was too general to call the attention of the court to the question raised, and hence the court of civil appeals will not review the question on appeal. *Judgment, Voelcker v. McKey* (Civ. App.), 60 S. W. 798, reversed on rehearing. *Voelcker v. McKey* (Civ. App.), 61 S. W. 424.

Simply stating that the verdict is not supported by evidence or is contrary to the evidence, is too general, and is not sufficient as basis on appeal for objection to verdict on the ground that it is against evidence. *St. Louis, etc., R. Co. v. Smith*, 11 Tex. Civ. App. 550, 551, 32 S. W. 828. See the title NEW TRIALS.

Same Objections Must Have Been Presented below as Urged in Appellate Court.—The appellate court will not reverse a judgment because of an erroneous verdict, unless in the motion for a new trial the same objection was presented as is urged in the appellate court. *Payton v. Love*, 49 S. W. 1109, 20 Tex. Civ. App. 613.

"It is now the established appellate practice not to reverse a judgment on account of an erroneous verdict unless in the motion for new trial the same objection to the verdict was distinctly made and thus brought to the attention of the trial court that is urged in the appellate court. *Suggs v. Terry* (Civ. App.), 34 S. W. 354; *First Nat. Bank v. Houts*, 85 Tex. 69, 19 S. W. 1080; *Sanborn v. Murphy*, 5 Tex. Civ. App. 509, 25 S. W. 459, affirmed in 86 Tex. 437; *Branch v. Simons* (Civ. App.), 48 S. W. 40 (see 93 Tex. 636, no op.)." *Payton v. Love*, 20 Tex. Civ. App. 613, 614, 49 S. W. 1109, affirmed in 93 Tex. 669, no op.

An assignment complaining of the verdict on a ground not called to the attention of the trial court in the motion for new trial will not be enter-

tained. *Carlowitz v. Bernstein*, 28 Tex. Civ. App. 8, 66 S. W. 464.

The findings of the jury can not be attacked as contrary to the preponderance of the evidence, where appellant did not attack them on that ground in the motion for a new trial. *Moore v. Pierson* (Civ. App.), 93 S. W. 1007, affirmed in 100 Tex. 113.

"In the eleventh and last assignment of error, appellant insists that 'the court erred in refusing to set aside the special finding of the jury on special issue No. 1, because it was contrary to the preponderance of the evidence.' In addition to what we have before said as to the state of the evidence, we note that in appellant's motion for a new trial he did not attack the finding of the jury here complained of on such ground, which effectually disposes of the assignment. See *Scott v. Farmers, etc., Nat. Bank* (Civ. App.), 66 S. W. 485; *Armstrong v. Elliott*, 20 Tex. Civ. App. 41, 48 S. W. 605, 49 S. W. 635, affirmed (see 93 Tex. 654, no op.)." *Moore v. Pierson* (Civ. App.), 93 S. W. 1007, affirmed in 100 Tex. 113.

Defendant in an action for overflows of land can not complain, on appeal, that the evidence showed the overflows were so extraordinary and unprecedented that it was not required to guard against them, where its motion for new trial alleged merely that the verdict was contrary to the law and the evidence, in that there was no evidence of the damage to the land, and, if there was, the verdict was excessive. *San Antonio & A. P. Ry. Co. v. Thigpen* (Civ. App.), 75 S. W. 836.

An assignment of error, attacking the verdict on the ground of plaintiff's failure to prove a certain matter, will not be considered; such question not having been raised in the motions for new trial. *Riske v. Rotan Grocery Co.* (Civ. App.), 93 S. W. 708.

Where defendant objected to any testimony bearing on the intent of the grantor in executing a deed, and by

special charges sought to present his phase of the case to the jury, and insisted that the deed conveyed only the grantor's individual interest in the land, and in his motion for a new trial renewed all the objections and contended that the finding of the jury to the effect that the grantor intended to convey not only his interest in the land, but the entire community interest, was against the evidence, and by a further motion urged that even under the jury's finding he was entitled to one-half of the land, it could not be contended that defendant did not attack in the lower court the special findings of the jury as to what the grantor intended to convey. *White v. Simonton*, 79 S. W. 621, 34 Tex. Civ. App. 464.

4. Admission of Liability as Waiving Objections, Save as to Amount of Verdict.

Where defendant, a telegraph company, in its motion for a new trial admitted its error and mistake in sending a message, and admitted its liability for a small amount of damages, it can not on appeal urge any objection, except as to the amount of the verdict. *Western Union Tel. Co. v. Patton* (Civ. App.), 55 S. W. 973, affirmed in 93 Tex. 723, no op.

O. FINDINGS OF COURT.

See, generally, the title FINDINGS OF COURT.

1. To Failure to File.

In General.—No exception having been taken in the trial court to its failure to file conclusions of law or fact, no complaint on that ground can be heard on appeal. *Haywood v. Scarborough* (Civ. App.), 102 S. W. 469.

In order to enable a party to assail a judgment on the ground of the failure of the trial court to find a fact, he should demand the filing of conclusions of fact. *Reed v. Brewer*, 90 Tex.

144, 148, 37 S. W. 418, affirming 36 S. W. 99.

Failure to make findings, not requested, can not be urged as error on appeal. *Thomas v. Quarles*, 64 Tex. 491, 493; *Lainer v. Foust*, 81 Tex. 186, 189, 16 S. W. 994; *Hensley v. Lewis*, 82 Tex. 595, 597, 17 S. W. 913; *Reed v. Brewer*, 90 Tex. 144, 37 S. W. 418, affirming 36 S. W. 99; *Scurry v. Fromer* (Civ. App.), 26 S. W. 461. See, also, *Caplen v. Cox*, 42 Tex. Civ. App. 297, 92 S. W. 1048, affirmed in 101 Tex. 630, no op.; *Caldwell v. Dutton*, 20 Tex. Civ. App. 369, 49 S. W. 723; *Arnold v. Hodge*, 20 Tex. Civ. App. 211, 49 S. W. 714, affirmed in 93 Tex. 635, no op.

Failure of the court to file conclusions of fact and law is not ground for reversal, where it is not shown by bill of exceptions that it was requested, and refused, to do so. *Scurry v. Fromer* (Civ. App.), 26 S. W. 461. See the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL.

Necessity for Request for Additional or More Specific Findings.—It is a well-established general rule that defects in findings of fact and law will not be revised on appeal unless they were called to the attention of the court below. *Fitzhugh v. Franco-Texas Land Co.*, 81 Tex. 306, 313, 16 S. W. 1078.

If the findings are defective on account of omissions, a request for fuller and more specific conclusions should be presented to the court, and an exception reserved to its refusal to grant the request. *Gulf, etc., R. Co. v. Fossett*, 66 Tex. 338, 1 S. W. 259; *Andrews v. Key*, 77 Tex. 35, 39, 13 S. W. 640; *Fitzhugh v. Franco-Texas Land Co.*, 81 Tex. 306, 313, 16 S. W. 1078; *Rio Grande Cattle Co. v. Burns*, 82 Tex. 50, 17 S. W. 1043; *Cassin v. La Salle County*, 1 Tex. Civ. App. 127, 21 S. W. 122; *Spencer v. James*, 10 Tex. Civ. App. 327, 31 S. W. 540, 43 S. W. 556; *Wetz v. Wetz*, 27 Tex. Civ. App.

597, 66 S. W. 869; *Alcott v. Spencer, etc., Mfg. Co.* (Civ. App.), 31 S. W. 833, affirmed in 93 Tex. 724, no op.; *Connor v. Blaisdell* (Civ. App.), 60 S. W. 890.

In absence of a request for specific finding the supreme court will not consider it error to fail to give it. *Tackaberry v. City Nat. Bank*, 85 Tex. 488, 496, 22 S. W. 151, 299, affirming 22 S. W. 121.

If a party objects to the conclusions filed by the court in response to his motion for conclusions of law and fact, he must point out in a motion for additional conclusions the facts on which he desires a finding. *Wetz v. Wetz*, 27 Tex. Civ. App. 597, 66 S. W. 869.

Where findings are not sufficiently specific to form the basis of an assignment of errors, and no more specific findings were requested, error assigned thereto will be disregarded. *Alcott v. Spencer, etc., Mfg. Co.* (Civ. App.), 31 S. W. 833, affirmed in 93 Tex. 724, no op.

Failure of Trial Judge in His Conclusions to Pass on All Issues.—Where the trial judge fails in his conclusions to pass on a certain issue, it is matter of omission, to which his attention should have been called, if the issue is intended to be relied on in the appellate court. *Chicago, etc., R. Co. v. Mitchell* (Civ. App.), 85 S. W. 286, affirmed in 101 Tex. 631, no op.

The failure of the court to make a finding, when the case is tried without a jury, upon an issue fairly involved in the pleadings and evidence, where the complaining party has not requested a finding upon it, can not be made a ground of error when urged for the first time in the supreme court. *Thomas v. Quarles*, 64 Tex. 491.

Omission of a trial judge to find as to value of rents for land recovered is not ground for reversal, where no objection was made below. *Henry v. Whitaker*, 82 Tex. 9, 10, 17 S. W. 509.

Necessity for Calling Court's Attention to Request.—Where a written request to the judge to file conclusions of law and of fact is filed sixteen days after the trial, and there is nothing to show that the judge's attention was ever called to the request, the failure to comply with it can not be assigned as error. *Glass v. Wiles* (Sup.), 14 S. W. 225.

Effect of Failure Where Demand Therefor Duly Made.—When a judge fails to state his conclusions of fact and law upon proper and timely demand therefor, and such failure is presented by proper bill of exception, and there is not a full statement of facts in the record, and it is not apparent that such failure was without injury to the complaining party, the judgment will be reversed and the cause remanded for another trial. (*Callaghan v. Grant*, 66 Tex. 236, 18 S. W. 507.) Application for such statement should be made promptly, and the attention of the court duly called thereto. *Dunlap v. Brooks*, 3 App. Civ. Cases, § 357.

When, on a trial by the court, it is pointed out that there is no finding of facts, or that the conclusions of law and fact are not separately stated, and the defect is not remedied, a statutory right is denied the party objecting. *Seymour Opera House Co. v. Woolbridge* (Civ. App.), 31 S. W. 234.

"It appears from the bill of exceptions that the court overruled the objection urged to this conclusion, not only on the ground that it failed to find the facts showing a compliance with the statute so as to fix a lien, but also on the further ground, urged alike to the entire conclusions, that there was a failure to state separately the conclusions of law and fact, and refused to file any additional conclusions. A statutory right was thus denied appellants. Not having waived it by failure to except, they may, in the absence of a statement of facts, here insist that the judgment declaring a

lien not shown to exist by the findings of fact is not supported thereby." *Seymour Opera House Co. v. Woolbridge* (Civ. App.), 31 S. W. 234, 235.

For a full treatment of the time, manner and sufficiency of requests for findings, see the title FINDINGS OF COURT.

2. To Time of Filing.

Where counsel for appellant knew that the judge would not file conclusions of fact until after the adjournment of court and failed to except to such failure, he can not complain on appeal of such failure. *Bradford v. Knowles*, 11 Tex. Civ. App. 572, 33 S. W. 149, affirmed in 93 Tex. 700, no op.

3. To Correctness or Sufficiency of Finding.

a. General Rule.

Rule Stated.—The findings of the trial court where not excepted to are conclusive, and their correctness can not be attacked on appeal, unless the failure to except has been waived. *Continental Ins. Co. v. Milliken*, 64 Tex. 46, 48; *Galveston, etc., R. Co. v. Reitz*, 27 Tex. Civ. App. 411, 65 S. W. 1088; *Drake v. Davidson*, 28 Tex. Civ. App. 184, 66 S. W. 889, affirmed in 95 Tex. 677, no op.; *Pullman, etc., Co. v. Arents*, 28 Tex. Civ. App. 71, 66 S. W. 329; *Smith v. Abadie*, 29 Tex. Civ. App. 60, 67 S. W. 925, affirmed in 95 Tex. 686, no op.; *Hughey v. Mosby*, 31 Tex. Civ. App. 76, 71 S. W. 395; *Colley v. Wood*, 32 Tex. Civ. App. 306, 74 S. W. 602, affirmed in 97 Tex. 629, no op.; *Buster v. Warren*, 35 Tex. Civ. App. 644, 80 S. W. 1063, affirmed in 98 Tex. 611, no op.; *Logan v. Lennix*, 40 Tex. Civ. App. 62, 88 S. W. 364 (see 101 Tex. 646, no op.); *Houston v. Kapner*, 43 Tex. Civ. App. 507, 95 S. W. 1103; *Jamison v. Alvarado Comp, etc., Co.*, 45 Tex. Civ. App. 263, 99 S. W. 1053; *Smith v. Ernest*, 46 Tex. Civ. App. 247, 102 S. W. 129; *Biggerstaff v. Murphy* (Civ. App.), 21 S. W. 773; *Hawkins v. Omahundro* (Civ. App.), 28 S. W. 1011;

Moore v. Blagge (Civ. App.), 34 S. W. 311; *St. Louis, etc., R. Co. v. White* (Civ. App.), 103 S. W. 673, affirmed in 102 Tex. 591, no op.; *McKee v. Price*, 3 App. Civ. Cases, § 335.

Findings of fact covering every issue material to the judgment will not be inquired into for their correctness on appeal, unless assailed by proper exceptions. *Drake v. Davidson*, 28 Tex. Civ. App. 184, 66 S. W. 889, affirmed in 95 Tex. 677, no op.

Where neither the conclusions of law nor the judgment is excepted to in the court below, and the failure to except is not waived, the only inquiry on appeal will be whether the pleadings justify the judgment, and no other assignments of error will be considered. *Continental Ins. Co. v. Milliken*, 64 Tex. 46; *McKee v. Price*, 3 Willson, Civ. Cas. Ct. App. § 336; *Biggerstaff v. Murphy* (Civ. App.), 21 S. W. 773.

Where the trial judge sets out his conclusions of law and of fact at the instance of the attorney, and neither the conclusions of law nor the sufficiency of evidence to sustain the judgment rendered are excepted to, the sufficiency of the findings of fact to sustain the conclusions of law will not be considered on appeal. *Continental Ins. Co. v. Milliken*, 64 Tex. 46.

Appellee, not having excepted to findings of fact of the trial court or the judgment, can not, on appeal, by cross assignment question the correctness of the same. *Jamison v. Alvarado Compress & Warehouse Co.*, 45 Tex. Civ. App. 263, 99 S. W. 1053.

Appellees, not having excepted to findings of fact of the trial court, may, not, on appeal, by cross assignment question the sufficiency of the evidence to sustain the findings. *Buster v. Warren*, 80 S. W. 1063, 35 Tex. Civ. App. 644.

Applications of Rule.—An objection to conclusions of fact by the court below, such as that the allegata and probata do not correspond on a minor

point, if made for the first time in the appellate court, in a case where such conclusions are fully supported by the evidence upon the main issue, can not be sustained. *Burgher v. Henderson*, 9 Tex. Civ. App. 521, 29 S. W. 522.

Where exceptions are not taken to findings of fact by the trial court, an assignment that the judgment is not supported by the facts will not be considered on appeal. *Smith v. Abadie*, 67 S. W. 925, 29 Tex. Civ. App. 60, rehearing denied (Civ. App.), 67 S. W. 1077.

Where a trial court erred, in an action against a railroad company for killing stock, in refusing to admit evidence of diligence on defendant's part in maintaining fences, and found as a fact that there was no negligence in the operation of defendant's train, which finding was not excepted to by plaintiff, and there was no cross assignment of error attacking such finding as unsupported by the evidence, on appeal plaintiff was not entitled to contend that such ruling was harmless on the ground that the uncontradicted evidence in the case showed that defendant was negligent in operating such train. *Galveston, H. & S. A. Ry. Co. v. Reitz*, 65 S. W. 1088, 27 Tex. Civ. App. 411.

Where facts found did not show adverse possession and were not attacked, defendant can not urge error in rulings of law thereon. *Hanrick v. Gurley*, 93 Tex. 458, 467, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330, affirming in part and reversing in part 48 S. W. 994.

Where, in an action against a sleeping car company for lost baggage, there is no testimony as to value, other than that of plaintiff, and the court finds about one-third of his estimate, the finding should not be set aside on objection, first taken on appeal, that part of plaintiff's testimony was inadmissible. *Pullman, etc., Co. v. Arents*, 28 Tex. Civ. App. 71, 6^a S. W. 329.

b. Exceptions to Rule.**(1) Where Judgment Excepted to.**

Where exceptions were taken to the judgment of the court below, the findings of the trial court may be attacked on appeal, even though exceptions were not taken to the findings. *Voight v. Mackle*, 71 Tex. 78, 8 S. W. 623; *Thompson v. State*, 23 Tex. Civ. App. 370, 56 S. W. 603; *Connellee v. Roberts*, 1 Tex. Civ. App. 363, 23 S. W. 187; *Smith v. Abadie*, 29 Tex. Civ. App. 60, 67 S. W. 925, affirmed in 95 Tex. 686, no op.; *Brenton v. Peck*, 39 Tex. Civ. App. 224, 87 S. W. 898; *Wilkins v. Burns* (Civ. App.), 25 S. W. 431, affirmed in 93 Tex. 723, no op.; *Gillespie v. Crawford* (Civ. App.), 42 S. W. 621, affirmed in 93 Tex. 729, no op.; *Temple v. Watkins Land Co.* (Civ. App.), 81 S. W. 1188; *Mutual, etc., Life Ass'n v. Green* (Civ. App.), 109 S. W. 1131. See, also, *Biggerstaff v. Murphy* (Civ. App.), 21 S. W. 773; *McKee v. Price*, 3 App. Civ. Cases, §§ 335, 336.

Where appellant excepts to the judgment of the trial court and there is a statement of facts, it is not necessary to the appeal that he should except also to the conclusions of fact and law. *Patten v. Herring & Kelley*, 9 Tex. Civ. App. 640, 29 S. W. 388.

Though there were no exceptions filed by appellant to conclusions of fact by the trial court, the findings may be revised on appeal, if exceptions were filed to the judgment, and if the question of the correctness of the findings is fairly raised in the assignments of error. *Mutual, etc., Life Ass'n v. Green* (Civ. App.), 109 S. W. 1131.

A party excepting to the judgment rendered preserves his right to assail the findings of fact as unsupported by the evidence. *Smith v. Abadie* (Civ. App.), 67 S. W. 1077, affirmed in 95 Tex. 686, no op.; *Brenton v. Peck*, 39 Tex. Civ. App. 224, 87 S. W. 898.

A motion for a new trial is not necessary to an assault on the suffi-

ciency of the evidence on appeal, the trial having been before the court without a jury, and the judgment being excepted to. *D. E. Foote & Co. v. Heisig & Norvell* (Civ. App.), 94 S. W. 362.

No motion for a new trial for the insufficiency of evidence to sustain a judgment is necessary to enable the court on appeal from a judgment in a case tried without a jury to review the case upon the facts. *West Bros. v. Thompson & Greer*, 48 Tex. Civ. App. 362, 106 S. W. 1134.

"Appellees make the point that the sufficiency of the facts to support the finding of the trial court and the judgment which followed can not be assailed for the first time here because there was no motion for new trial. They cite *Wetz v. Wetz*, 27 Tex. Civ. App. 597, 66 S. W. 869, and *Black v. Black* (Civ. App.), 67 S. W. 928, which are squarely in point. *Gillett v. Missouri, etc., R. Co.* (Civ. App.), 68 S. W. 61 (see 95 Tex. 681, no op.), is to the same effect. Subsequent to the date of these decisions, and with the first two, cited for consideration, the supreme court, in *Greer v. Featherston*, 95 Tex. 654, 69 S. W. 69, held that a motion for new trial was not necessary to an assault upon the sufficiency of the evidence upon appeal, the trial having been before the court without a jury and the judgment being excepted to. The question is no longer an open one. We must therefore proceed to a consideration of the assignments." *Foote v. Heisig* (Civ. App.), 94 S. W. 362.

A general exception to the judgment of the court trying a case without a jury does not raise the question of the insufficiency of the evidence to support the findings of fact. *St. Louis, I. M. & S. Ry. Co. v. White* (Civ. App.), 103 S. W. 673.

An exception to an order overruling a motion for new trial authorizes attack on the findings of the court,

though no exceptions were taken specially to them. *Thompson v. State*, 56 S. W. 603, 23 Tex. Civ. App. 370; *Temple v. Watkins Land Co.* (Civ. App.), 81 S. W. 1188.

"It is insisted in appellee's briefs that because the findings of the court were not excepted to, the appellants can not take advantage of the errors of the trial judge in this court, and in support of the proposition we are referred to the case of *Continental Ins. Co. v. Milliken*, 64 Tex. 46. In that case neither the findings nor the judgment were excepted to. Here, there is an exception to the judgment, and the record discloses that the facts found by the court do not support it. We think therefore that the exception to the judgment of the court is sufficient, and are of opinion that the exception and assignment of error upon it are well taken." *Voight v. Mackle*, 71 Tex. 78, 8 S. W. 623.

(2) Where Record Contains All the Facts.

Where the record on appeal contains all the facts, the court may review the sufficiency of the evidence to support a finding of fact, though such finding was not excepted to. *Tillman v. Peoples*, 67 S. W. 201, 28 Tex. Civ. App. 233; *Id.*, 67 S. W. 920.

Where there is a statement of facts in the record, it is not necessary to take exceptions to the findings of law and facts in order to review them on appeal. *Tudor v. Hodges*, 71 Tex. 392, 9 S. W. 443; *Connellee v. Roberts*, 1 Tex. Civ. App. 363, 23 S. W. 187; *Byrd v. Perry*, 7 Tex. Civ. App. 378, 26 S. W. 749, 753; *Tillman v. Peoples*, 28 Tex. Civ. App. 233, 67 S. W. 201; *Hahl v. Kellogg*, 42 Tex. Civ. App. 636, 94 S. W. 389, affirmed in 101 Tex. 640, no op.; *Wilkins v. Burns* (Civ. App.), 25 S. W. 431, affirmed in 93 Tex. 723, no op.; *Moore v. Blagge* (Civ. App.), 34 S. W. 311; *Gillespie v. Crawford* (Civ. App.), 42 S. W. 621, affirmed in 93 Tex. 729, no op.

An exception in the court below to the conclusions of fact and law is not necessary to a review of them, where they are contained in the record, together with bills of exception and a statement of facts. *Tudor v. Hodges*, 71 Tex. 392, 9 S. W. 443.

"It is settled by an unbroken line of authorities that it is not necessary to take exceptions to findings of law and facts, when there is a statement of facts in the record, in order to review them on appeal. *Voight v. Mackle*, 71 Tex. 78, 8 S. W. 623; *Smith v. Abadie*, 29 Tex. Civ. App. 60, 67 S. W. 925, affirmed in 95 Tex. 686, no op.; *Brenton v. Peck*, 39 Tex. Civ. App. 224, 87 S. W. 898." *Hahl v. Kellogg*, 42 Tex. Civ. App. 636, 94 S. W. 389, affirmed in 101 Tex. 640, no op.

Rev. St. 1895, art. 1333, which allows a judgment to be reviewed without any statement of facts, if the appellant has excepted to the judgment, does not require such exception where a statement of facts is made part of the record on appeal. *Gillespie v. Crawford* (Civ. App.), 42 S. W. 621.

"Under art. 1333, Rev. Stat. 1895, a party may have the judgment of the court below reviewed upon appeal or writ of error, upon conclusions of fact and law, without a statement of facts being contained in the record, when he excepts to such conclusions of law or judgment of the court, and causes his exception to be noted on the record in the judgment entry. If the case is brought up on conclusions of fact and law, without a statement of facts, the record must show that the appealing party excepted, to the conclusions of law or judgment of the court. There is no such requirement where a statement of facts is made part of the record on appeal. In support of counsel's contention, we are cited to the case of *Continental Ins. Co. v. Milliken*, 64 Tex. 46. In that case it is manifest that there was no statement of facts in the record, and

the court correctly held that an exception to the conclusion of law or judgment of the court was necessary to the consideration of the assignment of error. In the later case of *Tudor v. Hodges*, 71 Tex. 392, 9 S. W. 443, the court says: "It is contended by appellee that, appellant having failed to except in the court below to the conclusions of law and fact, he can not here question the correctness of these conclusions; and the case of *Continental Ins. Co. v. Milliken*, 64 Tex. 46, 48, is cited in support of the position assumed by appellee." *Gillespie v. Crawford* (Civ. App.), 42 S. W. 621, affirmed in 93 Tex. 729, no op.

(3) Where Conclusions Filed by Judge Voluntarily and without Request.

Rev. St. 1895, art. 1333, providing that upon a trial by the court the judge shall, at the request of either party, state in writing the conclusions of facts found by him separately from the conclusions of law, which conclusions of fact and law shall be filed with the clerk and constitute a part of the record, does not require a trial judge to file such conclusions of law and fact unless so requested by one of the parties, and when such conclusions are voluntarily filed by the judge, neither party need notice them, and no exception to the conclusion is necessary to entitle the party against whom the finding is made to attack the judgment, on the ground that it is unsupported by the evidence. *City of Houston v. Kapner*, 43 Tex. Civ. App. 507, 95 S. W. 1103.

(4) In Absence of Objection by Appellee.

In the absence of objection by appellee, an assignment challenging sufficiency of facts to support the trial court's conclusions of law, will be considered, though no exception was taken below and the record contains no statement of facts. *Hawkins v.*

Omahundro (Civ. App.), 28 S. W. 1011, 1012.

c. Necessity, Manner and Sufficiency of Noting on Record Exceptions under Rev. Stat., Art. 1333.

"If a party intends to have a case revised on the conclusions of fact and law found by the judge who tried the case, he should except to the conclusions and have his exceptions noted in the judgment entry. General Laws, 1879, p. 119. When such exception is made and noted, the adverse party must take notice of it, and if in his opinion the conclusions of fact or law are not so full or accurate as they should be, for his own protection, it will be his right to have a statement of facts from which the judgment may be sustained; or in any other respect to have a complete presentation of the case. If no exception to the conclusions of law or judgment of the court is noted, unless the failure to except be waived or not insisted on, the only inquiry will be, whether the pleadings justify the judgment; any other rule would often cause the reversal of judgments which would be affirmed if the case was fully presented." *Continental Ins. Co. v. Milliken*, 64 Tex. 46.

1 Sayles' Civ. St. art. 1333, requiring an exception to the judgment "to be noted on the record in the judgment entry," is complied with by having the exception noted in the order overruling a motion for a new trial, since a party should not be required to lay the foundation for his appeal by excepting to the action of the trial court until he has exhausted his remedies there. *Continental Ins. Co. v. Milliken*, 64 Tex. 46, disapproved. *Biggerstaff v. Murphy*, 3 Tex. Civ. App. 363, 22 S. W. 768.

The case was tried by the judge without a jury, and appellants excepted to the judgment, and the exception was noted in the judgment entry. This was in accordance with the statute, and entitled appellants to appeal without a

statement of facts, and to call in question the correctness of the judgment upon the facts, although said conclusions had not been excepted to. *Sayles' Civ. Stat.*, art. 1333; *Continental Ins. Co. v. Millikien*, 64 Tex. 46. *Craxton, etc., Co. v. Ryan*, 3 App. Civ. Cases, § 367.

P. JUDGMENTS.

See, generally, the title JUDGMENTS AND DECREES.

1. Necessity for Raising Objection in Court below.

a. When Necessary.

(1) General Rule.

Where error in judgment responsive to pleadings is not fundamental, it will not be noticed on appeal unless brought to the attention of the court below. *San Antonio, etc., R. Co. v. Knoepfli*, 82 Tex. 270, 273, 17 S. W. 1052.

Objections to a judgment appealed from, when urged for the first time in the supreme court, will not be considered. *Gaines v. National Exchange Bank*, 64 Tex. 18.

(2) Applications of Rule.

Time of Rendition.—Failure of the trial judge to comply with rule 65 and render judgment at least two days before adjournment of term is not cause for reversal where no exception was taken at the time. *Glenn v. Kinbrough*, 70 Tex. 147, 149, 8 S. W. 81.

Finality.—See, generally, the title FINAL JUDGMENTS AND DECREES.

Where a decree in a former suit is held to be *res judicata* of the controversy, an objection that a decree in such former suit is not conclusive because it did not dispose of one of the issues in the suit comes too late when made for the first time on appeal. *Jones v. Lee* (Civ. App.), 20 S. W. 863.

Failure to Afford All Relief to Which Party Entitled.—The fact that a judgment did not afford all the relief to which a party may have been

entitled will constitute no ground for reversal, where no objection, is made to the form of the judgment prior to the filing of assignments of error. *G., C. & S. F. Ry. Co. v. Donahoo*, 59 Tex. 128.

A party filing a cross assignment of error that the judgment was for less than he was entitled to waives the error by not excepting to the judgment below or otherwise preserving the question. *Gloor v. Allen*, 47 Tex. Civ. App. 519, 105 S. W. 539.

Excess in Judgment.—Error for an excess in judgment which has not been called to the attention of the trial court will not be considered on appeal. *Cass v. Sanger* (Civ. App.), 30 S. W. 502, affirmed in 93 Tex. 661, no op.

An assignment of error that the judgment is excessive, will not be considered where such excess was not called to the attention of the trial court. *Petri & Bro. v. First Nat. Bank of Fond Du Lac*, 83 Tex. 424, 18 S. W. 752.

A judgment which is excessive to the extent of four dollars or five dollars will not be reversed where error was not mentioned below. *Simmons v. Rhodes* (Civ. App.), 27 S. W. 903.

Objection to a judgment for ten per cent attorney's fees, against obligors on a note, can not be first raised on appeal. *Smith v. Brownson*, 53 Tex. 271, 274.

Judgment foreclosing lien on land for larger amount than prayed for, the excess not being property of defendant and no exception having been taken to it in the trial court, is not ground for reversal. *Nass v. Chadwick*, 76 Tex. 572, 574, 13 S. W. 383.

Judgment for cost will not be reversed because of being too large when the question is first raised on appeal. *Torrey v. Martin* (Sup.), 4 S. W. 642, 644.

Judgment Defective in Failing to Show That Trial Was upon Agreed Statement of Facts.—Where the judg-

ment was submitted to appellant's counsel before being put on record, and he failed to make any objections thereto, or to make a motion to reform, he could not, after the appeal and after a motion to strike out the statement of facts was filed, submitted, and sustained, and the judgment affirmed, be heard to say that the judgment appealed from is defective in failing to show that the case was tried upon an agreed statement of facts, since he should have sought to have the judgment corrected when attention was called to the matter in the motion to strike out. *Scott v. Cox*, 30 Tex. Civ. App. 190, 191, 70 S. W. 802, affirmed in 97 Tex. 646, no op. See the title CERTIORARI, vol. 4, p. 35.

Failure to Adduce Evidence in Possession of Defendant.—That defendant had evidence which he might have adduced, but did not, can not avail him as objection to validity of judgment, on appeal. *Wyser v. Calhoun*, 11 Tex. 323, 324.

Default Judgment Allowed under Misapprehension That No Answer Filed.—Party allowing default judgment under misapprehension that no answer filed, without objection or moving to correct error, can not raise question on appeal. *Hopkins v. Donaho*, 4 Tex. 336, 338.

Order of Court as to Sale of Land in Foreclosure Suit.—On a suit to foreclose a mortgage on several tracts of land where no request as to the order in which the tracts should be sold is made, the court may determine the order, and its action can not be objected to on appeal. *Price v. Lauve*, 49 Tex. 74.

Assessment of Damages on Dissolution of Injunction.—In a suit to enjoin the sale of certain personal property, an objection to the assessment of damages on dissolution of the injunction would not be reviewed, where it appeared that the attention of the trial court was not called thereto in the

motion for a new trial. *Wm. Cameron & Co. v. Jones*, 41 Tex. Civ. App. 4, 90 S. W. 1129.

b. Objections Available on Appeal Though Not Raised below.

Judgment Rendered without Proper Pleading.—To render judgment without proper pleading is error of law apparent from the record, and should be considered on appeal without assignment. *Holloway Seed Co. v. City Nat. Bank*, 92 Tex. 187, 192, 47 S. W. 95, 516.

A judgment must be warranted by the case made by the pleadings, and if it be against such case, it will be reversed. *Pas. Dig.*, art. 1476, note 572. *Menard v. Sydnor*, 29 Tex. 257.

In an action for negligent death, brought by the mother, widow, and minor children of decedent, the error in the judgment for plaintiffs, arising from the fact that it gives their attorneys a third thereof, in the absence of pleading and evidence on the subject or a verdict to support it, is fundamental, especially because of the interests of the minors. *El Paso, etc., R. Co. v. Murtle*, 49 Tex. Civ. App. 273, 108 S. W. 998, affirmed, no op.

Absence of Evidence to Support Judgment and Verdict.—In the total absence of evidence to support the judgment and verdict, the rule requiring the question to be raised in the trial court can not be applied. *Parham v. Shockler* (Civ. App.), 73 S. W. 839.

An error in rendering judgment against alleged sureties, without any proof whatever tending to establish liability, is fundamental in its nature, and may be presented for the first time on appeal though the question was not raised in the trial court. *Parham v. Shockler* (Civ. App.), 73 S. W. 839.

Nonconformity to Verdict or Findings.—An objection that the judgment rendered did not conform to the verdict need not be specifically called to the attention of the trial court by a

motion for a new trial to enable the party objecting to raise such question on appeal. *Letot v. Peacock* (Civ. App.), 94 S. W. 1121.

"The motion for a new trial in the different counts does present to the court that the judgment does not conform to the verdict of the jury, but does not specifically state in what particular the judgment does not conform to the verdict. The rendition of judgment was an act of the court and had to conform to the verdict, and a failure to conform thereto was not a matter that had to be called to the court's attention by a motion for a new trial to enable the party to present it here for revision. 'Having once acted, it is not to be presumed that the judge will change his ruling.' *Clark v. Pearce*, 80 Tex. 146, 15 S. W. 787; *Western Union Tel. Co. v. Mitchell*, 89 Tex. 441, 35 S. W. 4, affirming 33 S. W. 1016, 12 Tex. Civ. App. 262; *Marsalis v. Crawford*, 8 Tex. Civ. App. 485, 28 S. W. 371." *Letot v. Peacock* (Civ. App.), 94 S. W. 1121.

Error in Awarding Interest on Judgment Apparent of Record.—In an action for penalties for failure of a railroad to maintain waterclosets at passenger stations, error in awarding interest on the judgment appearing on the face of the record and being fundamental, the judgment will be reformed, so as to exclude interest, though the point was not raised in the trial court, nor suggested in the briefs. *Missouri, etc., R. Co. v. State* (Civ. App.), 97 S. W. 720.

Errors in Law Committed in Rendition of Judgment by Default.—Errors in law, committed in the rendition of judgment by default, are available on writ of error, though they were not excepted to in the lower court. *Brooks v. Breeding*, 32 Tex. 752.

Errors of Clerk in Assessing Damages Where Judgment by Default.—Errors committed by the clerk in the assessment of damages where the

judgment goes by default are not waived by a failure to apply to the district court for their correction; and on error, such judgment will be rendered as the court below ought to have rendered. *Holland v. Cook*, 10 Tex. 244.

Motion for New Trial on Grounds of Excessive Judgment Unnecessary Where Trial by Court.—Where an action for damages is tried by the court, a motion for new trial is not necessary to raise an objection that the judgment is excessive. *Gulf, C. & S. F. Ry. Co. v. Gaedecke* (Civ. App.), 39 S. W. 312.

Void Judgments.—It seems that the objection of nullity, when apparent on the record, may be taken at any time and by any person. *McCoy v. Crawford*, 9 Tex. 363. See the title JUDGMENTS AND DECREES.

2. Form and Requisites of Objection.

Objection to alleged error in judgment must point out the ground upon which the judgment was rendered. *Chatham v. May*, 2 Posey 456.

3. Reduction of Exceptions to Writing.

See, generally, the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL.

Exceptions to the opinion of the judge should be reduced to writing at the time the opinion is given or the ruling made. *Houston v. Jones*, 4 Tex. 170.

Q. COSTS.

See, generally, the title COSTS, vol. 4, p. 971.

No relief can be had on appeal against a judgment in so far as it relates to costs, if in other respects correct, unless an effort to correct the judgment as to costs was made before the trial court. *Valentine v. Sweatt*, 34 Tex. Civ. App. 135, 78 S. W. 385, affirmed in 98 Tex. 636, no op. See, also, *Dalton v. Rainey*, 75 Tex. 516, 13 S. W. 34; *Bridges v. Samuelson*, 73 Tex. 522, 523, 11 S. W. 539; *Jones v. Ford*, 60 Tex. 127; *Allbright v. Corley*, 54

Tex. 372; *Cunningham v. McDonald* (Civ. App.), 80 S. W. 871, 81 S. W. 52, judgment reversed, 83 S. W. 372, 98 Tex. 316; *De Cordova v. Rodgers* (Civ. App.), 67 S. W. 1042, reversed in 75 S. W. 16, 97 Tex. 60; *Edrington v. Butler* (Civ. App.), 33 S. W. 143; *Sulphur Springs, etc., R. Co. v. St. Louis, etc., R. Co.*, 2 Tex. Civ. App. 650, 22 S. W. 107, 23 S. W. 1012, affirmed in 93 Tex. 672, no op.

- An objection that the judgment is against only some of the defendants for costs, and not also against a codefendant, should be primarily made in the trial court, and presented on appeal by proper assignments. *Hill v. Smith*, 6 Tex. Civ. App. 312, 25 S. W. 1079.

Taxation of costs will not be reviewed on appeal unless a motion to correct it was made in the court below. *Edrington v. Butler* (Civ. App.), 23 S. W. 143, citing *Sulphur Springs, etc., R. Co. v. St. Louis, etc., R. Co.*, 2 Tex. Civ. App. 650, 22 S. W. 107, 23 S. W. 1012, affirmed in 93 Tex. 672, no op.

A party against whom the court adjudges the cost of his motion to retax costs, and who takes no exceptions to such ruling in his motion for a rehearing, can not raise the objection for the first time on appeal. *Allbright v. Corley*, 54 Tex. 372.

Alleged error in taxing costs in justice and county courts will not be considered on appeal in the absence of any effort to have such error corrected in the county court. *Hockaday-Gray Co. v. Jonett & Campbell* (Civ. App.), 74 S. W. 71.

Where no demand was made in the trial court that costs of an amendment be imposed, the right to such costs can not be urged on appeal. *Dalton v. Rainey*, 75 Tex. 516, 13 S. W. 34.

Where, in trespass to try title, the defendant properly vouches in his several warrantors, the costs of so doing are correctly adjudged against the plaintiff, in the event that judgment goes in favor of the defendants for

plaintiff's failure to maintain the suit. Error in a matter of this kind, to be available on appeal, must be first called to the attention of the court below. *Sulphur Springs, etc., R. Co. v. St. Louis, etc., R. Co.*, 2 Tex. Civ. App. 650, 22 S. W. 107, 23 S. W. 1012, affirmed in 93 Tex. 672, no op.

R. RULINGS ON APPLICATIONS FOR CONTINUANCES OR POSTPONEMENTS.

See, generally, the title CONTINUANCES, vol. 4, p. 482.

An order denying a continuance can not be reviewed on appeal unless an exception was taken thereto in the trial court. *Johnson v. Brown*, 25 Tex. Supp. 120; *Morris v. Files*, 40 Tex. 374; *Texas, etc., R. Co. v. Mallon*, 65 Tex. 115; *Smith v. Hughes*, 39 Tex. Civ. App. 113, 86 S. W. 936; *Ft. Worth, etc., R. Co. v. Garvin* (Civ. App.), 29 S. W. 794; *McGregor v. Skinner* (Civ. App.), 47 S. W. 398.

Where no exception to a ruling on an application for continuance appears in the record, it will afford no ground for reversal. *Lovelady v. Bennett* (Civ. App.), 30 S. W. 1124.

Where no exception is taken to a ruling on an application for a continuance, as required by Dist. Ct. Rule 55, the presumption is that circumstances justified the ruling, and it will not be disturbed on appeal. *City of Sulphur Springs v. Weeks* (Sup.), 18 S. W. 489.

Under rule 70 of the district and county courts (84 Tex. 718), providing that the ruling on a motion for continuance should be made a ground of objection in a motion for a new trial or in arrest of judgment, if it is desired to be relied on as ground of error, an objection to the ruling on a motion for continuance can not be raised on appeal after a motion for new trial in which no complaint was made of the ruling. *Lion Ins. Co. of London v. Wicker* (Civ. App.), 54 S. W. 294, judgment affirmed *Lion Fire Ins. Co. of London v. Same*, 55 S. W. 741, 93 Tex. 397.

The refusal of a continuance on the

ground of surprise on amendment to a pleading will not be revised where no exception is taken to the ruling. *Contreras v. Haynes*, 61 Tex. 103.

When defendant is surprised by an amendment, which entitles him to a continuance, he must ask for such continuance, and if refused sue a bill of exceptions, otherwise judgment will be affirmed. *Cunningham v. State*, 74 Tex. 511, 514, 12 S. W. 217.

Objection to the court's overruling application for continuance for witnesses on ground of surprise should not be raised for the first time on appeal. *Tittle v. Vanleer* (Civ. App.), 27 S. W. 736, 737.

Where there is an affidavit for a continuance purporting to be filed on the eve of trial, but no entry showing that it was called to the attention of the court, an assignment of error that the court erred in overruling the application for a continuance can not be considered. *Pennell v. Lovett*, 15 Tex. 265.

Where plaintiff in garnishment requests the postponement of the trial on the answer of the garnishee until the garnishee has executed a trust existing between himself and defendant, but the court disregards the request, and refuses to postpone the hearing on the garnishment, plaintiff, by going to trial without objection, is precluded from complaining on appeal that the court erred in refusing the request. *Carter Bros. & Co. v. Bush*, 79 Tex. 29, 15 S. W. 167.

S. RULINGS ON MOTIONS FOR NEW TRIAL.

See, generally, the title **NEW TRIALS**.

Defendant's complaint of the overruling of its motion for a new trial on the ground that there was no evidence of certain facts necessary to be shown by plaintiff was unavailing on appeal, no such objection being made at the time the ruling was made. *Red River, etc., R. Co. v. Eastin*, 39 Tex. Civ. App. 579, 88 S. W. 530, affirmed in 101 Tex. 653, no op.

A party can not complain that a motion for new trial was continued where he took no exception. *Peoples v. Terry* (Civ. App.), 43 S. W. 846.

T. FORM AND MANNER OF PROSECUTING APPEAL.

See, generally, the title **APPEAL AND ERROR**, vol. 1, p. 313.

Exceptions to the form and manner of prosecuting an appeal ought all to be taken at once and in the first instance. *Bank v. Simonton*, 2 Tex. 531.

U. OBJECTIONS TO CLAIMS PRESENTED TO ADMINISTRATOR.

See, generally, the title **EXECUTORS AND ADMINISTRATORS**.

Objections, on the ground of uncertainty, to a claim presented to an administrator can not be raised for the first time on appeal. *Trigg v. Moore*, 10 Tex. 199. See the title **JUDGMENTS AND DECREES**.

V. OBJECTIONS TO AUDITORS' REPORTS.

See, generally, the title **REFERENCE**.

Objection to an auditor's report can not be raised for the first time on appeal. *Smith v. Smith*, 10 Tex. Civ. App. 485, 486, 32 S. W. 28, affirmed in 93 Tex. 671, no op.

W. OBJECTIONS TO VALIDITY OF FOREIGN ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See, generally, the title **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**, vol. 2, p. 113.

Whether assignment for creditors executed in foreign state, and containing provisions allowed by the law of such state, but prohibited in Texas, is valid, embraces questions of fact as well as of law, can not be raised for the first time on appeal. *Carter, Battle Grocer Co. v. Jackson*, 18 Tex. Civ. App. 353, 360, 45 S. W. 615, affirmed in 93 Tex. 726, no op.

EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL.

BY S. BLAIR FISHER.

I. Necessity for Bill of Exceptions or Statement of Facts as Basis for Appellate Review, 96.

- A. General Rule Stated and Applied, 96.
- B. Presumptions in Absence of Bill or Statement, 99.

II. Bill of Exceptions, 99.

- A. Office and Scope, 99.
 - 1. In General, 99.
 - 2. As Distinguished from Statement of Facts, 99.
- B. Necessity for Bill, 100.
 - 1. Matters Which Must Be Presented by Bill of Exceptions, 100.
 - a. General Rule as to Motions and Rulings of Court, and Orders Made during Trial, 100.
 - b. Ruling on Application to Withdraw Announcement of Ready for Trial, 100.
 - c. Action of Court in Forcing Party to Trial in Absence of Attorney, 101.
 - d. Objections to Jurors, 101.
 - e. Rulings on Motion to Withdraw Case from Jury Trying Same, 101.
 - f. Rulings on Application for Continuance or Postponement, 101.
 - g. Rulings on Application for Change of Venue, 103.
 - h. Rulings in Regard to Pleadings, 103.
 - i. Rulings on Admission or Exclusion of Evidence, 104.
 - j. Want of Notice of Objections to Depositions, 106.
 - k. Action of Court in Allowing Recall of Witness after Retirement of Jury, 106.
 - l. Improper Argument of Counsel, 106.
 - m. Action of Court in Interrupting Argument of Counsel, 106.
 - n. Instructions, 106.
 - o. Submission of Issues, 107.
 - p. Failure of Court to File Findings as Requested, 107.
 - q. Action of Court in Refusing to Receive Verdict, 108.
 - r. Rulings on Objections to Award of Arbitrators, 108.
 - s. Rulings on Auditor's Report, 108.
 - t. Refusal of District Court to Dismiss Appeal from County Court, 108.
 - u. Violation of Rules of Court, 109.
 - 2. Matters Reviewable in Absence of Bill of Exceptions, 109.
 - a. General Rule as to Matters Constituting Record, 109.
 - b. Instructions, 109.
 - c. Where Judgment Not Supported by Pleadings, 110.
 - d. Dismissal, at Plaintiff's Instance, after Plea in Reconvention by Defendant, 110.
 - e. Refusal to Reform Judgment, 110.

- f. Presentment and Allowance of Bill of Exceptions after Expiration of Prescribed Time, 110.
3. Substitutes for Bill of Exceptions, 111.
- C. Form, Requisites and Sufficiency, 111.
 1. No Particular Form of Words Required, 111.
 2. Necessity for Compliance with Statute and Rules of Court, 111.
 3. Propriety of Embodying Several Exceptions in One Bill, 111.
 4. Contents and Sufficiency, 111.
 - a. In General, 111.
 - b. Rulings and Exceptions Thereto, 112.
 - c. Objections to Ruling or Action of Court with Circumstances and Evidence Explaining Same, 112.
 - (1) General Rule Stated and Construed, 112.
 - (2) Applications of Rule to Particular Rulings or Actions of Court, 113.
 - (a) Rulings on Motions for Continuance, 113.
 - (b) Rulings on Pleadings, 115.
 - (c) Rulings as to Amendments, 115.
 - (d) Rulings on Objections to Trial Judge, 115.
 - (e) Actions of Court as to Acceptance of Jurors, Allowance of Challengers, etc., 116.
 - (f) Rulings on Evidence, 116.
 - aa. Showing as to Court's Action, 116.
 - bb. Objections and Grounds Thereof, 117.
 - (aa) General Rule, 117.
 - (bb) Admission of Evidence, 119.
 - (cc) Exclusion of Evidence, 122.
 - cc. Showing as to Materiality of Evidence, 123.
 - dd. Incorporation of Evidence Admitted or Excluded, 125.
 - (aa) In General, 125.
 - (bb) Evidence Admitted, 125.
 - (cc) Showing Character of Excluded Testimony and Matters Proposed to Be Proven, 127.
 - (dd) Necessity for Setting Out Excluded Documents, 130.
 - (g) Action of Court in Refusing to Submit Case on Special Issues, 131.
 - (h) Improper Arguments of Counsel, 131.
 - (i) Improper Remarks of Court, 132.
 - (j) Action of Court in Interrupting Argument of Counsel, 132.
 - (k) Rendition of Judgment in Violation of Rules of Court, 132.
 - (3) Sufficient Where Evidence Contained in Statement of Facts, 132.
 5. Definiteness and Certainty, 134.
 6. Bill Must Be Complete in Itself or by Reference to Other Parts of Record, 135.
 - D. Preparation, Presentation, Settlement, Authentication and Filing, 135.
 1. By Whom Prepared, 135.
 2. Necessity for Presentation to Judge, 136.

3. Time for Preparation, Presentation and Filing, 136.
 - a. Allowance of Time during Trial to Embody Exceptions in Written Bill, 136.
 - b. Compliance with Provisions as to Time Essential to Consideration of Bill, 137.
 - c. Statement of Rules as to Time, 137.
 - (1) Must Be during Term, 137.
 - (2) Presentation within Ten Days after Conclusion of Trial, 139.
 - (3) Extension of Time after Adjournment, under Act of 1903, 141.
 - d. Application of Rules as to Time Where Bill Incorporated in Statement of Facts, 141.
 - e. Effect of Motion for New Trial as Extending Time, 142.
 - f. Presumption as to Time of Presentation and Filing, 142.
4. Submission to Adverse Party, 143.
5. Approval and Signature, 144.
 - a. Essential to Validity of Bill, 144.
 - (1) General Rule, 144.
 - (2) Statutory Provision as to Consideration of Unsigned Bills, 145.
 - b. Validity of Approval by Other than Trial Judge, 145.
 - c. Effect of Uncertainty in Approval and Explanations of Bill, 146.
 - d. Duty of Judge to Sign Correct Bill, 146.
 - e. Procedure Where Bill Found by Judge to Be Incorrect, 146.
 - (1) Suggestion of Corrections to Party Drawing Bill, 146.
 - (2) Duty of Judge to Make Out Bill Where Corrections Not Agreed to, 147.
 - (3) Procedure Where Party Dissatisfied with Bill Filed by Judge, 148.
 - (4) Effect of Failure of Judge to File Bill in Lieu of That Refused, 150.
6. Filing, 150.
- E. Bill as Part of Record, 151.
 1. In General, 151.
 2. Bill Allowed, Signed and Filed Not Subject to Alteration by Judge, 151.
 3. Conclusiveness as against Attack in Appellate Court, 151.
 4. Striking Out Bill, 151.
 - a. Grounds, 151.
 - b. Judge Can Not, in Vacation, Sustain Motion to Strike, 152.
 5. Substitution of Lost Bill, 152.
- F. Construction of Bill, 152.
 1. Presumption as to Completeness and Verity of Statements in Bill, 152.
 2. Construction of Bill in Connection with Statement of Facts, Where Not Inconsistent, 153.
 3. Rule in Case of Conflict between Bill and Statement of Facts, 153.

III. Statement of Facts on Appeal, 153.

- A. Origin, Purpose and Scope, 153.

1. Of Statutory Origin, 153.
2. Purpose and Scope, 153.
- B. Necessity, 154.
 1. General Rules, 154.
 2. Matters Not Considered in Absence of Statement of Facts, 156.
 - a. Rulings on Applications for Continuance or Postponement, 156.
 - b. Disqualification of Trial Judge, 156.
 - c. Rulings as to Parties, 157.
 - d. Rulings on Pleadings, 157.
 - e. Matters Relating to Evidence, 157.
 - (1) In General, 157.
 - (2) Rulings Admitting or Excluding Evidence, 157.
 - (a) General Rule Stated, Construed and Applied, 157.
 - (b) Exceptions to Rule, 161.
 - (3) Sufficiency of Evidence, 163.
 - f. Action of Court in Giving or Refusing Instructions, 164.
 - (1) General Rule Stated, Construed and Applied, 164.
 - (2) Exceptions to Rule, 166.
 - g. Improper Argument of Counsel, 167.
 - h. Action of Jury in Taking with Them Documentary Evidence, 167.
 - i. Where Findings of Court Sought to Be Reviewed, 167.
 - j. Matters Relating to Verdict, 169.
 - k. Insufficiency of Description of Land in Judgment, 169.
 - l. Matters Relating to Costs, 170.
 - m. Rulings on Motion for New Trial, 170.
 3. Substitutes for Statement of Facts, 170.
- C. Contents and Sufficiency, 173.
 1. Necessity for Statement to Contain All Material Facts and Evidence, 173.
 - a. General Rule Stated, Construed and Applied, 173.
 - b. Omission of Immaterial Matters, 176.
 - c. Discretion of Trial Judge as to Contents of Statement Prepared by Him, 176.
 2. Manner and Sufficiency of Stating Evidence, 176.
 - a. Rules Stated and Applied, 176.
 - (1) Where Evidence Sufficient to Establish Facts Alleged, 176.
 - (a) General Rule, 176.
 - (b) Impropriety of Using Full Stenographic Notes of Testimony and Proceedings, 177.
 - aa. In General, 177.
 - bb. Under Stenographers' Acts 1905 and 1907, 178.
 - (2) Where Doubt as to Sufficiency of Evidence to Establish Fact, 178.
 - (3) Description or Insertion of Written Instruments Adduced in Evidence, 179.
 - (a) In General, 179.
 - (b) Propriety of Copying Instrument on Which Cause of Action or Defense Based, 179.
 - (c) Time and Manner of Incorporating Written Instrument When Necessary, 180.

- aa. General Rule, 180.
- bb. Attachment to Statement as Exhibit, 182.
- (4) Manner of Setting Out Commissions, Notices and Interrogatories, 182.
- (5) Manner and Sufficiency of Reference to Other Parts of Record for Evidence, 182.
- b. Necessity for Compliance with Statutes and Rules of Court, 183.
- 3. Effect of Copying Charge into Statement Where Recitals Not Admitted, 184.
- D. Preparation, Presentation, Settlement, Authentication and Filing, 184.
 - 1. Preparation by Parties, 184.
 - 2. Preparation by Judge, 185.
 - a. Power and Duty to Prepare and File, 185.
 - (1) In General, 185.
 - (2) Failure to Prepare as Reversible Error, 186.
 - (3) Procedure to Compel Preparation and Filing, 188.
 - (4) Preparation by Successor of Trial Judge Unauthorized, 190.
 - (5) Preparation by Judge after Resignation Improper, 190.
 - b. Presumption as to Disagreement Where Statement Prepared by Judge, 190.
 - c. Basis of Statement, 190.
 - 3. Time for Preparation, Settlement and Filing, 191.
 - a. In Absence of Statute, 191.
 - b. Statutory Provisions as to Time, 191.
 - (1) General Rule Stated and Construed, 191.
 - (2) Extension, of Time, 194.
 - (a) By Agreement of Parties, 194.
 - (b) By Order of Court Entered of Record, 195.
 - aa. Allowance of Ten Days after Adjournment, under Rev. Stat., Art. 1379, 195.
 - (aa) Provisions Stated, Construed and Applied, 195.
 - (bb) Application for Order, 197.
 - (cc) Refusal of Court to Extend Time as Ground for Reversal, 198.
 - (dd) Necessity for Making and Filing within Time Allowed, 198.
 - bb. Allowance of Twenty Days after Adjournment, under Act 1903, 199.
 - c. Effect of Noncompliance with Provisions as to Time, 200.
 - (1) In General, 200.
 - (2) Diligence as Excusing Failure to File in Time Prescribed, 200.
 - (a) In General, 200.
 - (b) Provision Construed and Applied, 201.
 - (3) Waiver of Objection That Statement Was Not Filed within Time Prescribed, 205.
 - d. Conclusiveness of Indorsement as to Time of Filing, 205.
 - 4. Submission to Opposite Party or Attorney, 206.
 - 5. Approval and Signature, 206.
 - a. When Statement Agreed to, 206.

- (1) By Parties or Counsel, 206.
- (2) By Trial Judge, 208.
 - (a) Necessity for Approval and Signature, 208.
 - (b) Time, 210.
 - (c) Power of Judge to Make Corrections before Approving Statement, 210.
 - (d) Remedy Where Judge Refuses Approval, 210.
 - (e) Remedy Where Judge Misled into Signing Statement, 210.
- b. Of Statement Prepared by Judge, 211.
 - (1) Necessity for Authentication, 211.
 - (2) Form and Sufficiency of Certificate, 211.
- c. Effect of Alteration after Certification by Judge, 211.
- d. Effect of Mutilations and Interlineations in Statement Prepared by Judge, 212.
- 6. Seal, 212.
- 7. Filing, 212.
- E. Statement as Part of Record, 212.
 - 1. In General, 212.
 - 2. Conclusiveness, 213.
 - a. Estoppel of Appellant to Show Error, 213.
 - b. Inadmissibility of Affidavits on Appeal to Sustain or Discredit Statement, 213.
 - 3. Striking from Record, 213.
- F. Construction of Statement, 214.
- G. Amendment or Correction of Statement, 214.

IV. Agreed Case, 215.

CROSS REFERENCES.

See the titles AGREED CASE, vol. 1, p. 171; APPEAL AND ERROR, vol. 1, p. 313; CERTIORARI, vol. 4, p. 35; CONTINUANCES, vol. 4, p. 482; DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 6, p. 433; EVIDENCE, vol. 6, p. 1098; EXCEPTIONS AND OBJECTIONS, ante, p. 2; FINDINGS OF COURT; JUDGMENTS AND DECREES; LACHES; MANDAMUS; NEW TRIALS; PARTIES; PLEADING; RECORDS; STENOGRAPHERS; TRIAL; VARIANCE; VERDICT; WITNESSES.

I. Necessity for Bill of Exceptions or Statement of Facts as Basis for Appellate Review.

A. GENERAL RULE STATED AND APPLIED.

Essential to Review of Matters Not Otherwise a Part of Record.—It is a general rule that all matters which do not constitute a part of the record proper at common law or by statute, must be brought in the record by a bill of exceptions or a statement of facts. *San Antonio, etc., R. Co. v.*

Klaus, 34 Tex. Civ. App. 492, 79 S. W. 58, affirmed in 98 Tex. 631, no op.; *Hall v. Stancell*, 3 Tex. 400; *Wright v. Pate* (Sup.), 1 S. W. 661; *Houston, etc., R. Co. v. Kinser* (Civ. App.), 91 S. W. 243; *Owens v. Caraway* (Civ. App.), 110 S. W. 474; *Adams v. Duggan*, 1 App. Civ. Cases, § 1268.

Questions to be revised by the supreme court, if not otherwise apparent, must be presented by a bill of exceptions or arise out of a statement of facts—none other will be considered. *Secrest v. Townsend*, 1 Tex. 414; *Smith v. Adriance*, 1 Tex. 102.

Where no bills of exceptions, case, or statement of facts has been filed, the errors alleged will not be reviewed. *Harbert v. Henly*, 31 Tex. 666; *Madden v. Madden*, 79 Tex. 595, 15 S. W. 480; *Smith v. Anderson*, 8 Tex. Civ. App. 188, 27 S. W. 775; *Wachsmuth v. Sims* (Civ. App.), 32 S. W. 821.

The Texas Rev. Stat. prescribe the following basis for the exercise of appellate jurisdiction by courts of civil appeals: "In all case of appeal or writ of error to the courts of civil appeals, the trial shall be on a statement of facts or agreed statement of the pleadings and proof as agreed upon by the parties or their attorneys, or the conclusions of law and fact as the case may be, certified to by the judge of the court below; or, should the parties fail to agree, then the judge of the court below shall certify the facts; or on a bill of exceptions to the opinion of the judge; or on a special verdict; or on an error in law, either assigned or apparent on the face of the record; and in the absence of all these, the case shall be dismissed," etc. *Ennis, etc., Co. v. Wathen*, 93 Tex. 622, 57 S. W. 946; *El Paso v. Dickens* (Civ. App.), 23 S. W. 283; *Frost v. Frost*, 45 Tex. 324.

Illustrations.—When objections are taken to the ruling of the district court which do not ordinarily form a part of the record, they must be taken and presented by formal bill of exceptions or by the statement of facts. *Griffin v. Chadwick*, 44 Tex. 406, 408.

In the absence of statutory agreed case, or of the statement of facts or of bill of exceptions in lieu of agreed case, the appellate court will not revise the action of the trial court. *Whitaker v. Gee*, 61 Tex. 217, 219.

Merits of defence can not be considered in the absence of the statement of facts or bill of exceptions. *Hodges v. Longcope*, 23 Tex. 155, 156.

In the absence of a statement of facts, or statement of evidence in bill

of exceptions which was excepted to, the higher court can not rule on the admissibility of evidence. *May v. Ferrill*, 22 Tex. 340, 344.

An assignment of error to the court's refusing a new trial can not be considered in the absence of bill of exceptions, statement of facts, or findings of fact by the court. *Thurmond v. Bank* (Civ. App.), 27 S. W. 317, 318.

Appellate court will not disturb ruling on motion for new trial, where no statement of facts or bill of exceptions, no matter how well application for new trial was supported by affidavit of absent witness. *Angell v. Street*, 21 Tex. 485, 487.

The supreme court can not notice every paper that may have been filed in the cause while pending in the court below, when it is not made to appear, by a statement of facts, bill of exceptions, or otherwise, that some action was taken upon it by the court below. *Goss v. Pilgrim*, 28 Tex. 263.

Where a party moved for a new trial, on the ground of newly-discovered evidence, and relied upon affidavits, the fact that these affidavits were brought to the consideration of the court must appear by bill of exceptions or statement of facts. *Frizzell v. Johnson*, 30 Tex. 31.

In absence of a statement of facts or bill of exceptions supporting the alleged error, it is not ground for reversal that in the judgment and decree of foreclosure, a recital gives the date for the note and mortgage as different from that alleged in the petition. *Hague v. Jackson*, 71 Tex. 761, 12 S. W. 63.

A certified copy of a decree of another court, though found in the transcript, will not be considered by the supreme court for any purpose unless the same has been made a part of a statement of facts or bill of exceptions, or has otherwise been so made a part of the record in the cause as to au-

thorize the court to consider it. *Sidbury v. Ware*, 65 Tex. 252.

The fact of interlineation or erasure in an averment or record can only be brought to the knowledge of the supreme court by a bill of exceptions or statement of facts, and not by a facsimile or certificate by the court below. *Dikes v. Monroe*, 15 Tex. 236.

Documentary evidence, not made part of statement of facts or bill of exceptions, but improperly included in transcript can not be considered on appeal. *McLarty v. Prior* (Sup.), 2 S. W. 752, 753.

For a full consideration of matters which must be presented by bill of exceptions, see post, "Matters Which Must Be Presented by Bill of Exceptions," II, B, 1.

As to the necessity for a statement of facts in particular instances, see post, "Matters Not Considered in Absence of Statement of Facts," III, B, 2.

Matters Considered in Absence of Bill or Statement.—Error apparent on the face of the record may be taken advantage of on appeal without a bill of exceptions, case, or statement of facts. *Crook v. McGreal*, 3 Tex. 487; *Gibson v. Schoolcraft*, 1 White & W. Civ. Cas. Ct. App. § 49; *McKinion v. McGowan*, 2 Posey, Unrep. Cas. 288; *Wade v. Buford*, 1 White & W. Civ. Cas. Ct. App. § 1335.

In the absence of a statement of facts or bill of exceptions, the appellate court can only inquire into errors apparent upon the record. *Ward v. Lattimer*, 2 Tex. 245.

In absence of statement of facts and bill of exceptions, the appellate court can only examine the main question in the light of conclusion of fact as found by the trial court, not the details of evidence from which they were drawn. *Rio Grande Cattle Co. v. Burns, etc., Co.*, 82 Tex. 50, 54, 17 S. W. 1043.

Sufficiency of Pleadings to Support

Verdict and Judgment Alone Considered.—Where there is no case, statement of facts or bill of exceptions, the appellate court will consider only the sufficiency of the pleadings to support the verdict or judgment. *Willis v. Smith* (Civ. App.), 39 S. W. 377; *Armstrong v. Dreaper* (Civ. App.), 50 S. W. 1024; *Mayfield v. Williams*, 73 Tex. 508, 11 S. W. 530; *Morris v. Files*, 40 Tex. 375; *May v. Ferrill*, 22 Tex. 340; *Armstrong v. Lipscomb*, 11 Tex. 649, 651; *Crawford v. McGinty* (Sup.), 11 S. W. 1066.

"Any other rule, it is said, would result in the reversal of many judgments which would be affirmed if the case was properly presented." *Crawford v. McGinty* (Sup.), 11 S. W. 1066, citing *Continental Ins. Co. v. Milliken*, 64 Tex. 46.

Where the record on appeal contains neither findings of fact nor bills of exceptions, the only question for determination is whether or not there is sufficient evidence to support the judgment. *Holler v. Scott* (Civ. App.), 75 S. W. 839.

Judgment will be affirmed if the petition states a cause of action where there is no statement of facts or bill of exceptions. *Mundine v. Berwin*, 62 Tex. 341, 342.

Judgment Affirmed Where No Fundamental Error Apparent of Record.—See, generally, the title APPEAL AND ERROR, vol. 1, p. 313.

Where there is no bill of exceptions or statement of facts, and no error apparent of record, judgment will be affirmed. *Secrest v. Townsend*, 1 Tex. 414; *Jones v. Black*, 1 Tex. 527; *Duffield v. Bodine*, 2 Tex. 292; *Gibbs v. Anthony*, 31 Tex. 157.

Where there is no bill of exceptions, statement of facts or special verdict, it is impossible to ascertain whether errors assigned are well taken or not and judgment must be affirmed. *Close v. State*, 30 Tex. 631.

Where a writ of error is prosecuted,

but no statement of facts, bill of exceptions, finding of law and fact, assignments of error, or briefs by plaintiff in error are filed, and no fundamental errors appear in the record, the judgment will be affirmed. *Brooks v. Perkins* (Civ. App.), 46 S. W. 842.

Where there is no statement of facts, conclusions of facts, nor bill of exceptions in the record which can be considered on appeal, the judgment will be affirmed. *Maury v. Keller* (Civ. App.), 53 S. W. 59.

B. PRESUMPTIONS IN ABSENCE OF BILL OR STATEMENT.

See the title APPEAL AND ERROR, vol. 1, p. 722, et seq.

II. Bill of Exceptions.

A. OFFICE AND SCOPE.

1. In General.

Makes Matter of Record Which Would Otherwise Not Appear.—Bills of exceptions are intended to make that a part of the record which otherwise would not be. *Farrar v. Bates & Co.*, 55 Tex. 193; *Owens v. Missouri, etc., R. Co.*, 67 Tex. 679, 4 S. W. 593; *Cunningham v. Wheatly*, 21 Tex. 184.

A bill of exceptions serves to perpetuate in the record the ruling of the court to which the party presenting the bill excepts. *Roundtree v. Galveston*, 42 Tex. 612.

The office of a bill of exceptions is to enable a party who considers himself aggrieved by any ruling, opinion, or action of the court below upon a given point, to put the same upon the record, with his objections thereto, at the time the same is made or announced. *Firebaugh v. Ward*, 51 Tex. 409.

The office of a bill of exceptions is to truly and correctly show the action or ruling of the court upon any particular question or matter, so that the action or ruling may be reviewed by the supreme court. *Daugherty v.*

Harris, 2 Posey 458; *Gaines v. Salmon*, 16 Tex. 311, 312.

Brings up Rejected Testimony, or Testimony Admitted over Objection.

—There is no authority for bringing to the knowledge of the supreme court the facts proved upon the trial of a case through the medium of a bill of exceptions. Such a bill brings up rejected testimony, or testimony admitted over objections. *Dull v. Drake*, 68 Tex. 205, 4 S. W. 364.

Exceptions Can Not Reach Proceedings of Former Term.

—Exceptions can bring in question only the proceedings in a case had at the term of court at which the exceptions are presented, and can not reach the proceedings of a former term. *Marshall v. Spillane*, 7 Tex. Civ. App. 532, 27 S. W. 162.

2. As Distinguished from Statement of Facts.

In General.—"A bill of exceptions and statement of facts are alike intended to be incorporated into and become parts of the record of the case. Still they are altogether different in their character and purposes, as well as in the manner of their preparation and authentication. The first serves to perpetuate in the record the ruling of the court to which the party presenting the bill excepts. Only such facts are set out in it, as are necessary for the proper understanding of the action of the court to which the exception is taken. In its preparation and completion the opposite party has no necessary connection, and is frequently not even cognizant of its contents until it has become a part of the record. While the latter is intended to embody in the record all the evidence introduced on the trial as agreed to by the parties and approved by the court; or if the parties failed to agree, as certified to by the court after examining the statements prepared by them respectively." *Roundtree v. Galveston*, 42 Tex. 612.

Bill as Substitute for Statement of Facts.—A bill of exceptions can not supply a statement of facts, however full its recital of facts may be. *Roundtree v. Galveston*, 42 Tex. 612, 623; *Cates v. McClure*, 27 Tex. Civ. App. 459, 66 S. W. 224, affirmed in 95 Tex. 675, no op.

A bill of exceptions, though it professes to state all the facts the plaintiff's evidence tended to prove, and that there was no other evidence, can not be regarded as a statement of facts. *Carolan v. Jefferson*, 24 Tex. 229.

Bill of exceptions can not be made to supply the place of statement of facts by incorporating evidence admitted in order to show importance of rejected testimony referred to in the bill. *Dull v. Drake*, 68 Tex. 205, 4 S. W. 364.

"Counsel for appellant calls our attention to the fact that there is a bill of exceptions in the record which contains a statement of all the facts proven on the trial affecting the issue of damages, which it is insisted should be treated as a statement of facts; but in thus seeking to have us pass upon the sufficiency of the evidence to sustain the judgment, the learned counsel must have overlooked the rule of practice long since established in this state by the decisions of our supreme court, that it is inadmissible to substitute a bill of exceptions for a statement of facts. *Carolan v. Jefferson*, 24 Tex. 229, and *Roundtree v. Galveston*, 42 Tex. 612." *Cates v. McClure*, 27 Tex. Civ. App. 459, 66 S. W. 224, affirmed in 95 Tex. 675, no op.

B. NECESSITY FOR BILL.

1. Matters Which Must Be Presented by Bill of Exceptions.

a. General Rule as to Motions and Rulings of Court, and Orders Made during Trial.

Motions and Rulings Thereon.—Motions of various kinds made during the progress of the cause, and the rulings

of the court granting or denying them, must, in order to be reviewed on appeal, be taken up by bills of exceptions. *San Antonio, etc., R. Co. v. Klaus*, 34 Tex. Civ. App. 492, 79 S. W. 58, affirmed in 98 Tex. 631, no op.

Every ruling of the lower court made a ground of error should plainly appear in the transcript, and nothing be left to inference. All rulings, save those particularly excepted by rules 53 and 54 of the district court, upon incidental motions, must be made the subject of a bill of exceptions, or they will be considered as waived. Rule 55 of Rules for District and County Courts. *Supreme Commandery Knights v. Rose*, 62 Tex. 321; *Texas, etc., R. Co. v. Mallon*, 65 Tex. 115; *Moore v. Masterson*, 19 Tex. Civ. App. 308, 46 S. W. 855; *Chicago, etc., R. Co. v. Long*, 32 Tex. Civ. App. 40, 74 S. W. 59, affirmed in 97 Tex. 69; *Home Circle Soc. v. Shelton* (Civ. App.), 81 S. W. 84; *Borden v. Le Tulle, etc., Co.* (Civ. App.), 99 S. W. 128; *Panhandle, etc., R. Co. v. Kirby* (Civ. App.), 108 S. W. 498; *Texas, etc., R. Co. v. Byrd* (Civ. App.), 110 S. W. 199; *Texas, etc., R. Co. v. Evans*, 2 Posey 318; *Shaw v. Adams*, 2 App. Civ. Cases, § 177.

Rulings of the court, when not presented by bill of exceptions or shown by an order regularly entered on the minutes of the court, will not be reviewed. *Gulf, etc., R. Co. v. Carter* (Civ. App.), 25 S. W. 1023.

Orders of Court Made during Progress of Trial.—Orders of the court made during the progress of trial of the cause are ordinarily no part of the record proper, and must be brought in by bill of exceptions. *San Antonio, etc., R. Co. v. Klaus*, 34 Tex. Civ. App. 492, 79 S. W. 58, affirmed in 98 Tex. 631, no op.

b. Ruling on Application to Withdraw Announcement of Ready for Trial.

Assignments of error, based on a refusal to permit the withdrawal of

an announcement of ready for trial in order to have the accounts of a partnership audited, and file an affidavit denying the partnership, will not be sustained, where not based on any bill of exceptions, and where, in the application to withdraw, no excuse was offered for having gone to trial without attending to these matters. *Merchants' & Farmers' Nat. Bank of Cisco v. Johnson*, 49 Tex. Civ. App. 242, 108 S. W. 491.

c. Action of Court in Forcing Party to Trial in Absence of Attorney.

An assignment that the court erred "in forcing defendant to trial on the appearance day of said court in the absence of his attorney of record" is not available in the absence of a bill of exceptions complaining of such action. *Warren & Sons v. McCutcheson & Co.*, 16 Tex. Civ. App. 167, 40 S. W. 826.

d. Objections to Jurors.

See, generally, the title JURY.

Objection to jurors should be saved by bill of exception. *Thomae v. Zushlag*, 25 Tex. Supp. 225, 228.

"The record contains no statement of the facts given in evidence on the trial. The only questions in the case, therefore, which merit any notice, are those presented by the several bills of exception taken by the defendant in the court below, and to be found in the record. In the motion for a new trial, it is stated that the defendant excepted to certain jurors, when they were called, because they did not understand the English language. This statement can not be regarded. The fact should be shown by a bill of exceptions." *Thomae v. Zushlag*, 25 Tex. Supp. 225.

e. Rulings on Motion to Withdraw Case from Jury Trying Same.

In order that the ruling of the trial court in refusing a motion to withdraw a case from the jury trying it and submit it to another or continue may be revised, a proper bill of ex-

ceptions to the action of the court must be taken. *San Antonio, etc., R. Co. v. Klaus*, 34 Tex. Civ. App. 492, 79 S. W. 58, affirmed in 98 Tex. 631, no op.

f. Rulings on Application for Continuance or Postponement.

See, generally, the title CONTINUANCES, vol. 4, p. 482.

General Rule.—The action of the court on an application for a continuance can not be reviewed in an appellate court unless a bill of exceptions is properly prepared and made a part of the record. District Court Rule 55. *Campion v. Angier*, 16 Tex. 93; *Parker v. McKelvain*, 17 Tex. 157; *McMahan v. Busby*, 29 Tex. 191; *Harrison v. Cotton*, 25 Tex. 53; *Johnson v. Brown*, 25 Tex. Supp. 120; *Cocker v. State*, 31 Tex. 498; *Robson v. Jones*, 33 Tex. 324; *Bruckmiller v. Wolf*, 37 Tex. 342; *Morris v. Files*, 40 Tex. 375; *Meredith v. State*, 40 Tex. 480; *Davis v. Calhoun*, 41 Tex. 554; *Anderson v. State*, 42 Tex. 389; *Contreras v. Haynes*, 61 Tex. 103; *Texas, etc., R. Co. v. Mallon*, 65 Tex. 115; *Waites v. Osborne*, 66 Tex. 648, 2 S. W. 665; *Moss v. Katz*, 69 Tex. 411, 6 S. W. 764; *Alamo Fire Ins. Co. v. Lancaster*, 7 Tex. Civ. App. 677, 28 S. W. 126, affirmed in 93 Tex. 699, no op.; *Moore v. Masterson*, 19 Tex. Civ. App. 308, 46 S. W. 855; *Scalfi v. Graves*, 31 Tex. Civ. App. 667, 74 S. W. 795; *St. Louis, etc., R. Co. v. Bowles*, 32 Tex. Civ. App. 118, 72 S. W. 451, affirmed in 97 Tex. 645, no op.; *Chicago, etc., R. Co. v. Long*, 32 Tex. Civ. App. 40, 74 S. W. 59, affirmed in 97 Tex. 69; *Ft. Worth, etc., R. Co. v. Partin*, 33 Tex. Civ. App. 173, 76 S. W. 236, affirmed in 97 Tex. 632, on op.; *Smith v. Hughes*, 39 Tex. Civ. App. 113, 86 S. W. 936; *Gray v. Frontroy*, 40 Tex. Civ. App. 302, 80 S. W. 1090; *Texas, etc., R. Co. v. Dunn* (Sup.), 17 S. W. 622; *Strain v. Greer County* (Sup.), 19 S. W. 513; *Clitus v. Langford* (Civ. App.), 24 S. W. 325; *Gulf, etc., R. Co.*

v. Cannon (Civ. App.), 29 S. W. 689; *Ft. Worth, etc., R. Co. v. Garvin* (Civ. App.), 29 S. W. 794; *Jones v. League* (Civ. App.), 46 S. W. 283; *Simpson v. Texas Tram, etc., Co.* (Civ. App.), 51 S. W. 655; *Orange Mill-Supply Co. v. Goodman* (Civ. App.), 26 S. W. 700, affirmed in 94 Tex. 701, no op.; *Pierce v. Galveston, etc., R. Co.* (Civ. App.), 108 S. W. 979; *Texas, etc., R. Co. v. Byrd* (Civ. App.), 110 S. W. 199; *Texas, etc., R. Co. v. Crump* (Civ. App.), 110 S. W. 1013; *Shaw v. Adams*, 2 App. Civ. Cases, § 177.

Refusal to grant continuance will not be reviewed in absence of bill of exceptions. *Harrison v. Cotton*, 25 Tex. 53.

"It has been repeatedly decided, that it should appear by a bill of exceptions that the action of the court in overruling the application for a continuance was excepted to at the time, so that the judge may give any explanation thereon which he may think necessary to sustain his ruling. (*Campion v. Angier*, 16 Tex. 93; *Parker v. McKelvain*, 17 Tex. 157; *Cotton v. State*, 32 Tex. 614, 640, and numerous others down to 40 Texas, inclusive.)" *Anderson v. State*, 42 Tex. 389.

"The correct practice doubtless is, in no case to revise the judgment of the court refusing a continuance, unless the party seeking a reversal on that ground has reserved the point by a bill of exceptions. It not unfrequently happens that we would be at a loss to discover upon what ground a continuance has been refused, were it not for reasons contained in the bill of exceptions. When called upon to sign a bill of exceptions, the court may state very satisfactory reasons, apparent to the court there, which would not otherwise be made to appear to this court; as, that the evidence sought was, in fact, within the reach of the party (*Hall v. York*, 16 Tex. 18), or there was evidence before the court that the affidavit was not in fact true."

Campion v. Angier, 16 Tex. 93. And see *Cocker v. State*, 31 Tex. 498.

The correct rule is in no case to revise a judgment refusing a continuance, unless the point has been reserved by bill of exceptions; but, as the practice has always been to consider the question as raised by the entries upon the record, it should not be suddenly changed, to the prejudice of parties litigant. *Dangerfield v. Paschal*, 20 Tex. 536.

In *McMahan v. Busby*, 29 Tex. 191, while it was held to be the better practice, in all cases, to except to the action of the court overruling a motion for a continuance, yet, as the affidavit wholly failed to show diligence, the court determined upon its sufficiency without a bill of exceptions.

The action of the court below in refusing to postpone the trial of a cause can not be considered in the absence of a bill of exceptions. *Moss v. Katz*, 69 Tex. 411, 6 S. W. 764.

An assignment of alleged error to the refusal to suspend a trial to permit a party to ascertain by whom certain facts could be proved will not be considered on appeal, where there is no statement, and it does not appear from appellant's brief that any bill of exceptions was reserved to the action of the court. *Pierce v. Galveston, etc., R. Co.* (Civ. App.), 108 S. W. 979.

Rule Not in Conflict with Statute.—The rule providing that, in the absence of a bill of exceptions, the overruling of applications for continuance will not be reviewed, held not in conflict with the statute. *St. Louis, etc., R. Co. v. Bowles*, 32 Tex. Civ. App. 118, 72 S. W. 451, affirmed in 97 Tex. 645, no op.

Substitutes for Bill Held Insufficient.—An exception noted in the judgment refusing a continuance will not supply the place of a proper bill of exceptions. *Simpson v. Texas Tram, etc., Co.* (Civ. App.), 51 S. W. 655, citing *Campion v. Angier*, 16 Tex. 93; *Harrison v. Cotton*, 25 Tex. 53, 54;

McMahan v. Busby, 29 Tex. 191, 195; Texas, etc., *R. Co. v. Hardin*, 62 Tex. 367; *Philipowski v. Spencer*, 63 Tex. 604; Texas, etc., *R. Co. v. Mallon*, 65 Tex. 115; *Waites v. Osborne*, 66 Tex. 648, 2 S. W. 665.

Where neither the contents of an application for a continuance, nor the grounds on which it was asked, are shown by the record, except in the motion for new trial, the ruling of the court on the application can not be reviewed, as the motion can not take the place of a bill of exceptions. *Bal-
lew v. Casey* (Sup.), 9 S. W. 189.

g. Rulings on Application for Change of Venue.

See, generally, the title **VENUE**.

In General.—The rulings of the court upon applications for change of venue, when sought to be complained of as erroneous, must be presented by a bill of exceptions. Rule 55 of Rules for District and County Courts. *Panhandle, etc., R. Co. v. Kirby* (Civ. App.), 108 S. W. 498.

By the express provisions of rule 55 (67 S. W. xxiv), the court's action in granting a change of venue to a county whose seat is not the least distant from the county seat where the case was brought will not be reviewed, in the absence of a bill of exceptions thereto, though such action is excepted to and the exception entered of record. *Panhandle, etc., R. Co. v. Kirby* (Civ. App.), 108 S. W. 498.

Insufficiency of Mere Statement of Facts on Issue Presented by Motion.

—A mere statement of facts on the issue presented by a motion for a change of venue, which nowhere contains an exception to the court's ruling, can in no view be construed a bill of exceptions for the purpose of reviewing the court's action in granting the change to a county whose seat is not the least distant from the county seat where the case was brought, even though the statement was filed in the

lower court within the time required by law. *Panhandle, etc., R. Co. v. Kirby* (Civ. App.), 108 S. W. 498.

"The fact that the action of the trial court was duly excepted to, and that the same was entered of record, will not supply the place of the necessary bill of exceptions. See *Alamo Fire Ins. Co. v. Lancaster*, 7 Tex. Civ. App. 677, 28 S. W. 126, affirmed in 93 Tex. 699, no op., and cases therein cited. The mere recitation, therefore, in the court's order changing the venue to Wilbarger county, that appellant excepted to the action of the court on the motion is insufficient, and it seems quite clear to us that the statement of facts hereinbefore referred to can in no view be construed as a bill of exceptions. It nowhere contains an exception to the court's ruling on the motion, and even if filed in the county court of Hardeman county within the time required by law, which is not made to affirmatively appear, it wholly fails to come within the accepted definitions of a bill of exceptions. See *Cates v. McClure*, 27 Tex. Civ. App. 459, 66 S. W. 224, affirmed in 95 Tex. 675, no op., and authorities cited in *Words and Phrases*, vol. 1, under title 'Bill of Exceptions,' p. 783." *Panhandle, etc., R. Co. v. Kirby* (Civ. App.), 108 S. W. 498.

h. Rulings in Regard to Pleadings.

Rulings on Demurrers or Exceptions to Pleadings.—A bill of exceptions or statement of facts is necessary in order to review a ruling on demurrer. *Harbert v. Henly*, 31 Tex. 666.

Assignment of error to action of trial court in sustaining exceptions to appellant's pleadings will not be considered on appeal where only evidence that exceptions were acted upon by the court at all, is certificate of clerk to copy of the judge's notes upon his docket, with statement that orders thus indicated were never carried into minutes of court. *Massie v. State Nat.*

Bank, 11 Tex. Civ. App. 280, 282, 32 S. W. 797, citing *Swearingin v. Wilson*, 2 Tex. Civ. App. 157, 21 S. W. 74.

Ruling Striking Out Plea or Answer.—Where entry is so indefinite as to create doubt as to which of two pleas was struck out, and there is no statement of facts or bill of exceptions, the ruling will not be revised on error. *Seawall v. Lowery*, 16 Tex. 47, 51.

There being neither a motion to strike out the defendant's answer, an exception to the answer, nor order of court upon such motion or exception, and the record containing neither bill of exceptions nor a statement of facts, the errors assigned, to the striking out the defendant's answer—that the plaintiff was a foreign administrator—and that interest was allowed according to the laws of the state of Kentucky, without proper allegation and proof—can not be considered. *Cannon v. Tompkins*, 22 Tex. 35.

Rulings on Special Pleas.—The action of the trial court in overruling a special plea will not be revised where there is no bill of exceptions showing the testimony on which the ruling was based. *Cadwallader v. Lovece*, 10 Tex. Civ. App. 1, 29 S. W. 666.

An assignment of error in refusing to sustain a plea of privilege to be sued in a certain county is not well taken, as presented, where the plea was contested on the merits, and appellants failed to reserve a bill of exceptions or statement of facts. *Varner v. Dexter Gin, etc., Ass'n* (Civ. App.), 39 S. W. 206.

Rulings upon Oral Pleadings in Justice's Court.—Since pleadings in justice court may be stated orally, and oral pleadings can not be incorporated in the record save by bill of exceptions, rulings of the court upon them can not be reviewed unless the pleadings are shown in that way; it being otherwise presumed that the pleadings were good as against the exceptions

taken. *Postal Tel. Co. v. Levy & Co.* (Civ. App.), 102 S. W. 134, citing *Williams v. Deen*, 5 Tex. Civ. App. 575, 24 S. W. 537.

i. Rulings on Admission or Exclusion of Evidence.

In General.—The rulings of the court below upon the admission or rejection of evidence, when sought to be complained of as erroneous, must be presented in a proper bill of exceptions. Rule 55 of Rules for District and County Courts. *Borden v. Le Tulle, etc., Co.* (Civ. App.), 99 S. W. 128; *Jones v. Neal*, 44 Tex. Civ. App. 412, 98 S. W. 417, affirmed in 102 Tex. 582, no op.; *Whitaker v. Gee*, 61 Tex. 217; *McGehee v. Lane*, 34 Tex. 390; *Roberts v. State*, 5 Tex. Cr. App. 141; *Willis v. Smith* (Civ. App.), 39 S. W. 377, reversed in 90 Tex. 635; *Holt v. Cave*, 38 Tex. Civ. App. 62, 85 S. W. 309, affirmed in 101 Tex. 641, no op.; *Phillips v. Texas Loan Co.*, 26 Tex. Civ. App. 505, 63 S. W. 1080, affirmed in 95 Tex. 684, no op.

Parties aggrieved by rulings of the district court on questions of evidence must make the rulings matter of record by proper bills of exception, in order to entitle themselves to a revision of the rulings by the supreme court. It does not suffice that the rulings were complained of in a motion for a new trial, no bill of exceptions having been taken. *McGehee v. Lane*, 34 Tex. 390.

The only objections to evidence that will be considered on appeal are those made in the trial court, as shown by the bill of exceptions. *Jones v. Neal*, 44 Tex. Civ. App. 412, 98 S. W. 417, affirmed in 102 Tex. 582, no op.

To entitle one to a revision of the ruling of the court below in regard to the admission or rejection of evidence, the matter must be so presented by bill of exceptions, filed in proper time, as to enable the court to fully understand and know all the facts on which the correctness or error of the ruling depends. Hence, when the decision

of a question attempted to be raised by exception depended on knowing the contents of a deposition, and the transcript contained an agreement signed by counsel as to what papers should be copied therein, and among those copied was the deposition, but there was no agreement, signed by counsel and approved by the trial court, that such deposition was used or offered on the trial, the bill of exceptions can not be considered. *Whitaker v. Gee*, 61 Tex. 217.

Admission of Evidence.—In the absence of a bill of exceptions, an assignment of error as to the admission of evidence is not available. *Ellis v. Marshall Car Wheel, etc., Co.*, 41 Tex. Civ. App. 501, 95 S. W. 689; *Spicer v. Taylor* (Civ. App.), 21 S. W. 314; *Feagan v. Barton-Parker Mfg. Co.*, 42 Tex. Civ. App. 373, 93 S. W. 1076; *Texas, etc., R. Co. v. Birdwell* (Civ. App.), 86 S. W. 1067; *Texas, etc., R. Co. v. Jowers* (Civ. App.), 110 S. W. 946.

Alleged error in the admission of testimony will not be considered on appeal where there was no bill of exceptions reserved except by the statement of facts filed more than ten days after the trial. *King v. Sassaman* (Civ. App.), 54 S. W. 304.

Alleged error in the reception of evidence can not be reviewed on appeal when no bill of exceptions is referred to in appellant's brief and none appears in the record. *Texas, etc., R. Co. v. Jowers* (Civ. App.), 110 S. W. 946.

Under rule 55 (67 S. W. xxiv), requiring rulings on the admission or rejection of evidence complained of as error to be presented by bills of exceptions, the refusal of a court to strike out answers of witnesses to interrogatories will not be reviewed where the matter is not presented by a bill of exceptions. *Borden v. Le Tulle, etc., Co.* (Civ. App.), 99 S. W. 128.

The ruling of the court on plaintiff's

exception to the reading of a certain deposition should have been presented by bill of exception embodying the grounds of objection before it could be revised. That not being done, the error complained of can not be considered. *Cundiff v. McLean*, 40 Tex. 391.

Where no bill of exceptions was taken to the ruling of the court overruling defendant's motion to suppress certain depositions, the error complained of is not the subject of revision on appeal. *Texas, etc., R. Co. v. Evans*, 2 Posey 318.

Where plaintiff made a written motion setting forth his grounds of objection to certain testimony, and praying for its exclusion, and an order was entered overruling the motion, which order contained a recital that plaintiff excepted in open court, it constituted no part of the record proper, in the sense that the same might be reviewed without a bill of exceptions. If the motion and order were regarded as a bill of exceptions, it was insufficient because not allowed by the court as such or approved by him. *Holt v. Cave*, 38 Tex. Civ. App. 62, 85 S. W. 309, affirmed in 101 Tex. 641, no op. *

Necessity for Bill in Addition to Statement.—A formal bill of exceptions is unnecessary if exceptions to the admissibility of evidence appears in statement of facts. *Howard v. North*, 5 Tex. 290.

Exceptions to admission of deeds in evidence, incorporated in statement of facts filed by order of the court after adjournment of court, can not be considered on appeal in absence of bill of exceptions. *Yoe v. Montgomery*, 68 Tex. 338, 4 S. W. 622.

Exclusion of Evidence.—The exclusion of evidence will not be reviewed on appeal where no bill of exceptions was reserved to the ruling. *Holmes v. Adams* (Civ. App.), 100 S. W. 816; *Durham v. Atwell* (Civ. App.), 27 S. W. 316; *German Ins. Co. v.*

Everett (Civ. App.), 36 S. W. 125.

The only question that can be considered in regard to excluded evidence is, when properly raised by bill of exceptions and urged by an assignment of error, the action of the court in excluding such evidence, for until admitted in evidence it can not be considered as such. *Stubblefield v. Hanson* (Civ. App.), 94 S. W. 406, affirmed in 101 Tex. 661, no op.

Rulings on the exclusion of evidence must be preserved by bill of exceptions, and not in the statement of facts. *Home Circle Soc. v. Shelton* (Civ. App.), 81 S. W. 84; *Scott v. Llano County Bank* (Civ. App.), 85 S. W. 301, reversed in 99 Tex. 221, 89 S. W. 749.

Where no bill of exceptions is taken to the action of a trial court in excluding certain depositions, there is nothing for the appellate court to pass on. *Noell v. Bonner* (Civ. App.), 21 S. W. 553.

In the absence of bill of exceptions approved by the trial court, recital in motion for new trial that certain evidence was offered and rejected is insufficient to have assignment of error to rejection of such evidence considered on appeal. *Burnett v. Powell*, 6 Tex. Civ. App. 39, 40, 25 S. W. 1030 (see 86 Tex. 382).

j. Want of Notice of Objections to Depositions.

Want of notice of objections in writing to depositions must be shown by bill of exceptions. *Garner v. Cutler*, 28 Tex. 175, 184.

k. Action of Court in Allowing Recall of Witness after Retirement of Jury.

After the retirement of the jury they recalled a witness and submitted to him a written question, which he answered. Held: The action of the court in this respect could not be revised when no objection thereto was saved by bill of exceptions. *Martin-*

Brown Co. v. Wainscott, 66 Tex. 131, 1 S. W. 264.

1. Improper Argument of Counsel.

See, generally, the title ARGUMENT OF COUNSEL, vol. 2, p. 42.

Alleged abuse of the privilege of argument by counsel can not be revised in the absence of bill of exceptions. *International, etc., R. Co. v. Mills*, 34 Tex. Civ. App. 127, 78 S. W. 11, affirmed in 98 Tex. 621, no op.

An assignment of error presenting objections to part of counsel's argument can not be considered on appeal, where there is no bill of exceptions approved by the court; affidavits presented in the motion for a new trial not being a sufficient substitute. *Colorado Canal Co. v. McFarland*, 50 Tex. Civ. App. 92, 109 S. W. 435.

Complaint urged to alleged improper remarks of counsel is properly made by bill of exceptions and not by motion for new trial accompanied by affidavits. *Gulf, etc., R. Co. v. Rowland* (Civ. App.), 35 S. W. 31, 32.

m. Action of Court in Interrupting Argument of Counsel.

A bill of exception to the action of the judge in the court below, in interrupting counsel while arguing the law to the court, to read to the jury a statute relating to the matter in controversy, does not disclose matter of which the supreme court can take judicial cognizance. *Edrington v. Rogers*, 15 Tex. 188.

n. Instructions.

Giving or Refusing.—Generally as to the necessity for a bill of exceptions to action of court in giving, refusing, or qualifying instructions, see post, "Instructions," II, B, 2, b.

Failure to Again Read General Charge When Giving Additional Instructions.—Where a case is submitted to a jury, and two days thereafter additional instructions are given, an error assigned because the court did

not again read the general charge when giving the additional instruction will be overruled, when, no bill of exceptions was reserved to the court's action, and the record does not show that the general charge was not again so given. *American Well Works v. De Aguayo* (Civ. App.), 53 S. W. 350, affirmed in 93 Tex. 724, no op.

Failure to Instruct Jury Not to Consider Certain Testimony.—In order to predicate error on the court's failure to instruct the jury not to consider certain testimony, a bill of exceptions must be reserved to the ruling. *San Antonio v. Wildenstein*, 49 Tex. Civ. App. 514, 109 S. W. 231, affirmed, no op.

Action of Court in Charging Jury Verbally.—In *Gulf, etc., R. Co. v. Holt*, 1 App. Civ. Cases, § 835, it was assigned as error that, upon the trial, the judge charged the jury verbally. There was, however, no bill of exceptions in the record presenting this action of the court, and it was therefore, held not subject to revision.

Statement of Court to Jury.—A statement by the court to the jury, to which no bill of exceptions was reserved, can not be considered on appeal. *Texas Telegraph & Telephone Co. v. Seiders*, 9 Tex. Civ. App. 431, 29 S. W. 258.

o. Submission of Issues.

A party who desires to review the action of the court in refusing to submit a case upon special issues should except to the ruling of the court and take a bill of exceptions thereto. *Galveston, etc., R. Co. v. Cody*, 92 Tex. 632, 51 S. W. 329, affirming 50 S. W. 135, 20 Tex. Civ. App. 520.

The failure of the court to submit certain issues to the jury can not be considered on review where the record fails to show by bill of exceptions or otherwise that special issues were presented to the court or called to its attention. *Kahler v. Carruthers*, 18 Tex. Civ. App. 216, 45 S. W. 160.

An assignment of error complaining of a refusal to submit the case to the jury on special issues is not reviewable, where there is no bill of exceptions taken to such action of the court. *Galveston, etc., R. Co. v. Robinett* (Civ. App.), 54 S. W. 263, affirmed in 93 Tex. 707, no op., citing *Galveston, etc., R. Co. v. Cody*, 92 Tex. 632, 51 S. W. 329, affirming 50 S. W. 135, 20 Tex. Civ. App. 520.

"We are of opinion that a party who desires to review the action of the court in refusing a submission upon special issues should except to the ruling of the court and take a bill of exceptions thereto. Such a request is neither a charge given nor a requested charge refused, and it stands upon a very different footing. The propriety of a bill of exceptions in such a case is shown by the very record before us. We are clearly of the opinion that a request for a submission upon special issues should be made before the main charge is given to the jury. If the proceedings are inserted in the transcript in the order of time, then the request in this case was made after the charge was given to the jury. This was too late. A proper bill of exceptions would have shown at what point in the progress of the trial the request was made. Being of the opinion that the action of the court in the particular we have had under consideration can not be reviewed in the absence of a bill of exceptions, the application is again refused." *Galveston, etc., R. Co. v. Cody*, 92 Tex. 632, 51 S. W. 329, affirming 50 S. W. 135, 20 Tex. Civ. App. 520.

p. Failure of Court to File Findings as Requested.

See, generally, the title FINDINGS OF COURT.

A bill of exceptions must be taken to the failure of the trial court to file conclusions of law and fact as requested, in order to entitle the matter

to consideration upon appeal. *Supreme Commandery Knights v. Rose*, 62 Tex. 321; *Hess v. Dean*, 66 Tex. 663, 2 S. W. 727; *Cleveland v. Sims*, 69 Tex. 153, 6 S. W. 634; *Cotulla v. Goggan & Bros.*, 77 Tex. 32, 13 S. W. 742; *Landa v. Heermann*, 85 Tex. 1, 19 S. W. 885; *Sloan v. Thompson*, 4 Tex. Civ. App. 419, 23 S. W. 613; *American, etc., Ins. Co. v. Green*, 16 Tex. Civ. App. 531, 41 S. W. 74, affirmed in 93 Tex. 531, no op.; *Wetz v. Wetz*, 27 Tex. Civ. App. 597, 66 S. W. 869; *Alamo Fire Ins. Co. v. Shacklett* (Civ. App.), 26 S. W. 630; *Hopson v. Schoelkopf* (Civ. App.), 27 S. W. 283; *Garza v. Western Mortg., etc., Co.* (Civ. App.), 27 S. W. 1090; *Maverick v. Burney* (Civ. App.), 30 S. W. 566, reversed in 88 Tex. 560.

Where there is a full statement of facts, the refusal of the trial court to file conclusions of law and fact, when asked to do so, is no ground of reversal, in the absence of a bill of exceptions. *Landa v. Heermann*, 85 Tex. 1, 19 S. W. 885, and *Cotulla v. Goggan*, 77 Tex. 32, 13 S. W. 742, followed. *Alamo Fire Ins. Co. v. Shacklett* (Civ. App.), 26 S. W. 630.

Failure of judge trying case without jury to file written conclusions of law and fact, is waived, in absence of a bill of exceptions, although a motion so to do had been granted appellant. *American, etc., Ins. Co. v. Green*, 16 Tex. Civ. App. 531, 41 S. W. 74, affirmed in 93 Tex. 531, no op.

Where it was not disclosed by the record or by bill of exceptions that a motion that the court file conclusions of law and fact was insisted on or called to the court's attention, the matter would not be considered on appeal. *Sloan v. Thompson*, 4 Tex. Civ. App. 419, 23 S. W. 613.

Where, on the last day of court, appellant's attorney knew that the trial judge would not file his conclusions of fact until after adjournment for the term, and did not take a bill of ex-

ceptions to such failure to file them during the term, he is not entitled on appeal to have the judgment reversed because of such failure to file them in due time. *Bradford v. Knowles*, 11 Tex. Civ. App. 572, 33 S. W. 149, affirmed in 93 Tex. 700, no op.

q. Action of Court in Refusing to Receive Verdict.

See, generally, the title VERDICT.

The trial court's action in refusing to receive the first verdict returned can not be reviewed when not presented by bill of exceptions. *Int. & G. N. R. R. Co. v. Stewart*, 57 Tex. 166.

r. Rulings on Objections to Award of Arbitrators.

Where a cause, pending in the district court, has been referred to arbitrators, and either party desires to object to the award because a day for the trial was not assigned by the clerk, or because he had no notice of the time and place of trial, or that the arbitrators were not sworn, he must bring his objections and the facts to the notice of the court below, and if his objections be overruled, he must cause the facts to appear in a bill of exceptions or statement of facts. *Hall v. Little*, 11 Tex. 404. See the titles ARBITRATION AND AWARD, vol. 2, p. 25; REFERENCE.

s. Rulings on Auditor's Report.

Complaint of the action of the court in refusing to strike out an auditor's report on motion should be based on a bill of exceptions reserved to such ruling. *Moore v. Waco Bldg. Ass'n*, 19 Tex. Civ. App. 68, 45 S. W. 974, affirmed in 93 Tex. 692, no op.

t. Refusal of District Court to Dismiss Appeal from County Court.

Refusal of district court to dismiss appeal from county court will not be considered where there is no bill of exceptions and nothing in statement of facts to show facts on which error

depended. *Higgs v. Garrison* (Civ. App.), 27 S. W. 34, 35.

u. Violation of Rules of Court.

Under court rules No. 121, which provides that the party prejudiced by a violation of the rules may reserve a bill of exceptions and assign the same as error, an assignment of error based upon an alleged violation of the rules will not be considered when no exception has been reserved. *Glenn v. Kimbrough*, 70 Tex. 147, 8 S. W. 81.

2. Matters Reviewable in Absence of Bill of Exceptions.

a. General Rule as to Matters Constituting Record.

A bill of exceptions is not necessary to show facts that are properly matters of record. *Cunningham v. Wheatly*, 21 Tex. 184.

Though the case comes before the appellate court without a statement of facts or bill of exceptions, still, if there is error assigned or apparent on the face of the record, or the special verdict found by the jury does not warrant the judgment, it must be reversed. *Frost v. Frost*, 45 Tex. 324.

Where the ruling or other action of the court appears otherwise of record, no bill of exceptions shall be necessary to reserve an exception thereto. *Sayles' Civ. Stats.*, art. 1364 (1362).

It is expressly provided by rule 53 of rules for district and county courts that "there shall be no bills of exceptions taken to the judgments of the court rendered upon those matters which at common law constitute the record proper in the case, as the citation, petition, answer, and their supplements and amendments, and motion for new trial, or in arrest of judgment, and final judgment." *Supreme Commandery Knights v. Rose*, 62 Tex. 321.

b. Instructions.

Errors in Instructions.—"It is well settled by decisions prior to the Rev. Stat. that an erroneous charge will not, in a civil case, be sufficient ground

for reversal, when no exception is taken to it, nor additional nor counter charges asked, unless it clearly appears that the jury were misled by the charge given and complained of. (*W. & W. Con. Rep.*, §§ 413, 626, 710; *Mills v. Ashe*, 16 Tex. 295, 304; *Cook v. Wootters*, 42 Tex. 294.)" *Wallis & Co. v. Eichelberger*, 2 App. Civ. Cases, §§ 133, 135.

Under the present practice, however, no bill of exceptions need be taken to a charge of the court, in order to secure the action of the supreme court thereon, regarding any errors it may contain. *Western Union Tel. Co. v. Edsall*, 63 Tex. 668; *Missouri, etc., R. Co. v. Rabb*, 3 App. Civ. Cases, § 37.

"The statute provides that the charge is to be filed, 'and shall constitute a part of the record of the cause, and shall be regarded as excepted to, and subject to revision for errors therein, without the necessity of taking any bill of exceptions thereto.' *Rev. Stat.*, art. 1318." *Western Union Tel. Co. v. Edsall*, 63 Tex. 668. See, also, *Atchison, etc., R. Co. v. Click*, 5 Tex. Civ. App. 224, 23 S. W. 833; *Wallis & Co. v. Eichelberger*, 2 App. Civ. Cases, §§ 133, 135.

Article 1318, *Rev. Stat.*, does not require a bill of exceptions to be taken to the charge, but it is filed and constitutes a part of the record, and is regarded as excepted to, and subject to revision for errors therein. Defendant had a right to present special instructions on the subject, but his failure to present them would not deprive him of the right to have none but the proper issue submitted to the jury. *Atchison, etc., R. Co. v. Click*, 5 Tex. Civ. App. 224, 23 S. W. 833.

Giving, Refusing or Qualifying Instructions.—Under the present *Rev. Stat.*, it is expressly provided that the ruling of the court in the giving, refusing or qualifying of instructions to the jury shall be regarded as excepted to in all cases, without the necessity of

taking any bill of exceptions thereto. Act 1846, §§ 100, 101, Sayles' Civ. Stats., arts. 1363, 1361.

"The statute appears to provide that no bill of exceptions is required to bring up for review instructions that are given or refused and so marked by the judge. Rev. Stat., art. 1320." *Redus v. Burnett*, 59 Tex. 576.

By rule 54 of rules for the district and county courts, "the charges of the court that are given, and those asked that are refused, when signed by the judge and filed by the clerk being made thereby a part of the record by statute, should not, in civil causes, be made a part of a bill of exceptions." *Supreme Commandery Knights v. Rose*, 62 Tex. 321.

It has sometimes been said that a party wishing to take advantage of any error in the charge of the court must except. But by this it is not intended that he shall take a bill of exceptions, for he may attain the same purpose by asking such instructions as will place the law of the case in a proper light before the jury, which, if refused, will have the effect of a bill of exceptions. (Hart. Dig., art. 754.) *Earle v. Thomas*, 14 Tex. 583.

Parties must submit to the court, in writing, whatever instructions they desire to be given; and to their being given or refused no formal bill of exceptions is necessary. *Jones v. Thurmond*, 5 Tex. 318.

"In our practice the parties are required to submit to the court in writing such instructions as they may desire, which the court will give or refuse, and as to these no formal bill of exceptions is necessary. (Acts of 1846, p. 390, sec. 100.) If in the charge of the court there is anything to which either party desires to except, it will be in time to indicate his exception as soon as the jury shall have retired; and the instructions indicated, when reduced to writing and signed by the judge, may be filed at any time during

the term and made a part of the record. The whole term is allowed for reducing to form the statement of facts. No reason is perceived why the same period may not also be given for placing upon the record the instructions of the court, provided the exceptions to them were taken in time. It is the common practice, where exceptions were taken during the trial, to reduce to form and sign the bill of exceptions afterwards." *Jones v. Thurmond*, 5 Tex. 318.

c. Where Judgment Not Supported by Pleadings.

Judgment not supported by pleadings will be reversed although there are no statement of facts or bill of exceptions. *Morris v. Montgomery*, 2 Posey 385.

Where there are no pleadings to support the judgment, it will be reversed, although there be no statement of facts, or bill of exceptions, in the record. *Neill v. Newton*, 24 Tex. 202.

d. Dismissal, at Plaintiff's Instance, After Plea in Reconvention by Defendant.

See, generally, the title DISMISSAL, DISCONTINUANCE AND NON-SUIT, vol. 6, p. 433.

Dismissal, at instance of plaintiff, after plea in reconvention by defendant, is deemed a ruling adverse to defendant, and bill of exceptions is unnecessary. *Cunningham v. Wheatly*, 21 Tex. 184.

e. Refusal to Reform Judgment.

No bill of exceptions is necessary where the action of the court in refusing to reform a judgment is apparent on the record. *Randall v. Collins*, 52 Tex. 435.

f. Presentment and Allowance of Bill of Exceptions after Expiration of Prescribed Time.

A bill of exceptions is not necessary to present an objection that appellant's bill of exceptions was presented and allowed after the time for its pre-

sentment had expired. *San Antonio & A. P. Ry. Co. v. Holden*, 55 S. W. 603, 23 Tex. Civ. App. 144.

3. Substitutes for Bill of Exceptions.

Statement of Facts as Serving Purpose of Bill.—Under the liberal Texas practice, discarding mere matters of form, the statement of facts may be made to serve the purpose also of a bill of exceptions; for the reason that it bears upon its face the concurrent assent of the parties and the court. *Roundtree v. Galveston*, 42 Tex. 612.

That Action of Court Was Excepted to and Same Entered of Record Not a Substitute for Bill.—The fact that action of the court below was excepted to, and the same was entered of record, does not supply necessary bill of exceptions. *Alamo Fire Ins. Co. v. Lancaster*, 7 Tex. Civ. App. 677, 678, 28 S. W. 126, affirmed in 93 Tex. 699, no op.

Exceptions to an instruction, in order to be considered on appeal, must be taken at the time, and a bill of exceptions prepared, tendered to, and signed by the judge, after having been submitted to the opposing attorney as required by statute. The mere statement of the judge, of the facts in the record, although written by him and signed officially, can not be received as its substitute. *Owens v. Missouri Pac. Ry. Co.*, 67 Tex. 679, 4 S. W. 593.

Stenographer's Transcript as Bill of Exceptions.—See the title STENOGRAPHERS.

Affidavits in Appellate Court Not Admissible to Supply Bill of Exceptions.—See, generally, the title APPEAL AND ERROR, vol. 1, p. 313.

Affidavits in the supreme court are not admissible to supply either a statement of facts or bill of exceptions. *Live Oak County v. Heaton*, 39 Tex. 499.

C. FORM, REQUISITES AND SUFFICIENCY.

1. No Particular Form of Words Required.

It is expressly provided by statute

that "no particular form of words shall be required in a bill of exceptions." Sayles' Civ. Stats., art. 1361 (1359).

2. Necessity for Compliance with Statute and Rules of Court.

Bills of exception are intended to make that a part of the record which otherwise would not be, and to accomplish this object, the material requisites of the statute and of the prescribed rules of practice should be complied with. *Farrar v. Bates & Co.*, 55 Tex. 193; *Lanier v. Perryman*, 59 Tex. 104, 110.

3. Propriety of Embodying Several Exceptions in One Bill.

In *Stephens v. Herron*, 99 Tex. 63, 87 S. W. 326, the supreme court held that while in regulating the manner in which bills of exception should be made parts of the record, the legislature had in mind the preparation of a separate bill for each exception, yet exceptions would be good though more than one be embodied in a single bill.

4. Contents and Sufficiency.

a. In General.

It is the duty of a party complaining of denial to him of a right upon the trial to take such bill of exceptions as will show appellate court what he proposed to do and what the judge refused to permit him to do. *Barker v. Swenson*, 66 Tex. 407, 413, 1 S. W. 117; *Dunham v. Forbes*, 25 Tex. 23; *Moss v. Cameron*, 66 Tex. 412, 1 S. W. 177.

"It is for the party claiming that there was error, to show it by a bill of exceptions presenting the question passed upon." *Flanagan v. Boggess*, 46 Tex. 330.

Where bill of exceptions does not indicate the point decided or the exception sustained, it will be disregarded. *Stephens v. Bowerman*, 27 Tex. 18.

He who complains of an erroneous ruling of the court must preserve such evidence of it in the record

as will leave no doubt about the matter in the appellate court. *Baily v. Trammell*, 27 Tex. 317.

b. Rulings and Exceptions Thereto.

Showing of Ruling Complained of.—A bill of exceptions must show the particular ruling complained of. *Anderson v. Anderson*, 23 Tex. 639; *Simonton v. Forrester*, 35 Tex. 584.

Necessity for Showing That Ruling Was Excepted to.—Error in admitting a document in evidence on trial will not be considered on appeal, where the bill of exceptions does not show that any exception was taken to the ruling admitting the evidence. *Foley v. Houston, etc., R. Co.*, 50 Tex. Civ. App. 218, 108 S. W. 169, 110 S. W. 96.

A bill of exceptions to the exclusion of evidence should show that exception was taken to such exclusion. *Fox v. Brady*, 1 Tex. Civ. App. 590, 20 S. W. 1024.

Though evidence incorporated in a statement of facts does not appear therein to have been excepted to, it is sufficient if bill of exceptions shows that an exception was reserved. *Heffron v. Pollard*, 73 Tex. 96, 98, 11 S. W. 165.

Where a bill of exceptions to an alleged error in the admission of evidence failed to show that the trial court admitted the evidence, or that an exception was reserved, but merely showed that certain evidence was offered, to which an objection was taken, and the ground of the objection, the alleged ruling could not be reviewed. *Hausmann v. Trinity, etc., R. Co.* (Civ. App.), 82 S. W. 1052, affirmed in 98 Tex. 619, no op.

Generally, as to the necessity for a bill of exceptions to alleged error in the admission or exclusion of evidence to show that such evidence was admitted or excluded, see post, "Showing as to Court's Action," II, C, 4, c, (2), (f), aa.

c. Objections to Ruling or Action of Court with Circumstances and Evidence Explaining Same.

(1) General Rule Stated and Construed.

Provisions of Statute and Rules of Court.—The bill of exceptions should state the objection to the ruling or action of the court, with such circumstances, or so much of the evidence as may be necessary to explain it, and no more, and the whole as briefly as possible. *Sayles Civ. Stats.*, art. 1361, (1359). *Hurd v. Texas Brewing Co.*, 21 Tex. Civ. App. 296, 51 S. W. 883, 57 S. W. 573, affirmed in 93 Tex. 664, no op.; *Adams v. Missouri, etc., R. Co.* (Civ. App.), 70 S. W. 1006; *Anderson v. Anderson*, 28 Tex. 639.

When objections are taken to the ruling of the trial court which did not ordinarily form a part of the record, not only must exceptions be taken and presented by formal bill of exceptions or by statement of facts, but all the facts and circumstances pertinent to the exceptions, and necessary to enable the supreme court to determine the questions decided, must also be set forth in the bill or statement of facts, or be identified and referred to therein. *Griffin v. Chadwick*, 44 Tex. 406.

"Rule 59 of the district courts is as follows: 'Bills of exceptions must state enough of the evidence or facts proved in the case, to make intelligible the ruling of the court excepted to, in reference to the issue made by the pleadings.' * * * This rule is not of modern origin, but has been enforced almost from the beginning of our judicial system. *Burleson v. Hancock*, 28 Tex. 81, 83; *Jones v. Cavasos*, 29 Tex. 428, 432; *Bast v. Alford*, 22 Tex. 399; *King v. Gray*, 17 Tex. 62, 71; *Styles v. Gray*, 10 Tex. 503, 507." *Hereford Cattle Co. v. Powell*, 13 Tex. Civ. App. 496, 36 S. W. 1033, affirmed in 93 Tex. 731, no op. See, also, *Stark v. Ellis*, 69 Tex. 543, 7 S. W. 76.

It seems that, in taking a bill of exceptions to the decision of a motion which involves matters of fact, the matters of fact should be stated; or it should be stated that no evidence was offered respecting the same, otherwise the presumption will be that such evidence was offered, and in the absence thereof the decision can not be revised. *Ponton v. Bellows*, 13 Tex. 254.

The supreme court will not reverse for insufficiency of evidence, unless the facts are set out by bill of exceptions. *Mann v. Thurston*, Dallam 370.

Showing of Error Prejudicial to Complainant.—It must appear from the bill of exceptions that error to the prejudice of the party complaining has been done. *Hurd v. Texas Brewing Co.*, 21 Tex. Civ. App. 296, 51 S. W. 883, 57 S. W. 573, affirmed in 93 Tex. 664, no op.

"Every presumption is in favor of the action of the court, and the circumstances may have been such as to show that the court's discretion was properly exercised in the matter." *Hurd v. Brewing Co.*, 21 Tex. Civ. App. 296, 51 S. W. 883, 57 S. W. 573, affirmed in 93 Tex. 664, no op.

It is the duty of the party complaining of the rulings of the court below to show the particulars in which they are erroneous to his injury. *Pridham v. Weddington*, 74 Tex. 354, 12 S. W. 49; *Beeman v. Jester Bros.*, 62 Tex. 431, 433; *Moss v. Cameron*, 66 Tex. 412, 1 S. W. 177.

"In the absence of a statement of facts, in order to show that an error has been committed to the plaintiff's injury, either in the charge of the court, the refusal of instructions or the rejection of evidence, the bill or bills of exception must disclose facts enough to show that the supposed error is not merely abstract, but one which may have operated to the injury of the complaining party." *Liton v. Thompson*, 2 Posey 577.

7 Tex—8

Grounds of Objection.—A bill of exceptions must state, not only the rulings of the lower court, objected to, but also and specifically, the grounds of objection there taken. *Simonton v. Forrester*, 35 Tex. 584; *Dunham v. Forbes*, 25 Tex. 23; *Scott v. State*, 25 Tex. Supp. 168; *Gaines v. Salmon*, 16 Tex. 311; *Jones v. Thurmond*, 5 Tex. 318; *Harlan v. Baker*, Dallam 378.

Strong equities may, however, induce court to waive strictly technical compliance with this rule. *Simonton v. Forrester*, 35 Tex. 584.

It is presumed that bill of exceptions gives objections and rulings as they were. *Oppenheimer v. Robinson*, 87 Tex. 174, 27 S. W. 95.

Only Such Facts to Be Set Out as Are Necessary for Proper Understanding of Court's Action.—All facts and circumstances pertinent to the exceptions and necessary to enable the court to properly understand and determine the questions decided below must be set forth in the bill of exceptions or identified and referred to therein so as to become part of the record. *Griffin v. Chadwick*, 44 Tex. 406, 408.

Only such facts are set out in the bill of exceptions, as are necessary for the proper understanding of the action of the court to which the exception is taken. *Roundtree v. Galveston*, 42 Tex. 612.

(2) Applications of Rule to Particular Rulings or Actions of Court.

1. Rulings on Motions for Continuance.

Ground of Court's Action.—A bill directed to the action of the trial court in overruling a motion for a continuance should fully state the ground on which the action of the court in overruling the motion was based. *Texas & P. Ry. Co. v. Hardin*, 62 Tex. 367.

Statement of Material Facts.—The refusal of the court to grant a continuance will not be revised unless the record contains a bill of exceptions in which the material facts are stated.

Parker v. McKelvain, 17 Tex. 157, 159.

Setting Out or Identifying Application for Continuance.—The action of the trial court in overruling a motion for a continuance will not be reviewed where the bill of exceptions thereto does not contain the motion, or in any other way sufficiently identify it. *Chicago, etc., R. Co. v. Long*, 32 Tex. Civ. App. 40, 74 S. W. 59, affirmed in 97 Tex. 69.

Where the bill of exceptions to the court's refusal to grant a continuance neither includes the application nor in any manner brings the same before the appellate court, an assignment of error based on the refusal is of no avail to appellant. *Ft. Worth, etc., R. Co. v. Partin*, 33 Tex. Civ. App. 173, 76 S. W. 236, affirmed in 97 Tex. 632, no op.

An application for continuance need not be copied in the bill of exceptions. *Wilborn v. Elmendorf* (Civ. App.), 40 S. W. 1059.

Setting Out Affidavit on Which Motion for Continuance Based.—Bill of exceptions on appeal from order denying motion for continuance based on affidavit, should set out said affidavit in full. *Bruckmiller v. Wolf*, 37 Tex. 342, 343.

"We think there is another very cogent reason for requiring not only a bill of exceptions, but also that the bill of exceptions should generally set out in full the affidavit upon which the motion was founded. And that is the necessity of an identification of the very affidavit upon which the order of the court was made. It is well known to the profession that on the trial of causes in the district court, there is necessarily much confusion in using and keeping the numerous papers filed in a cause in that court, and it not unfrequently happens that more than one affidavit is made at the same term, though but one perhaps has ever come to the knowledge of the court; and in such a case it might be quite impossible to determine, without a bill of

exceptions as herein indicated, which affidavit was, and which was not the basis of the ruling of the court. We think the rule as heretofore established by this court, too well founded in wisdom and good practice, to be disregarded in this case, and we must therefore decline to consider appellant's first assignment of errors, for the reason herein given." *Bruckmiller v. Wolf*, 37 Tex. 342.

It is improper to incorporate in the transcript an affidavit for continuance unless it be included in a bill of exceptions to the ruling of the court thereon. *Morris v. Files*, 40 Tex. 375.

"If parties desire to have this court review the action of the district in refusing an application for a continuance, it is their duty to incorporate the ruling of the court and their exception taken at the time into the record by a bill of exception. A departure from this well-established rule is forbidden alike by principle and policy, for when the bill of exceptions is presented to the judge, he has an opportunity, before ordering its incorporation into the record of the case, not only to see that nothing improper is stated in the bill, but he may also have all the facts stated, and, if he desire it, matters of explanation which induced the ruling to which exception is taken. The recitation in the minutes of the court on the application for continuances does not supply the place of the bill of exceptions. It forms no part of the judgment of the court in the cause. It is but the recital of facts transpiring during the progress of the trial, of which no record was required to be made. But even if the recital in the entry can be made to supply the place of the bill of exceptions, which we are not called upon now to decide, unquestionably it would have to show the fact that the ruling of the court on the application was excepted to, which is not done in this case." *Morris v. Files*, 40 Tex. 375.

Showing as to Whether Overruled Application for Continuance Was First, Second or Third.—A bill of exceptions to the overruling of an application for the continuance should show whether it was the first or subsequent application. *Arnold & Co. v. Hockney & Bro.*, 51 Tex. 46, 48; *City Nat. Bank v. Stout*, 61 Tex. 567, 570; *Watkins v. Atwell* (Civ. App.), 45 S. W. 404.

Showing as to Ground of Overruled Application for Continuance.—The action of the court below in overruling an application for a continuance will not be reviewed by an appellate court in the absence of a bill of exceptions showing the grounds of the application. *Strain v. Greer County* (Sup.), 19 S. W. 513.

Showing as to Diligence in Issuing Subpoena Where Continuance Refused.—Subpoenas are not copied into the record and on refusal of continuance bill of exception should show due diligence in issuing subpoena. *Baker v. Kellogg*, 16 Tex. 117, 118.

(b) Rulings on Pleadings.

The sufficiency of oral pleadings in justice's court will not be reviewed on appeal, unless such pleadings, together with the objections interposed, and the rulings of the court thereon, are fully shown by bills of exceptions; and the brief statement of the pleadings required to be noted in the justice's docket will not supply the place of such a bill. *Williams v. Deen*, 5 Tex. Civ. App. 575, 24 S. W. 536.

A bill of exceptions, on a judgment rendered on an appeal from a justice, showing that a party "claimed that he had pleaded" a certain issue orally, is not sufficient to establish the fact that such oral plea was made. *Stanger v. Dorsey*, 55 S. W. 129, 22 Tex. Civ. App. 573.

A judgment overruling defendant's plea of privilege will not be revised where the evidence on which the ruling was based is not preserved by bill

of exceptions. *Campbell v. Cates* (Civ. App.), 51 S. W. 268.

The court below overruled plaintiff's exceptions to the defendant's plea to the jurisdiction, and rendered a judgment dismissing plaintiff's suit. Plaintiff's bill of exceptions recited that by agreement of parties the issue was submitted to the judge without a jury, and that the judgment was rendered "after hearing the evidence and the argument of counsel." The issue on the plea to the jurisdiction presented questions of fact as well as of law, and there was no statement of facts, nor did the bill of exceptions recapitulate the evidence adduced. Held, that there being no means whereby this court can be put in possession of the evidence adduced upon the issue, the judgment can not be revised, although, so far as the record discloses, there appears to have been no good reason for sustaining the plea to the jurisdiction. *Chandler v. Sappington*, 36 Tex. 272.

(c) Rulings as to Amendments.

Refusal of leave to file a trial amendment will not be deemed an abuse of the court's discretion where the grounds of the ruling and the circumstances relating thereto are not set out in the bill of exceptions. *Rev. Stat.*, arts. 1188, 1361. *Hurd v. Texas Brewing Co.*, 21 Tex. Civ. App. 296, 51 S. W. 883, 57 S. W. 573, affirmed in 93 Tex. 664, no op.

Bill of exceptions to refusal to allow amendment should show amendment proposed, and state facts upon which court acted. *DeWitt v. Jones*, 17 Tex. 620, 624.

(d) Rulings on Objections to Trial Judge.

The statement of facts was on motion stricken from the record. An exception was taken in the court below to the action of the special judge in overruling objections to his trying the cause; the ground of the objection being that he was the attorney for a

claim against an insolvent assignor, and could not sit as judge in a cause involving the validity of the assignment. Held, that in the absence of any statement in the bill of exceptions showing the ground on which the objection was overruled, it will be presumed that it was because the alleged ground of disqualification did not exist. *King v. Pfeiffer & Co.*, 62 Tex. 307.

(3) Actions of Court as to Acceptance of Jurors, Allowance of Challenges, etc.

A bill of exceptions complaining of the acceptance on the jury of two men who had not paid their poll tax for the preceding year, which recited the number of persons in the county who had paid their poll tax and the number who had proved their exemption from the tax, but failed to show how many of those persons were qualified jurors, whether the jurors complained of actually owed a poll tax and were not exempt, that any peremptory challenges were directed to poll tax delinquents, and that the party complaining was in any wise injured by the acceptance of the jurors, is defective. (Civ. App.), *San Antonio & A. P. Ry. Co. v. Lester*, 84 S. W. 401, reversed, 89 S. W. 752, 99 Tex. 214.

It seems that a bill of exception to action of the court in allowing each of several defendants six peremptory challenges should show specifically that the party excepting to such ruling was prejudiced thereby. *Wagoner v. Dodson*, 96 Tex. 6, 68 S. W. 813, 69 S. W. 993.

(f) Rulings on Evidence.

aa. Showing as to Court's Action.

Showing That Evidence Complaind of Was Admitted.—Where the bill of exceptions fails to show that the testimony complained of was introduced in evidence, the court on appeal need not search the record to ascertain if the testimony was in fact introduced, but will disregard the assignment of er-

ror. *Jamison v. Dooley*, 79 S. W. 91, 34 Tex. Civ. App. 428, affirmed 82 S. W. 780, 98 Tex. 206.

Bills of exceptions to the overruling of objections to offered evidence, which do not show that such evidence was admitted, fail to show error. *Chicago, R. I. & T. Ry. Co. v. Halsell*, 80 S. W. 140, 35 Tex. Civ. App. 126, judgment affirmed 83 S. W. 15, 98 Tex. 244.

A bill of exceptions to an alleged error in the admission of evidence which fails to show that the trial court admitted the evidence, is insufficient. *Hausmann v. Trinity, etc., R. Co.* (Civ. App.), 82 S. W. 1052, affirmed in 98 Tex. 619, no op.

Bill of exceptions to refusal to suppress deposition on ground that the officer taking it failed to write his name across the seal, should show that some part of such deposition was read in evidence. *Western Union Tel. Co. v. Hinkle*, 3 Tex. Civ. App. 518, 22 S. W. 1004.

An assignment of error to the court's refusal to strike out part of the answer of a witness, testifying by deposition, will not be sustained where neither the bill of exceptions taken nor the statement of facts shows that the objectionable deposition was read to the jury. *Bell v. Bates*, 36 Tex. Civ. App. 233, 81 S. W. 551.

Error in the admission of evidence can be shown on review only by a bill of exceptions, in which it must be made to appear not only that objectionable evidence was offered, but that a valid objection to its admission was timely interposed, and that the objection was overruled, and the evidence admitted. *Saenz v. Mumme & Co.* (Civ. App.), 85 S. W. 59, citing *Fox v. Brady*, 1 Tex. Civ. App. 590, 20 S. W. 1024.

As to necessity for testimony, stated by the bill of exceptions to have been given, to be set forth in the statement of facts, in order that objections to

such testimony may be considered, see post, "Incorporation of Evidence Admitted or Excluded," II, C, 4, c, (2), (f), dd.

Showing as to Offer and Exclusion of Evidence.—Bill of exceptions must distinctly show that the evidence excluded was offered at a proper time and that the court refused to admit it. *Litton v. Thompson*, 2 Posey 577, 580; *Anderson v. Anderson*, 23 Tex. 639.

Where a bill of exceptions does not show testimony was excluded or that any objection was made to its introduction nor that any exception was taken to its exclusion, if excluded, an assignment of error complaining of its exclusion can not be sustained. *Fox v. Brady*, 1 Tex. Civ. App. 590, 20 S. W. 1024.

When a bill of exceptions is taken to the exclusion of evidence, the bill of exceptions as well as the brief of counsel, who claims that the ruling was erroneous, should both show the objection made and sustained. *Johnson v. Crawl*, 55 Tex. 571, citing *Whitehead v. Foley*, 28 Tex. 268; *Hagerty v. Scott*, 10 Tex. 525.

Failure to Show That Particular Person Was Offered as a Witness.—Error in refusing to permit defendant to prove a certain fact by a particular witness is not shown by a bill of exceptions in which it does not appear that such person was offered as a witness on that subject. *Hurst v. McMullen* (Civ. App.), 47 S. W. 666, rehearing denied (Civ. App.), 48 S. W. 744.

Statement as to Time of Motion to Withdraw Testimony from Jury.—Bill of exceptions stating refusal to withdraw testimony from jury should state when motion was made. *Gulf, etc., R. Co. v. Rowland* (Civ. App.), 23 S. W. 421, 422.

bb. Objections, and Grounds Thereof.
(aa) General Rule.

It is the established rule that bills of exception, in order to be considered

by appellate courts, must show the objection made to the admission or exclusion of evidence. *Hagerty v. Scott*, 10 Tex. 525; *Croft v. Rains*, 10 Tex. 520; *Wright v. Thompson*, 14 Tex. 558; *Hamilton v. Rice*, 15 Tex. 382; *Harris v. Leavitt*, 16 Tex. 340; *Fulton v. Bayne*, 18 Tex. 50; *Butler v. Dunagan*, 19 Tex. 559; *Rector v. Hudson*, 20 Tex. 234; *Frizzell v. Johnson*, 30 Tex. 31; *Whitehead v. Foley*, 28 Tex. 268; *Johnson v. Newman*, 35 Tex. 166; *Simonton v. Forrester*, 35 Tex. 584; *Griffin v. Chadwick*, 44 Tex. 406; *Flanagan v. Boggess*, 46 Tex. 330; *Norvell v. Phillips*, 46 Tex. 161; *Ragsdale v. Robinson*, 48 Tex. 379; *Houston, etc., R. Co. v. Knapp*, 51 Tex. 569, 577; *Young v. O'Neal*, 54 Tex. 544; *Johnson v. Crawl*, 55 Tex. 571; *Underwood v. Coolgrove*, 59 Tex. 164; *Lockett v. Schurenberg*, 60 Tex. 610; *Brothers v. Mundell*, 60 Tex. 240; *Endick v. Endick*, 61 Tex. 559; *Bonart v. Waag*, 61 Tex. 33; *Franklin v. Tierman*, 62 Tex. 92; *Houston, etc., R. Co. v. Adams*, 63 Tex. 200; *G. H. & S. A. R. Co. v. Gage*, 63 Tex. 568, 575; *Heffron v. Pollard*, 73 Tex. 96, 11 S. W. 165; *Torrey v. Cameron & Co.*, 74 Tex. 187, 190, 1 S. W. 1088; *Kimmarle v. Houston, etc., R. Co.*, 76 Tex. 686, 12 S. W. 698; *Arambula v. Sullivan*, 80 Tex. 615, 16 S. W. 436; *Stephens v. Moth*, 81 Tex. 115, 16 S. W. 731; *Opferheimer v. Robinson*, 87 Tex. 174, 27 S. W. 95; *Waller v. Leonard*, 89 Tex. 507, 35 S. W. 1045, reversing 34 S. W. 789; *Wheeler v. Taylor, etc., R. Co.*, 91 Tex. 356, 43 S. W. 876, affirming 41 S. W. 517; *New York, etc., Steamship Co. v. Island City Boating Ass'n*, 2 Tex. Civ. App. 490, 21 S. W. 1007; *Western Union Tel. Co. v. Arwine*, 3 Tex. Civ. App. 156, 22 S. W. 105; *Smith v. Powell*, 5 Tex. Civ. App. 373, 378, 23 S. W. 1109; *Alamo Fire Ins. Co. v. Lancaster*, 7 Tex. Civ. App. 677, 28 S. W. 126, affirmed in 93 Tex. 699, no op.; *Cabell v. Halloway*, 10 Tex. Civ. App. 307, 31 S. W. 201,

affirmed in 93 Tex. 656, no op.; Texas, etc., *Coal Co. v. Lawson*, 10 Tex. Civ. App. 491, 31 S. W. 847; *Kolp v. Specht*, 11 Tex. Civ. App. 685, 33 S. W. 714, affirmed in 93 Tex. 665, no op.; *Cunningham v. Holt*, 12 Tex. Civ. App. 150, 33 S. W. 981, affirmed in 93 Tex. 658, no op.; *Wallace v. Byers Bros.*, 14 Tex. Civ. App. 574, 38 S. W. 574, affirmed in 93 Tex. 676; *Ingenhuett v. Hunt*, 15 Tex. Civ. App. 248, 39 S. W. 310, affirmed in 93 Tex. 710, no op.; *Hendricks v. Huffmeyer*, 15 Tex. Civ. App. 93, 38 S. W. 523, affirmed in 90 Tex. 577; *Gulf, etc., R. Co. v. Brown*, 16 Tex. Civ. App. 111, 40 S. W. 608 (see 93 Tex. 684, no op.); *Green v. White*, 18 Tex. Civ. App. 509, 45 S. W. 389, affirmed in 93 Tex. 708, no op.; *Grinnan v. Rousseaux*, 20 Tex. Civ. App. 19, 48 S. W. 58, 781, affirmed in 93 Tex. 661, no op.; *Herndon v. De Cardovo*, 22 Tex. Civ. App. 202, 54 S. W. 401; *Clark v. McKnight*, 25 Tex. Civ. App. 60, 61 S. W. 349, affirmed in 94 Tex. 694, no op.; *Chicago, etc., R. Co. v. Long*, 26 Tex. Civ. App. 601, 65 S. W. 882 (see 95 Tex. 681, no op.); *Caplen v. Hawkins*, 27 Tex. Civ. App. 608, 66 S. W. 471, affirmed in 95 Tex. 674, no op.; *Lindsey v. State*, 27 Tex. Civ. App. 540, 66 S. W. 332; *Metropolitan Life Ins. Co. v. Gibbs*, 34 Tex. Civ. App. 131, 78 S. W. 398; *Kesterson v. Bailey*, 35 Tex. Civ. App. 235, 80 S. W. 97, affirmed in 98 Tex. 622, no op.; *Jones v. Humphreys*, 39 Tex. Civ. App. 644, 88 S. W. 403, affirmed in 101 Tex. 645, no op.; *Ft. Worth, etc., R. Co. v. James*, 39 Tex. Civ. App. 408, 87 S. W. 730; *St. Louis, etc., R. Co. v. Boyd*, 40 Tex. Civ. App. 93, 88 S. W. 509, affirmed in 101 Tex. 655, no op.; *Texas, etc., R. Co. v. Terry*, 43 Tex. Civ. App. 591, 97 S. W. 325; *Jones v. Neal*, 44 Tex. Civ. App. 412, 98 S. W. 417, affirmed in 102 Tex. 582, no op.; *Linn v. Waller* (Civ. App.), 98 S. W. 430; *Calhoun v. Quinn* (Civ. App.), 21 S. W. 705; *Gulf, etc., R. Co. v. Rowland* (Civ. App.), 23 S. W. 421; *Davis v. Wheeler* (Civ. App.), 23 S. W. 435; *Neal v.*

Minor (Civ. App.), 26 S. W. 882; *Sutherland v. McIntire* (Civ. App.), 28 S. W. 578; *Houston, etc., R. Co. v. Williams* (Civ. App.), 31 S. W. 556; *Minor v. Powers* (Civ. App.), 38 S. W. 400; *Schoch v. San Antonio* (Civ. App.), 57 S. W. 893; *International, etc., R. Co. v. Jones* (Civ. App.), 60 S. W. 978, affirmed in 94 Tex. 705, no op.; *South-ern, etc., R. Co. v. Crump* (Civ. App.), 74 S. W. 335, affirmed in 97 Tex. 647, no op.; *Watson v. Williamson* (Civ. App.), 76 S. W. 793; *Everett v. Kemp* (Civ. App.), 80 S. W. 534; *Texas, etc., R. Co. v. Birdwell* (Civ. App.), 86 S. W. 1067; *Austin v. Forbes* (Civ. App.), 86 S. W. 29, reversed in 99 Tex. 234; *Buckler v. Kneezell* (Civ. App.), 91 S. W. 367, affirmed in 101 Tex. 630, no op.; *Ramm v. Galveston, etc., R. Co.* (Civ. App.), 92 S. W. 426, affirmed in 101 Tex. 653, no op.; *St. Louis, etc., R. Co. v. Dodson* (Civ. App.), 97 S. W. 523; *San Antonio Tract. Co. v. Lambkin* (Civ. App.), 99 S. W. 574; *Snow v. Price*, 1 App. Civ. Cases, § 1343; *Missouri, etc., R. Co. v. Round-tree*, 2 App. Civ. Cases, § 387.

An appellate court will not undertake to decide upon the validity of objections to evidence where the bill only states that an objection was made and overruled, without giving the ground of objection. *Hagerty v. Scott*, 10 Tex. 525; *Simonton v. Forrester*, 35 Tex. 584; *Johnson v. Crawl*, 55 Tex. 571; *Franklin v. Tiernan*, 62 Tex. 92.

Exceptions taken to the action of the trial court in admitting or rejecting evidence must be specific, and show clearly what was excepted to. *McAuley v. Harris*, 71 Tex. 631, 9 S. W. 679; *Gulf, C. & S. F. Ry. Co. v. Locker*, 78 Tex. 279, 14 S. W. 611; *Cheek v. Herndon*, 82 Tex. 146, 17 S. W. 763.

In taking his bill of exceptions the party excepting must, it has been said, "lay his finger on those points which arise either in admitting or denying evidence." *Cheatham v. Riddle*, 8 Tex.

162, quoting from *Cow. & Hills* notes to Phil. Ev. part, 2, N. 403, p. of notes 778-9, 3rd Ed.

Bills of exception must show the objection made to the evidence admitted or excluded. Every presumption is in favor of the correctness of the ruling of the court below. *New York, etc., Steamship Co. v. Island City Boating Ass'n*, 2 Tex. Civ. App. 490, 21 S. W. 1007, citing *G. H. & S. A. R. Co. v. Gage*, 63 Tex. 568.

"The bill of exceptions does not disclose the objections made to the testimony, and can not, therefore, be considered. This rule was laid down in *Hagerty v. Scott*, 10 Tex. 525, in 1853, and has never been varied. *Franklin v. Tiernan*, 62 Tex. 92; *G. H. & S. A. R. Co. v. Gage*, 63 Tex. 568; *Arambula v. Sullivan*, 80 Tex. 615, 16 S. W. 436; *Ingenhuett v. Hunt*, 15 Tex. Civ. App. 248, 39 S. W. 310, affirmed in 93 Tex. 710, no op." *Gulf, etc., R. Co. v. Pearce*, 43 Tex. Civ. App. 387, 95 S. W. 1133, affirmed in 101 Tex. 639, no op.

The bill of exceptions controls the assignment of errors; and only the grounds of objection stated in the bill will be considered, though the assignment may be upon other grounds. *Kimmarle v. Houston, etc., Co.*, 76 Tex. 686, 12 S. W. 698.

Where objection in lower court to evidence of witness appears affirmatively from bill of exceptions to have been based on specific grounds not involving objection to witness giving opinion, that ground of objection can not be raised on appeal for first time. *Houston, etc., R. Co. v. Knapp*, 51 Tex. 569, 577.

The bill of exceptions not having in terms stated the ground of objection made to evidence, though it may be inferred therefrom that a certain objection was made, and the statement of facts having stated the objection as something else, reversal may not be had on the ground that the first objection was made. *Kesterson v.*

Bailey, 80 S. W. 97, 35 Tex. Civ. App. 235.

(bb) Admission of Evidence.

In General.—"It is the well-established rule of this court that, upon a bill of exceptions to evidence admitted, this court will consider only such objections as were presented in the trial court and as are stated in the bill of exceptions. *Houston, etc., R. Co. v. Adams*, 63 Tex. 200; *Rector v. Hudson*, 20 Tex. 234; *Hamilton v. Rice*, 15 Tex. 382, 385; *Herndon v. Casiano*, 7 Tex. 322, 333; *Waller v. Leonard*, 89 Tex. 507, 35 S. W. 1045." *Wheeler v. Tyler, etc., R. Co.*, 91 Tex. 256, 43 S. W. 879, affirming 41 S. W. 517. See cases cited ante, "General Rule," II, C, 4, c, (2), (f), bb, (aa).

"A bill of exceptions must point out the specific error in admitting testimony, and it must show distinctly what the evidence was objected to. *Houston v. Perry*, 5 Tex. 462, 468; *Sadler v. Anderson*, 17 Tex. 245; *I. & G. N. R. Co. v. Leak*, 64 Tex. 654." *Gulf, etc., R. Co. v. Brown*, 16 Tex. Civ. App. 93, 40 S. W. 608, writ of error dismissed (see 93 Tex., 684, no op.).

When, by the bill of exceptions, it is not shown that the testimony, was under no circumstances, admissible, the court will suppose that the court below would have made the proper ruling, had the objection been insisted on to the testimony, so far as it seems objectionable. *Norvell v. Phillips*, 46 Tex. 161.

By rule 57 of rules for district and county courts, it is provided that "Exceptions to the admission of evidence on the trial where no reason is assigned for objecting to it, shall not be sustained where the evidence is obviously competent and admissible as tending to prove any of the facts put in issue in the pleadings; and in all cases the court when deemed necessary may call upon the party offering the evidence to explain the object of its admission, and also upon the party

excepting the reason of his objections; which, when done in either or both cases, may form a part of the bill of exceptions." *Bonart v. Waag*, 61 Tex. 33.

Exceptions to the admission of evidence where the ground of objection is assigned, shall be considered in reference to the objection made to it, and the objection shall be stated in the bill of exceptions to its admission or exclusion. Rule 58 of Rules for the District and County Courts. *Willis & Bro. v. McNeill*, 57 Tex. 465; *Sutherland v. McIntire* (Civ. App.), 28 S. W. 578; *Stark v. Ellis*, 69 Tex. 543, 7 S. W. 76; *Cunningham v. Holt*, 12 Tex. Civ. App. 150, 33 S. W. 981, affirmed in 93 Tex. 658, no op.

In a suit for damages for injuries received from a battery by defendant, exception was taken to the action of the court below in sustaining an objection to the following question: "For what purpose did you strike Waag" (the plaintiff). The bill of exceptions failed to reveal the objection stated to the question. Held, that the bill of exceptions was not in accordance with rule 57, and the ruling below would not be revised. *Bonart v. Waag*, 61 Tex. 33.

"The bill of exception taken to the action of the court in refusing to allow the appellant Ben Bonart to answer the question asked him, as to the purpose that induced him to strike the appellee, does not show, as it ought to do (see district court rules, No. 57), what was the objection of appellee to the question." *Bonart v. Waag*, 61 Tex. 33.

When the matter contained in the answer of a witness is admissible on some issue presented by the pleading, though the manner of answering might be subject to objection, as where the witness substitutes opinion for facts, the supreme court will not for that cause reverse the judgment, when the bill of exceptions fails to indicate the

objection to either question or answer. *Houston, etc., R. Co. v. Adams*, 63 Tex. 200.

If the ground of objection to evidence is that it is secondary, it should be stated at the time when the objection is made, and the bill of exceptions should show that it was so stated. *Croft v. Rains*, 10 Tex. 520.

Bill of exceptions should state objections to documentary evidence, and party excepting must confine himself thereto. *Herndon v. Casiano*, 7 Tex. 322.

Objections Not Urged Held to Be Waived.—A bill of exceptions to the admissibility of evidence operates as a waiver of the objections not urged. *Ann Berta Lodge, No. 42, I. O. O. F. v. Leverton*, 42 Tex. 18.

Where a bill of exception to the admission of a deposition over objections for want of notice of the interrogatories is so qualified as to indicate that notice may have been waived, the bill of exceptions should negative the fact of such waiver, to make the point available on appeal. *Texas, etc., R. Co. v. Murtishaw*, 34 Tex. Civ. App. 447, 78 S. W. 953.

Failure to State Grounds Not a Reason for Striking Out Bill.—The failure to state in the bill the grounds of objection to the admission of evidence is not a reason for striking out the bill itself. *Heffron v. Pollard*, 73 Tex. 96, 11 S. W. 165.

Showing as to Actual Existence of Facts on Which Objection Predicated.—Bills of exception on their faces, or in connection with the pleadings and statement of facts, should clearly show that evidence objected to was not admissible. *Willis v. Donac*, 61 Tex. 588.

It is necessary for a bill of exceptions to the admission of evidence to show that the facts on which the objection to the evidence is predicated actually existed, as that the party objecting to a deposition for want of

notice of the interrogatories had no such notice. *Ward v. Cameron*, 97 Tex. 466, 80 S. W. 69, affirming 76 S. W. 240.

Bill of exceptions to action of the trial court in overruling motion to suppress depositions, must show that grounds of motion were true in fact. Fact that motion was overruled because presented late does not show that the court admitted grounds of motion to be true. *Terrell v. McCown*, 91 Tex. 231, 241, 43 S. W. 2.

A bill of exception, reserved to the trial court's action in overruling a motion to quash a deposition on the ground that the certificate of the deposition officer did not comply with the law, not containing the certificate nor stating its contents, the ruling can not be reviewed. *Gulf, etc., R. Co. v. Sauter*, 46 Tex. Civ. App. 309, 103 S. W. 201, affirmed in 102 Tex. 584, no op.

Bill of exceptions to admission of deed without proof and three days' notice, must show that the deed had not been filed for three days. *Henry v. Whitaker*, 82 Tex. 5, 17 S. W. 509.

"An affidavit was made by the attorney of the plaintiffs that the deed 'is not in the possession of the plaintiffs, and they do not know where it is and can not procure the same.' This was sufficient to show that it was not in the power of the plaintiffs to produce the deed, and there is nothing suggested by the form of the affidavit, or otherwise, to indicate that the defendant was prejudiced by the failure of one of the plaintiffs to make an affidavit of the same facts. It is not shown by the bill of exceptions nor by any other part of the record that the copies of the deed admitted in evidence had not been on file among the papers of the cause for three days before the trial. If such was not the fact it should have been so stated in the bill of exceptions in addition to the objection made upon that ground." *Henry v. Whitaker*, 82 Tex. 5, 17 S. W. 509.

Objections Held Insufficient.—The admission of testimony objected to will not be reviewed on appeal, where the bill of exceptions merely recited that the evidence was objected to, but did not specify the objection. *Buckler v. Kneezell* (Civ. App.), 91 S. W. 367, affirmed in 101 Tex. 630, no op.

An objection to the testimony of a witness merely on the ground of incompetency is insufficient. *Wright v. Thompson*, 14 Tex. 558.

Defendants to impeach plaintiff read certain answers from depositions as admissions made by him. Plaintiff, to rebut the impeachment, read the remainder of the depositions. Held, that where a bill of exceptions reserved to the overruling of defendant's objection did not point out the particular answers objected to, but sweepingly included the statements constituting the remainder of the depositions, the objection could not be considered on appeal. *Wright v. Solomon* (Civ. App.), 46 S. W. 58.

A bill of exceptions to the admission in evidence of a judgment, showing merely that appellants introduced evidence "tending to establish" that, at the institution of the suit culminating in the judgment, the defendant therein was dead, does not raise the question of the validity of the judgment. *Ledbetter v. Higbee*, 13 Tex. Civ. App. 267, 35 S. W. 801.

A recital in a bill that objection to the introduction of a deposition in evidence was made because "neither the caption nor certificate disclose in what case it was taken," and that "written notice of the objection was served on the adverse counsel before trial," sufficiently shows the nature of the objection made, and the service of written notice thereof on the adverse counsel before trial. *Southern Pac. R. Co. v. Royal* (Civ. App.), 23 S. W. 316.

Where the bill of exceptions to the introduction of several amended classifications and appraisements of certain public lands in evidence failed to set

out the land commissioner's certificate, stating that one of the two pieces of such land "was classified and appraised at two dollars per acre, and has never been changed," and that the other "has never been classified nor appraised," which was the ground of the objection to the admission of such evidence, the question was not before the court on the record. *Clark v. McKnight*, 25 Tex. Civ. App. 60, 61 S. W. 349, affirmed in 94 Tex. 694, no op.

When General Objection Sufficient.

—To the general rule that the ground of objection must be stated, there may be exceptions, depending on the character of the proposed evidence. It may be so manifestly incompetent to prove the proposed fact, or its inadmissibility may be so apparent, that it will be sufficient to object generally to its admission. *Cheatham v. Riddle*, 8 Tex. 162.

Objection Construed.—Where a bill of exceptions recites that a deed was admitted in evidence over the objection that it did not appear therefrom that the deed had been acknowledged as required by law in that the officer certifying the same failed to state in his certificate that the grantor acknowledged that he executed the deed for the purposes and considerations therein expressed, the objection will be held to include an objection that it failed to show that he had acknowledged it at all. *Stephens v. Motl*, 81 Tex. 115, 16 S. W. 731.

(cc) Exclusion of Evidence.

In General.—"It is a rule well settled in this state that a bill of exceptions to the exclusion of evidence must disclose the ground upon which it was excluded." *International, etc., R. Co. v. Jones* (Civ. App.), 60 S. W. 978, affirmed in 94 Tex. 705, no op. And see cases cited ante, "General Rule," II, C, 4, c, (2), (f), bb, (aa).

Where the bill of exceptions taken to the exclusion of evidence fails to specify the objection sustained by the

court, an assignment of error to the court's action will not be considered. *Texas, etc., Coal Co. v. Lawson*, 10 Tex. Civ. App. 491, 31 S. W. 847; *Cabell v. Holloway*, 10 Tex. Civ. App. 307, 31 S. W. 201, affirmed in 93 Tex. 656, no op.; *Ft. Worth, etc., R. Co. v. James*, 39 Tex. Civ. App. 408, 87 S. W. 730.

Where the exclusion of testimony is claimed to be erroneous, the party injured should show, by bill of exceptions, what objections were made to the testimony, and why it was excluded. *Flanagan v. Boggess*, 46 Tex. 330.

Where the ground upon which testimony was excluded by the court below is not shown in the bill of exceptions, the appellate court does not feel called upon to review the ruling of the court below in excluding the evidence, unless injustice has manifestly been done. *Whitehead v. Foley*, 28 Tex. 268.

A bill of exceptions to the exclusion of certain evidence, which fails to show what objections were interposed thereto, and sustained by the court was insufficient to authorize a review of the ruling on appeal. *St. Louis, I. M. & S. Ry. Co. v. Dodson* (Civ. App.), 97 S. W. 523.

The supreme court will not resort to conjecture to determine the grounds on which an appellee objected to the introduction of evidence, the exclusion of which was assigned as error. If the objection was a general one, the bill of exceptions should still show the grounds on which the judge below based his ruling. *Franklin v. Tiernan*, 62 Tex. 92.

A party complaining of rejection of testimony must show ground of rejection and if the record be silent presumption is in favor of the court's ruling. *Texas, etc., R. Co. v. De Milley*, 60 Tex. 194.

When the bill of exceptions does not show the objection on which testimony

was excluded, the court must presume that it was a valid one. *Neal v. Minor* (Civ. App.), 26 S. W. 882.

A bill to the exclusion of a deposition should show that it was not objected to on the ground that it was informally taken and returned. *Harris v. Leavitt*, 16 Tex. 340.

Where bills of exception to the exclusion of evidence merely stated that plaintiff objected to the testimony, such bills were insufficient to authorize a review of the rulings. *Missouri, K. & T. Ry. Co. of Texas v. Jarrell*, 86 S. W. 632, 88 Tex. Civ. App. 425.

A bill of exception certifying "that on the trial defendants, to maintain the issues on their part, offered in evidence certified copies of the entries on the execution docket of the district court of T. county in a certain cause specified, among which entries was the sheriff's return (see transcript, pages 22 and 25)," was incomplete in itself, and insufficient to point out the objection relied on. *Veatch v. Gray*, 91 S. W. 324, 41 Tex. Civ. App. 145.

"The bills of exception taken to the exclusion of evidence do not state the objections which were urged to the evidence, nor the grounds on which it was excluded. In such case, and especially so when there is no statement of facts, rulings of a court in excluding evidence will not be considered. *Thompson v. Callison*, 27 Tex. 438; *Lockett v. Schurenberg*, 60 Tex. 610; *Whitehead v. Foley*, 28 Tex. 268. The same matters may have been proved by other evidence introduced in the case, so far as we can know from the record, and if so, no injury may have resulted from the ruling of the court even if erroneous." *Endick v. Endick*, 61 Tex. 559.

A bill of exceptions to the exclusion of testimony will be taken as stating the very objection made to the question. Where the only statement of the objection contained in the bill is in the words "To which plaintiff objects" it

will be considered that the objection was general and should be sustained only in case the question was not calculated to elicit competent and material testimony. The appellate court will not assume that specific objections were made and refuse to consider the bill because they do not appear in it. *Waller v. Leonard*, 89 Tex. 507, 35 S. W. 1045, reversing 34 S. W. 789.

See, however, *Kingsbury v. Waco State Bank*, 30 Tex. Civ. App. 387, 70 S. W. 551, holding that error in exclusion of evidence may be considered, though the bill of exceptions does not show that any special ground of objection was assigned.

"We are urged to disregard appellants' bills of exception to the exclusion of the evidence discussed in the foregoing assignments, because the bill does not show what objection was made in the lower court, and that we can not revise the ruling of that court without knowing precisely what it was. There are some authorities which seem to sustain this contention, but under the rule now adopted by our supreme court the bills are entitled to be considered. *Waller v. Leonard*, 89 Tex. 507, 35 S. W. 1045." *Kingsbury v. Waco State Bank*, 30 Tex. Civ. App. 387, 70 S. W. 551.

Facts Showing Error in Rejection of Deposition Taken in Another Trial.—Bill of exceptions to refusal to admit deposition of witness taken in another trial must show that witness is dead or beyond jurisdiction. *Sadler v. Anderson*, 17 Tex. 245, 255.

cc. Showing as to Materiality of Evidence.

In General.—Where error is assigned as to the admission or exclusion of evidence, the appellate court should be furnished with a full statement of the facts proven on the trial, or at least the bill of exceptions should show with certainty the materiality of the evidence when considered in connec-

tion with all that has been proved upon the trial. *Bupp v. O'Connor & Co.*, 1 Tex. Civ. App. 328, 21 S. W. 619, citing *Lockett v. Schurenberg*, 60 Tex. 610. See, also, *G. H. & S. A. R. Co. v. Stovall*, 3 App. Civ. Cases, §§ 251, 255; *Rose v. San Antonio, etc., R. Co.*, 31 Tex. 49; *Vance v. Saathoff*, 2 Poscy 658.

Bills of exceptions to exclusion of testimony should state facts enough to show relevancy and materiality of evidence. *King v. Gray*, 17 Tex. 62, 70; *Tarleton v. Daily*, 55 Tex. 92, 96; *G. H. & S. A. R. Co. v. Stovall*, 3 App. Civ. Cases, § 251.

"In order to enable this court to reverse the decision of the court below, in excluding testimony, the relevancy of the evidence excluded should be made to appear either by the bill of exceptions or some part of the record, that it was relevant to the issue." *Bryant v. Kelton*, 1 Tex. 434.

A bill of exceptions to the exclusion of testimony should show that the testimony would have benefited the party excepting. *McKay v. Overton*, 65 Tex. 82.

When the record shows no statement of facts from which the materiality of excluded testimony can be determined, and the bill of exceptions based on such exclusion fails to state enough of the facts established in the case to make intelligible the ruling of the court in reference to the issue made by the pleadings, the exception will be disregarded on appeal. *Stark v. Ellis*, 69 Tex. 543, 7 S. W. 76.

Where a bill of exceptions shows that objections to the competency of a witness were overruled, the record should also show that he swore to something material, or the point will not be reviewed. *Stone v. Darnell*, 25 Tex. Supp. 430.

Where there was an exception to excluding the deposition of a certain witness, the bill of exceptions must show the materiality of the evidence.

Pas. Dig., art. 217, note 280; *Morris v. Runnells*, 12 Tex. 175; *Harris v. Leavitt*, 16 Tex. 340; *King v. Gray*, 17 Tex. 62; *Rose v. San Antonio, etc., R. Co.*, 31 Tex. 49.

A bill of exceptions to the suppression of a second deposition of a witness on the same interrogatories was based on a conflict between it and the first deposition. Held, that where it failed to point out the conflict, or show that the second deposition was material, it was insufficient. *White v. Houston & T. C. R. Co. (Civ. App.)*, 46 S. W. 382.

Where a bill of exceptions to the exclusion of plaintiff's deposition as taken and filed by defendant merely stated the fact of such exclusion and the reasons therefor,—an error in addressing the commission in the full terms of the statute,—and it appeared that plaintiffs testified in the case by depositions taken in their own behalf with cross-interrogatories by defendant, and there was nothing to show that the plaintiffs refused to answer defendant's interrogatories, or to what they related, the bill was not sufficient to show there was material error in suppressing the deposition. *Caplen v. Hawkins*, 27 Tex. Civ. App. 608, 66 S. W. 471, affirmed in 95 Tex. 674, no op.

Where an action was brought for divorce on the ground of cruel treatment, and error was assigned upon the refusal of the trial court to admit in evidence a writing of the husband made about a year before the trial, the appellate court will overrule the assignment where the bill of exceptions does not show that its slanderous parts had reference to the wife, and the only name mentioned in it is of another than hers. *Luhn v. Luhn (Civ. App.)*, 93 S. W. 525.

A bill of exceptions is sufficient, without a statement of facts, when it discloses facts enough to show that the court excluded competent testi-

mony, the relevancy and materiality of which appear from the pleadings. *Salinas v. Wright*, 11 Tex. 572; *Sublett v. Kerr*, 12 Tex. 367; *Fox v. Sturm*, 21 Tex. 406; *Tarlton v. Daily*, 55 Tex. 92; *Craxton v. Ryan*, 3 Willson, Civ. Cas. Ct. App. § 367.

dd. Incorporation of Evidence Admitted or Excluded.

(aa) In General.

To obtain a review of a ruling admitting or excluding evidence, the evidence admitted or excluded must be embodied in a bill of exceptions. *Gulf, C. & S. F. Ry. Co. v. Day* (Civ. App.), 22 S. W. 772.

Bill of exceptions should set out evidence offered and rejected. *Styles v. Gray*, 10 Tex. 503, 507.

(bb) Evidence Admitted.

In General.—Bill of exceptions to admission of evidence should set out evidence objected to. *Williams v. Deen*, 5 Tex. Civ. App. 575, 24 S. W. 536.

A bill of exceptions to evidence admitted should contain the evidence objected to, and not refer therefor to the testimony of the witness, as preserved in the statement of facts. *Gulf, etc., R. Co. v. Brown*, 16 Tex. Civ. App. 93, 40 S. W. 608, writ of error dismissed (see 93 Tex. 684, no op.).

Where, in an assignment of error, it is claimed that evidence was improperly received, the evidence complained of must be set out in the bill of exceptions. *Gulf, etc., R. Co. v. Day* (Civ. App.), 22 S. W. 772, affirmed in 93 Tex. 661, no op.; *West End, etc., Co. v. Galveston City Co.* (Civ. App.), 55 S. W. 752.

The court of civil appeals is not required to look to the evidence contained in the statement of facts in aid of a bill of exceptions. *St. Louis, etc., R. Co. v. Demsey*, 40 Tex. Civ. App. 398, 89 S. W. 786.

Where the bill of exceptions does not show the testimony objected to, the appellate court need not look to

the records therefor, but may disregard the assignment of error. *Fields v. Haley* (Civ. App.), 52 S. W. 115.

"In the absence of a bill of exception distinctly stating what testimony was objected to, we can not revise the action of the court below in admitting the evidence." *I. & G. N. R. Co. v. Leak*, 64 Tex. 654.

Questions and Answers Where Objection Overruled.—A bill of exceptions taken to the admission of evidence is defective where it fails to show what the answer of the witness to the question objected to was. *Gipson v. Morris*, 83 S. W. 226, 36 Tex. Civ. App. 593.

A cause will not be reversed on account of the admission in evidence of answers to interrogatories, when the question and answer are not set forth in the bill of exceptions, and when the statement of facts is so made up as to convey no information regarding the real character of such question and answer. *Still v. Focke*, 66 Tex. 715, 2 S. W. 59.

"Complaint is made in the ninth assignment that the court should have excluded the answer of the witness Hicks to the third cross-interrogatory, on the ground that the answer in argumentative. The bill of exceptions does not set out the interrogatory, and we are hence unable to say that the answer was not properly responsive to the question." *Wallace v. Byers Bros.*, 14 Tex. Civ. App. 574, 38 S. W. 228, affirmed in 93 Tex. 676.

A bill of exceptions taken to the admission of certain testimony, merely reciting that the questions objected to elicited the replies of the witness embodied in the bill of exceptions, but failing to set out the questions, was insufficient. *Galveston, etc., R. Co. v. Paschall*, 41 Tex. Civ. App. 357, 92 S. W. 446.

Assignments of error relating to the admission of certain testimony based on a bill of exceptions, which fails to

state what the answers to the questions objected to were, will not be considered. *Mullen v. Galveston, etc., R. Co.* (Civ. App.), 92 S. W. 1000, affirmed in 101 Tex. 650, no op.

Where the answer of a witness has been objected to on the ground that it was not responsive to the question propounded, and the record states neither the language nor the substance of the question, it will be assumed that the trial court, in overruling the objection, considered that the interrogatory did call for the answer given, and the court's ruling in that particular will not be revised, in the absence of a knowledge of what the interrogatory was. *Missouri Pac. R. Co. v. Jarrard*, 65 Tex. 560.

When neither the bill of exceptions nor the statement of facts show what answer was given to a question claimed to have been improperly asked, the point will not be considered on appeal. *Haney v. Clark*, 65 Tex. 93.

A ruling on an objection to a question will not be reviewed on appeal, where the answer does not appear in the bill of exceptions. *Selkirk v. Watkins* (Civ. App.), 105 S. W. 1161.

Where the testimony of witnesses is objected to, on the ground that one of them is a codefendant, and interested in the suit; and that, as to the other, there is no foundation in the pleadings for the evidence offered; and there is neither a statement of facts, nor does it appear, by the bill of exceptions, what was testified to by the witnesses; the supreme court can not consider the question of the correctness of the ruling admitting the testimony. *May v. Ferrill*, 2 Tex. 340.

Bill of exceptions to overruling of objection to attorney of adverse party as witness on ground of interest, should disclose evidence given. *Hancock v. Dimon*, 17 Tex. 369, 372.

Where it appeared by bill of exceptions that the plaintiff called his attorney as a witness, to whose competency

the defendant objected, "because said witness is interested, his interest being his commission upon the note set up, which is, according to custom, ten per cent upon the amount recovered in controversy," which objection was overruled; this court declined to revise the point, on the ground that the bill of exceptions did not disclose the evidence of the witness, remarking that the witness might have testified in relation to some matter not at all connected with the note, and if so, his commissions could not be affected by such testimony. *Hancock v. Dimon*, 17 Tex. 369, 370.

A bill of exceptions stating that the court permitted experts to testify to plaintiff's statements to them, as to "the history of his case," and "the way he had been affected," without showing the particular testimony, is not sufficiently definite. *Gulf, C. & S. F. Ry. Co. v. Brown*, 40 S. W. 608, 16 Tex. Civ. App. 93.

Setting Out Deposition Read in Evidence over Objection.—To enable the supreme court to revise the action of the district court in overruling objections which were read in evidence, it is necessary that the bill of exception contain the deposition or certificate objected to and the grounds of objection urged. *Griffin v. Chadwick*, 44 Tex. 406.

"The objections taken in the court below to the deposition of the defendant in error are not presented by the record in such manner as to enable us to review the action of the court overruling them. The bill of exceptions taken by the plaintiff states the grounds of his objection to the admissibility of the deposition, but it does not set forth the deposition or certificate, the insufficiency of which is mainly relied upon for the exclusion of the deposition, so as to enable us to determine whether the alleged defects in the certificate in fact exist, nor does the statement of facts set out the depo-

sition, but properly states merely the facts found by it. The deficiency of the bill of exceptions is therefore in no way supplied by the statement of facts, if we could properly look to it for this purpose." *Griffin v. Chadwick*, 44 Tex. 406.

Setting Out Statute, Admission of Which Is Complained of.—Where a special act of the legislature, the admission of which is complained of, is not set out in the bill of exceptions nor in the statement of facts, a ruling of the court in admitting it is not reviewable. *Wallace v. Byers Bros.*, 14 Tex. Civ. App. 574, 38 S. W. 228.

(cc) Showing Character of Excluded Testimony and Matters Proposed to Be Proven.

General Rule Stated and Applied.—As a general rule, a bill of exceptions to the exclusion of testimony must show what the testimony would have been, or what was proposed to be proved by the witness. *Brothers v. Mundell*, 60 Tex. 240; *Beeman v. Jester Bros.*, 62 Tex. 431; *Milliken v. Smoot*, 64 Tex. 171; *Reddin v. Smith*, 65 Tex. 26; *Moss v. Cameron*, 66 Tex. 412, 1 S. W. 177; *Vance v. Upson*, 66 Tex. 476, 1 S. W. 179; *Overstreet v. Manning*, 67 Tex. 657, 4 S. W. 248; *Orr, etc., Shoe Co. v. Ferrell*, 68 Tex. 638, 5 S. W. 490; *Tucker v. Smith*, 68 Tex. 473, 3 S. W. 671; *Beeks v. Odom*, 70 Tex. 183, 7 S. W. 702; *McAuley v. Harris*, 71 Tex. 631, 9 S. W. 679; *Pridham v. Weddington*, 74 Tex. 354, 12 S. W. 49; *Gulf, etc., R. Co. v. Locker*, 78 Tex. 279, 14 S. W. 611; *Cheek v. Herndon*, 82 Tex. 146, 17 S. W. 763; *Cunningham v. Austin, etc., R. Co.*, 88 Tex. 334, 31 S. W. 629; *Stephenson v. Stephenson*, 6 Tex. Civ. App. 529, 25 S. W. 649, affirmed in 93 Tex. 650, no op.; *Ortiz v. Navarro*, 10 Tex. Civ. App. 195, 30 S. W. 581, affirmed in 93 Tex. 716, no op.; *Northern Assur. Co. v. Samuels*, 11 Tex. Civ. App. 417, 33 S. W. 239; *Bailey v. Chapman*, 15 Tex. Civ. App. 240, 38 S. W. 544; *Herring v.*

Mason, 17 Tex. Civ. App. 559, 43 S. W. 797, affirmed in 93 Tex. 686, no op.; *Houston, etc., R. Co. v. Wallace*, 21 Tex. Civ. App. 394, 53 S. W. 77, affirmed in 93 Tex. 731, no op.; *Herndon v. De Cordova*, 22 Tex. Civ. App. 202, 54 S. W. 401; *First Nat. Bank v. Hicks*, 24 Tex. Civ. App. 269, 59 S. W. 842; *Curlee v. Rose*, 27 Tex. Civ. App. 259, 65 S. W. 197; *Texarkana, etc., R. Co. v. Spencer*, 28 Tex. Civ. App. 251, 67 S. W. 196, affirmed in 95 Tex. 687, no op.; *Chimine v. Baker*, 32 Tex. Civ. App. 520, 75 S. W. 330; *Shippers Compress, etc., Co. v. Davidson*, 35 Tex. Civ. App. 558, 80 S. W. 1032, affirmed in 98 Tex. 632, no op.; *Ex parte Battis*, 40 Tex. Cr. App. 112, 114, 48 S. W. 513; *Houston v. Potter*, 41 Tex. Civ. App. 381, 97 S. W. 389; *Chicago, etc., R. Co. v. Birk*, 44 Tex. Civ. App. 615, 99 S. W. 753, affirmed in 102 Tex. 579, no op.; *Ft. Worth, etc., R. Co. v. Travis*, 45 Tex. Civ. App. 117, 99 S. W. 1141; *Sabine, etc., R. Co. v. Johnson (Sup.)*, 7 S. W. 378; *Gulf, etc., R. Co. v. Rowland (Civ. App.)*, 23 S. W. 421; *Neal v. Minor (Civ. App.)*, 26 S. W. 882; *Western Union Tel. Co. v. Hill (Civ. App.)*, 26 S. W. 252, affirmed in 93 Tex. 653, no op.; *Farmer v. Randel (Civ. App.)*, 28 S. W. 384; *Maury v. Smith (Civ. App.)*, 37 S. W. 463; *Ivey v. Bondies (Civ. App.)*, 44 S. W. 916, affirmed in 93 Tex. 732, no op.; *Adams v. Missouri, etc., R. Co. (Civ. App.)*, 70 S. W. 1006; *Texas, etc., R. Co. v. Meeks (Civ. App.)*, 74 S. W. 329; *Long v. Red River, etc., R. Co. (Civ. App.)*, 85 S. W. 1048; *Ramm v. Galveston, etc., R. Co. (Civ. App.)*, 92 S. W. 426, affirmed in 101 Tex. 653, no op.; *Meredith v. Miller (Civ. App.)*, 99 S. W. 430; *Bluestein v. Collins (Civ. App.)*, 103 S. W. 687; *Moss v. Gulf, etc., R. Co. (Civ. App.)*, 103 S. W. 221; *Pierce v. Galveston, etc., R. Co. (Civ. App.)*, 108 S. W. 979; *El Paso, etc., R. Co. v. Bolgiana (Civ. App.)*, 109 S. W. 388; *Vance v. Saathoff*, 2 Posey 658.

"It has been repeatedly held by this court, that the materiality of the excluded testimony must be made to appear by statement of facts or bill of exceptions, which should set forth the testimony itself, so that this court may determine its materiality, and whether the complaining party has been injured by the erroneous ruling of the court. *Fox v. Sturm*, 21 Tex. 407; *Harvey v. Hill*, 7 Tex. 591, 593." *Jones v. Cavazos*, 29 Tex. 428.

Bill of exceptions to exclusion of evidence must show nature of evidence and that its exclusion may have influenced judgment. *Holstein v. Adams*, 72 Tex. 485, 10 S. W. 560.

Bill of exceptions to exclusion of answers to interrogatories in deposition must state what answers were. *King v. Gray*, 17 Tex. 62, 70.

To support an assignment that "the court erred in refusing to permit defendant to prove, as it offered to do, each and every allegation made in the fourteenth paragraph of its * * * answer," the bill of exceptions must set out the specific testimony which was sought to be introduced, and which was objected to, as required by rule 59 of the district courts, which provides that "bills of exception must state enough of the evidence or facts proved in the case to make intelligible the ruling of the court excepted to, in reference to the issue made by the pleadings." *Hereford Cattle Co. v. Powell*, 36 S. W. 1033, 13 Tex. Civ. App. 496.

Where exception is taken to the exclusion of evidence, the excluded evidence must be set forth in the record, in order that the appellate court may be enabled to judge of its relevancy and materiality, otherwise the court can not determine whether its exclusion was error of which the appellant could complain. *Pas. Dig.*, art. 217, note 280; art. 1581, note 613. *Burleson v. Hancock*, 28 Tex. 81, 82.

Where neither the bill of exceptions

nor the assignment of error discloses what the offered evidence would have shown, its materiality and sufficiency can not be determined, and the action of the trial court in excluding the evidence will not be reviewed. *First Nat. Bank v. Hicks*, 24 Tex. Civ. App. 269, 59 S. W. 842.

Bill of exceptions taken to rejection of witness in rebuttal, should show what was to be proven by witness and what judge did. *Dunham v. Forbes*, 25 Tex. 23, 25.

Bill of exception neither stating objection raised to question asked witness, nor what the answer of witness would have been if admitted will not be considered. *Orr, etc., Shoe Co. v. Ferrell*, 68 Tex. 638, 640, 5 S. W. 490, citing *Moss v. Cameron*, 66 Tex. 412, 1 S. W. 177; *Dunham v. Forbes*, 25 Tex. 23, 25.

Where objections are sustained to a question asked a witness, the bill of exceptions taken to the ruling should show the evidence proposed to be elicited, so that its materiality may be determined on appeal. *Mathews v. State*, 44 Tex. 376.

Alleged error in the exclusion of evidence can not be considered on appeal, when the bill of exceptions does not show that the witness would, if permitted, have testified as claimed. *Bailey v. Chapman*, 15 Tex. Civ. App. 240, 38 S. W. 544.

When the excluded evidence is not made a part of the bill of exceptions or shown in the record, it will be presumed that it was properly excluded. *St. Louis, etc., R. Co. v. McAnellia* (Civ. App.), 110 S. W. 936.

Under *Sayles' Ann. Civ. St. art. 1360*, authorizing a party dissatisfied with a ruling to except thereto, and secure time to make a written bill, and article 1361, providing that the objection shall be stated with such circumstances, or so much of the evidence, as may be necessary to explain it, the lower court's action in excluding evidence

can not be reviewed where the bill of exceptions fails to state the question asked the witness, the exception made thereto, or what it was expected to prove. *Adams v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.), 70 S. W. 1006.

The action of the court in excluding testimony offered to show that such of plaintiff's cattle as did not die from the effects of the overflow brought about by defendant's negligence were greatly depreciated in value thereby, will not be revised on appeal, where it does not appear from the bill of exceptions what the evidence proposed to be introduced on that point was. *Sabine, etc., R. Co. v. Johnson* (Sup.), 7 S. W. 378.

Where a bill of exceptions to the action of the court in sustaining an objection to a hypothetical question does not disclose what the witness would have answered, no prejudice from the ruling of the court is shown. *El Paso Elect. Co. v. Bolgiana* (Civ. App.), 109 S. W. 388.

In an action for delay in delivering a telegram, stating that plaintiff's brother was dead, and his funeral would be the next day, whereby plaintiff was prevented from attending the funeral, an assignment that defendant was not allowed to show that, by a reasonable postponement of the funeral, plaintiff would have arrived in time therefor, can not be considered where it is not shown what testimony would have been given. *Western Union Tel. Co. v. Hill* (Civ. App.), 26 S. W. 252, affirmed in 93 Tex. 653, no op.

A bill of exceptions to the rejection of evidence offered which fails to set forth the specific testimony rejected, but which recites that "the defendant offered evidence to prove actual and exemplary damages, to which plaintiff objected, because there was no allegation in defendant's answer to admit such evidence," is not sufficient. There being nothing to show what the

rejected testimony was, the presumption must prevail that what was offered did not correspond with the allegations in the pleading. *Brothers v. Mundell*, 60 Tex. 240.

In an action against a carrier for expulsion of a woman from a train, defendant's counsel asked plaintiff on cross-examination why she did not take certain medicines prescribed by her family physician. On her refusal to answer, he further asked her if it was not because she was a Christian Scientist. After objection by plaintiff's counsel had been sustained, defendant's counsel stated that he wanted to prove that the witness would not take medicine on the ground suggested, and to ascertain if it was not her belief that she only suffered when she thought she suffered, and did not suffer when she thought she did not. Held, that the issue submitted by an assignment that the court erred in refusing to permit defendant's attorney to interrogate the witness with reference to her belief in Christian Science for the purpose of showing that, as a Christian Scientist, she could not suffer either mentally or physically, but lived on a spiritual plane high above mental and physical suffering, was sufficiently presented by the record, where it appeared from the bill of exceptions that counsel for defendant in a statement of the object of such testimony, made to the stenographer pursuant to the direction of the trial court, expressed his desire to prove that "she lived in a spiritual plane above mental and physical suffering, that it was an article of her faith that there was no such a thing as mental or physical suffering, and that she did not actually suffer." *Ft. Worth & D. C. Ry. Co. v. Travis*, 45 Tex. Civ. App. 117, 99 S. W. 1141.

Reason for Rule.—Where bills of exceptions taken to rulings excluding evidence do not disclose what the proposed evidence was, or what the witness would have stated in answer to a

question, the appellate court is unable to determine whether the rulings were prejudicial to appellant or not. *Pridham v. Weddington*, 74 Tex. 354, 12 S. W. 49; *Shippers Compress, etc., Co. v. Davidson*, 35 Tex. Civ. App. 558, 80 S. W. 1032, affirmed in 98 Tex. 632, no op.; *Neal v. Minor* (Civ. App.), 26 S. W. 882; *Pennington v. McQueen* (Sup.), 3 S. W. 315.

"A bill of exceptions should show what the witness whose evidence is offered would have testified, for, without it is disclosed that the proof which was offered could have been made, no injury is shown by the court's sustaining an objection to the testimony offered." *Neal v. Minor* (Civ. App.), 26 S. W. 882.

It is the duty of the party complaining of such rulings, to show the particular in which they are erroneous to his injury. *Pridham v. Weddington*, 74 Tex. 354, 12 S. W. 49.

When Unnecessary.—Where questions were excluded on cross-examination, a bill of exceptions, based on such exclusion, was not objectionable on the ground that it did not show definitely what answer the witness would have made to the questions had he been permitted to answer. *Cunningham v. Austin & N. W. R. Co.*, 88 Tex. 534, 31 S. W. 629.

A bill of exceptions to the exclusion of an answer to a question asked on cross-examination need not show what answer the witness was expected to make. *Long v. Red River, etc., R. Co.* (Civ. App.), 85 S. W. 1048.

"It has been held that the general rule which requires a party to show by his bill of exception what answer he expected to elicit from the witness, in order that the court may see that he had been deprived of legitimate evidence, does not apply to a case where he is cross-examining the witness of his adversary, with whose knowledge of the matter about which he is being interrogated he is not expected to be

familiar. The rule is limited to a case where the party is seeking to introduce original evidence, the nature of which he should be expected to know before he offers the same.' *Cunningham v. Austin, etc., R. Co.*, 88 Tex. 534, 31 S. W. 629." *Long v. Red River, etc., R. Co.* (Civ. App.), 85 S. W. 1048.

Where a question is proper, no matter what the answer might be, its exclusion will be considered on appeal, though the bill of exceptions fails to show the expected answer. *Brown v. Wilson* (Civ. App.), 29 S. W. 530.

(dd) Necessity for Setting Out Excluded Documents.

In General.—It has been frequently held that where an exception is taken to the rejection of a written document as evidence, the exception must be set out in such document, so that the appellate court may judge of its sufficiency and materiality. *Watson v. Mathews*, 36 Tex. 278, citing *Ponton v. Bellows*, 13 Tex. 254; *Morris v. Runnells*, 12 Tex. 175; *Styles v. Gray*, 10 Tex. 503; *Frizzell v. Johnson*, 30 Tex. 31.

Depositions.—Where an exception is taken to the exclusion of a deposition, the bill of exceptions should contain the deposition. *Harris v. Leavitt*, 16 Tex. 340, 343.

Where a bill of exceptions does not show why the deposition of a witness was excluded, nor what it contained, the court will presume that it was rightly excluded. *Pas. Dig.*, art. 217, note 280. *Greenwade v. Walling*, 30 Tex. 377.

Where error was predicated on the suppressing of depositions of plaintiffs taken by defendant, but the bill of exceptions merely stated the fact of such exclusion and the reason therefor, without setting out the interrogatories, the bill of exceptions was insufficient to show the alleged error. *Caplen v. Hawkins*, 66 S. W. 471, 27 Tex. Civ. App. 608.

County Records.—An exception

which merely states that "the defendant offered the book of records of the county clerk's office to show an outstanding title in a third person to the land in question, which testimony was ruled out," is too vague. It should have stated what the evidence substantially was. *Styles v. Gray*, 10 Tex. 503.

Assessment Rolls.—Where the refusal of the court to admit in evidence an assessment roll is assigned as error, the bill of exceptions should state what, in fact, was contained in the assessment roll which was offered. *Vance v. Saathoff*, 2 Posey 658.

Setting Out Links in Chain of Title Subsequent to Conveyance to Which Objection Sustained.—The better practice is, when objections are sustained to one of several mesne conveyances, through which appellant sought to connect himself with the sovereignty of the soil, for the bill of exceptions to set forth the subsequent connecting links in the chain of title, or to give in the bill their dates, contents, etc. *Bowles v. Beal*, 60 Tex. 322.

(g) Action of Court in Refusing to Submit Case on Special Issues.

An assignment alleging error in a refusal to submit the case by special issues will not be considered where the bill of exceptions does not show a request for such submission. *San Antonio, etc., R. Co. v. Williams* (Civ. App.), 52 S. W. 89, affirmed in 93 Tex. 719, no op.

(h) Improper Arguments of Counsel.

In General.—Rule for district courts 41 (67 S. W. xxiii) provides that, when violations of rules as to arguments are not noticed and corrected by the court, opposing counsel may ask leave to present his point of objection. Held, that where appellant's bill of exceptions, which was properly approved by the judge, showed that appellant called attention to the language complained of, and duly objected thereto, this was sufficient to properly present the ques-

tion raised by the objection for revision; it further appearing from the bill, as construed by the court, that the trial court did not sustain the objection. *St. Louis Southwestern Ry. Co. of Texas v. Boyd*, 88 S. W. 509, 40 Tex. Civ. App. 93.

An assignment of error complaining of a statement alleged to have been made to the jury by appellee's counsel can not be considered where the bill of exceptions does not contain such statement. *Galveston, H. & S. A. Ry. Co. v. Walter* (Civ. App.), 25 S. W. 163.

Where counsel, after several exceptions taken to the argument of the opposing counsel, declined to interrupt him further, but gave notice that he would except to all improper arguments, a bill of exceptions taken to the remarks of counsel treating as an admission of liability the fact that defendant had settled with others injured in the same accident with plaintiff, which did not show that the objection was called to the court's attention at the time nor show wherein the argument was improper, did not present ground for reversal. *Gulf, etc., R. Co. v. Brown*, 16 Tex. Civ. App. 93, 40 S. W. 608, writ of error dismissed (see 93 Tex. 684, no op.).

Sufficient if Language Substantially Set Out.—Where a bill of exceptions to words spoken in argument is filed, a motion to have same corrected is properly overruled where effect of language admitted in motion is substantially same as that shown in such bill. *Gulf, etc., R. Co. v. Jones*, 73 Tex. 232, 235, 11 S. W. 185.

The bill of exceptions stated the language of counsel to be, "If the plaintiff, J., fails to recover herein, he will be turned loose upon the county as a pauper. He has no means of support outside of his labor. It means that you and I, or the county, will have to support him." On motion to amend the bill it was admitted the language

used was: "It was contrary to public policy for indiscreet minors like the defendant [plaintiff], who had no means of support outside of his labor, to be employed in dangerous positions, and that such a policy was calculated to increase the pauperism of the county, and means that you and I and the county have them to support." Held, that the effect of the language set out in the bill was substantially the same as that given, and plaintiff was not prejudiced by refusal to order the bill amended. *Gulf, C. & S. F. Ry. Co. v. Jones*, 73 Tex. 232, 11 S. W. 185.

(i) Improper Remarks of Court.

"With respect to the matters complained of in the tenth assignment of error, it does not appear from the bill of exceptions that the remarks of the court objected to were made in the presence or hearing of the jury, so that they could have been in any manner affected thereby." *Alexander v. McGaffey*, 39 Tex. Civ. App. 8, 88 S. W. 462, affirmed in 101 Tex. 627, no op.

(j) Action of Court in Interrupting Argument of Counsel.

Bill of exceptions merely setting out that court interrupted counsel's argument to read law to jury, is too general to warrant attention on appeal. *Edrington v. Rogers*, 15 Tex. 188, 197.

Showing as to Matter Proposed to Be Read by Counsel to Jury.—A bill of exceptions to the refusal of the court to permit counsel to read from a legal authority or work of science, must show what it was, and how much the counsel proposed to read; in order that the supreme court may see whether it was pertinent, and whether the counsel proposed to confine the reading within reasonable limits. *Wade v. De Witt*, 20 Tex. 398.

(k) Rendition of Judgment in Violation of Rules of Court.

Where a bill of exceptions recites the rendition of judgment on the last day of the term under circumstances constituting a violation of the court

rules, "to which action defendant objected in open court, and here and now in open court objects," etc., it does not show that the objection was made before the judgment was rendered, and is insufficient to warrant reversal. *Harris v. Harris*, 50 Tex. Civ. App. 188, 109 S. W. 1138.

(3) Sufficient Where Evidence Contained in Statement of Facts.

In General.—It is expressly provided by statute (Sayles' Civ. Stats. art. 1362), that where the statement of facts contains all the evidence requisite to explain the bill of exceptions, it shall not be necessary to set out such evidence in the bill of exceptions, but it shall be sufficient to refer to the same as it appears in the statement of facts. *Stephens v. Herron*, 99 Tex. 63, 87 S. W. 326, rehearing denied (Sup.), 87 S. W. 1144; *Jamison v. Dooley*, 34 Tex. Civ. App. 428, 79 S. W. 91, affirmed in 98 Tex. 206; *Northern Texas, etc., Co. v. Yates*, 39 Tex. Civ. App. 114, 88 S. W. 283.

It is further provided by rule 56 of rules for the district and county courts, that "exceptions to evidence admitted over objections made to it on the trial may be embraced in the statement of facts in connection with the evidence objected to, provided the statement of facts be presented to the judge within the time allowed for presenting bills of exceptions, and be filed in term time." *Stephens v. Herron*, 99 Tex. 63, 87 S. W. 326, rehearing denied (Sup.), 87 S. W. 1144.

"The purpose of the statement of facts, which was unknown to the practice at common law, and which was introduced into our system by statute, is to make the evidence introduced upon the trial a part of the record in the case; and in a number of cases in this court it has been looked to and considered in connection with the bills of exception, and the bills have frequently been construed in the light of the evidence disclosed by the state-

ment of facts." *Heffron v. Pollard*, 73 Tex. 96, 11 S. W. 165; *Wiseman v. Baylor*, 69 Tex. 63, 6 S. W. 743; *Ramsey v. Hurley*, 72 Tex. 194, 202, 12 S. W. 56; *McClelland v. Fallon*, 74 Tex. 236, 12 S. W. 60; *Jamison v. Dooley*, 98 Tex. 206, 82 S. W. 780, affirming 79 S. W. 71.

Under the express provisions of Sayles' Ann. Civ. St. 1897, art. 1362, where evidence in the statement of facts would explain or show the relevancy of evidence embraced in the bill of exceptions, it is sufficient for the bill to refer to such evidence as it appears from the statement of facts, without setting it out. *Northern Texas Traction Co. v. Yates*, 88 S. W. 283, 39 Tex. Civ. App. 114.

Rev. St. 1895, art. 1362, providing that, where the statement of facts contains all the evidence requisite to explain the bill of exceptions, it shall not be necessary to set out such evidence in the bill, but it shall be sufficient to refer to the same as it appears in the statement of facts, does not render sufficient a bill of exceptions which does not set out the evidence, nor refer to it as it appears in the statement of facts. *Jamison v. Dooley*, 79 S. W. 91, 34 Tex. Civ. App. 428, affirmed in 82 S. W. 780, 98 Tex. 206.

Where the statement of facts is substantially a bill of exceptions, an objection that an exception taken to the exclusion of evidence should have been preserved in a separate bill, and not incorporated into the statement, is without merit. *International Building & Loan Ass'n v. Hardy* (Civ. App.), 26 S. W. 523.

A bill of exceptions to the admission of evidence is sufficient to require the ruling thereon to be considered where it shows that the evidence was objected to, and the objections, and that they were overruled, though it does not show that the evidence was admitted, but the fact that it was admitted is shown by its appearing in the state-

ment of facts, which constitutes a part of the record and may be considered in connection with the bill. *Jamison v. Dooley*, 98 Tex. 206, 82 S. W. 780, affirming 79 S. W. 71.

District court rule 56 (20 S. W. xv) provides that exceptions to evidence admitted over objections may be embraced in the statement of facts in connection with the evidence objected to. The statutes in relation to bills of exception provide for a statement of facts independent of the bills of exception, and that evidence which appears in the statement of facts need not be embodied in the bill. Held, that where a bill of exceptions to the exclusion of evidence was incorporated in the statement of facts without objection from appellee, and the bill was seasonably drawn, approved, signed, and filed in conformity with Rev. St. 1895, arts. 1364-1366, the bill was open to consideration on appeal. *Stephens v. Herron*, 99 Tex. 63, 87 S. W. 326, rehearing denied (Sup.), 87 S. W. 1144.

A bill of exceptions to the admission of evidence of plaintiff's worldly condition and as to how many children he had and whether they were dependent upon him for support is substantially supported by a statement of facts showing the number of plaintiff's children and that he stated that he had to support them. *Dreiss v. Friedrich*, 57 Tex. 70.

"A difficulty in the way of our holding upon this question is presented by rule 56 of rules for the government of the district courts, which was first adopted in the year 1877 and which reads as follows: 'Exceptions to evidence, admitted over objections made to it on the trial, may be embraced in the statement of facts, in connection with the evidence objected to.' This rule does not expressly prohibit the incorporation of a bill of exceptions to the ruling of the court in excluding evidence, in the statement. Its lan-

guage is permissive and directory; and it may be gravely doubted, whether the purpose was not to leave the law as to exceptions of the latter character as it aforesaid was. But our decisions distinguish rules of the court from statutory rules and hold that the former unlike the latter are not inflexible. In *Mills v. Bagby*, 4 Tex. 320, speaking on this subject, Judge Lipscomb says: 'If it had rested on a rule of practice established by the court, it would have been competent for the court so to adapt its exercise as to prevent any particular oppression and to make it yield to the particular circumstances of the case.' (See, also, *DeLeon v. Owen*, 3 Tex. 153.) Besides it is held in *Langton v. Marshall*, 59 Tex. 296, that if a party wishes to take advantage of the failure of the adverse party to comply with a mere rule of practice he should make his objection in the trial court. The appellee in this case not having objected to the incorporation of the bill of exceptions in the statement and the bill otherwise having been seasonably and properly drawn, approved and signed and filed, we are of opinion he can not upon appeal complain that it is not in compliance with the rule." *Stephens v. Herron*, 99 Tex. 63, 87 S. W. 326.

Rules Prescribed for Bills of Exceptions Must Be Followed.—Where statement of facts, instead of bill of exceptions, is employed to preserve record of objections below, rules prescribed for bills of exceptions must be followed. *Howard v. Mayor*, 59 Tex. 76; *Bonnell v. Prince*, 11 Tex. Civ. App. 399, 32 S. W. 855, affirmed in 89 Tex. 104.

5. Definiteness and Certainty.

It is the rule in Texas, established by a long line of decisions, that a bill of exceptions should state the facts in regard to the matter of which complaint is made in such a manner as to exclude any reasonable hypothesis upon which the decision of the trial

court can be sustained. *San Antonio, etc., R. Co. v. Lester* (Civ. App.), 84 S. W. 401, reversed on another point in 99 Tex. 214.

Sufficient facts must be stated in a bill to exclude any reasonable conclusion of fact therefrom upon which the decision can be sustained. *Sadler v. Anderson*, 17 Tex. 245.

Every point in the bill of exceptions must be so clear and full that nothing will be left to inference or implication. *San Antonio, etc., R. Co. v. Lester* (Civ. App.), 84 S. W. 401, reversed on another point in 99 Tex. 214, citing *Merlin v. Manning*, 2 Tex. 351; *Sadler v. Anderson*, 17 Tex. 245; *Anderson v. Anderson*, 23 Tex. 639, 641; *Hill v. Cunningham*, 25 Tex. 25, 32; *Supreme Commandery Knights v. Rose*, 62 Tex. 321; *Snow v. Starr*, 75 Tex. 411, 12 S. W. 673. See, also, as to the certainty required in a bill of exceptions, *Nalle v. Gates*, 20 Tex. 315.

Points presented by bill of exceptions should be so distinct and expressive as to the party's object that nothing should be left to inference. *Merlin v. Manning*, 2 Tex. 351.

Assignments of error based upon bills of exceptions so general that the court can not specifically decide the question will not be passed upon. *Runnells v. Pecos & N. T. Ry. Co.*, 49 Tex. Civ. App. 150, 107 S. W. 647.

Error can not be predicated upon bill of exceptions incomplete and obscure in its statements. *Sweetzer, etc., Co. v. Clafin & Co.*, 82 Tex. 513, 516, 17 S. W. 769.

A bill of exceptions dealing only in general expressions, without indicating the exact point decided on the exception sustained, is insufficient. *Stephens v. Bowerman's Heirs*, 27 Tex. 18.

A bill of exception complaining of all of the evidence, some of which is admissible, presents nothing for review. *Dolan v. Meehan* (Civ. App.), 80 S. W. 99.

6. Bill Must Be Complete in Itself or by Reference to Other Parts of Record.

In General.—Parties, in taking bills of exceptions, should make them complete within themselves, or by reference to such other parts of the record as under the rules may be thus referred to. *Taylor v. Davis* (Sup.), 13 S. W. 642.

Where the bill shows that a judgment and petition in a case between plaintiff and a third person were offered in evidence, but they are not made part of the bill, papers in the record, purporting to be the judgment and petition in an action between plaintiff and such third person, but not identified as the papers referred to in the bill of exceptions, do not form part of the bill. *Taylor v. Davis* (Sup.), 13 S. W. 642.

Error can not be predicated on the refusal of the trial court to charge, on an inquiry made by the jury after they had retired, where it does not appear by the bill of exceptions, but only by an affidavit filed with the motion for a new trial, that the jury requested additional instructions. *Taylor v. Davis* (Sup.), 13 S. W. 642.

An assignment of error based on the refusal of the court to consider a will as evidence will not be considered, where the bill of exceptions nor the statement of facts contains a copy of the will, although the record contained a copy of a paper purporting to be a copy of the will and its probate. *Mattfeld v. Huntington*, 17 Tex. Civ. App. 716, 43 S. W. 53.

Bill of exceptions referring to documents and depositions not contained in record can not be considered. *Morris v. Runnells*, 12 Tex. 175, 178.

"The record is evidently incomplete in not containing the protest and deposition referred to, and properly constituting a part of the statement of facts. Every presumption is in favor of the judgment. And in the absence

of the protest and deposition in question, it would not be unreasonable to suppose that, taken in connection, they may have afforded competent evidence of the due presentation and nonpayment of the receipt." *Morris v. Runnells*, 12 Tex. 175, 176.

All Bills to Be Literally Transcribed—Impropriety of Copying Instruments Referred to.—Under Sup. Ct. Rule No. 82a (14 S. W. iv), providing that "all bills of exceptions and statements of facts shall be literally transcribed, and the clerks are hereby prohibited from copying as parts of the same any instrument in writing or document not originally inserted therein, but merely referred to and directed to be copied from some other paper in the case," the clerk, where a bill of exceptions is taken in an action on a note, is prohibited from copying the indorsements of the note into the blanks left in the bill of exceptions, and the party appealing can not complain of the other party's refusal to permit the clerk to copy the indorsements. *Sparks v. Texas Loan Agency* (Sup.), 19 S. W. 256.

D. PREPARATION, PRESENTATION, SETTLEMENT, AUTHENTICATION AND FILING.

1. By Whom Prepared.

Duty of Parties to Prepare Bill.—As a general rule the bill of exceptions is prepared by the party who has excepted, during the progress of a cause, or the trial thereof, to the decisions or opinion of the court and desires to appeal therefrom. Act May 13, 1846, § 101; Sayles' Civ. Stats., art. 1360, (1358). *Stephens v. Herron*, 99 Tex. 63, 87 S. W. 326; *International, etc., R. Co. v. Mercer* (Civ. App.), 78 S. W. 562, affirmed in 98 Tex. 621, no op.; *Maury v. Keller* (Civ. App.), 53 S. W. 59, affirmed in 93 Tex. 714, no op.; *Carolan v. Jefferson*, 24 Tex. 229; *Mi Palmo v. Slayden & Co.*, 100 Tex. 13,

92 S. W. 796, affirming 90 S. W. 908; *Houston v. Jones*, 4 Tex. 170.

In the preparation and completion of a bill of exceptions the opposite party has no necessary connection and is frequently not even cognizant of its contents until it has become a part of the record. *Roundtree v. Galveston*, 42 Tex. 612.

The opposite party is not bound to see that the bill of exceptions contains all the facts, or to agree to it; and has no control over it. *Carolan v. Jefferson*, 24 Tex. 229.

Where the appellant omits to make a bill of exceptions, or a statement of the case, prepared and settled as required by law, the order or judgment appealed from should be affirmed. *Hodges v. Longcope*, 23 Tex. 155.

Preparation by Trial Judge.—A bill of exceptions may, at the request of appellant's counsel, be prepared by the trial court. *Doll v. Mundine*, 84 Tex. 315, 19 S. W. 394.

Preparing bill of exceptions at request of counsel is an act which the court may perform in its discretion, and if statement so prepared accords with the facts and counsel have opportunity to examine it, such action is unobjectionable. *Doll v. Mundine*, 84 Tex. 315, 317, 19 S. W. 394.

The trial judge, in preparing bill of exceptions, should follow strictly all statutory requirements. *Lanier v. Perryman*, 59 Tex. 104, 110.

As to the duty of the judge to make out bill where the party drawing the bill does not agree to proposed corrections therein, see post, "Duty of Judge to Make Out Bill Where Corrections Not Agreed to," II, D, 5, e, (2).

2. Necessity for Presentation to Judge.

In General.—It is expressly required by the Texas statutes and rules of court, that the bill of exceptions, after being reduced to writing, shall be presented to the judge for his allowance

and signature, within a prescribed time. Sayles' Civ. Stats., art. 1365, (1363); Rule 56 of Rules for District and County Courts. *Stephens v. Heron*, 99 Tex. 63, 87 S. W. 326; *San Antonio, etc., R. Co. v. Holden*, 23 Tex. Civ. App. 144, 55 S. W. 603, affirmed in 93 Tex. 694, no op.; *Owens v. Missouri, etc., R. Co.*, 67 Tex. 679, 4 S. W. 593. And see cases cited post, "Time for Preparation, Presentation and Filing," II, D, 3.

Manner and Sufficiency.—The mere fact that a bill of exceptions was read by counsel in presenting a motion for a new trial, and that it was placed among the files in the case, and delivered to the judge when he took the motion under consideration, is not a sufficient presentment of the bill for allowance unless his attention was specially called to the bill with a request that it be considered as presented for allowance. *San Antonio & A. P. Ry. Co. v. Holden*, 55 S. W. 603, 23 Tex. Civ. App. 144.

A bill of exceptions which was not filed among the papers, nor called to the court's attention, will not be considered. *Spencer v. James*, 10 Tex. Civ. App. 327, 31 S. W. 540, 43 S. W. 556.

3. Time for Preparation, Presentation and Filing.

a. Allowance of Time during Trial to Embody Exceptions in Written Bill.

By art. 1360 Sayles' Civ. Stats. (1358), it is provided that "whenever, in the progress of a cause, either party is dissatisfied with any ruling, opinion or other action of the court, he may except thereto at the time the same is made or announced, and at his request time shall be given to embody such exception in a written bill." *International, etc., R. Co. v. Mercer* (Civ. App.), 78 S. W. 562, affirmed in 98 Tex. 621, no op.

Refusal of the court to suspend the trial for a reasonable time to enable a

party to prepare and present to the judge a bill of exceptions, is not available on appeal where the bill of exceptions was obtained and approved by the judge notwithstanding such refusal. *Gonzales v. Batts*, 20 Tex. Civ. App. 421, 50 S. W. 403.

"It is doubtless the right of counsel when, in the trial of a cause he expects to any action of the court, to require a suspension of the trial for a reasonable time to enable him to prepare and present to the judge his bill of exceptions; and a denial of this right and a refusal to suspend the trial for this purpose for a reasonable time, when excepted to, and when no bill of exceptions to the ruling complained of were secured by counsel by reason of the refusal of the court to suspend the trial, would be reversible error, unless the exception should show of itself that it was without merit. But in this case counsel sought and obtained his bill of exceptions, approved by the judge, notwithstanding the refusal of the court to suspend the trial and permit the bill to be prepared at the time of the execution. Under these circumstances the appellant can not be heard to complain that the court did not suspend the trial." *Gonzales v. Batts*, 20 Tex. Civ. App. 421, 50 S. W. 403.

b. Compliance with Provisions as to Time Essential to Consideration of Bill.

A bill of exceptions not presented, allowed, and filed within the time allowed can not be considered. *San Antonio & A. P. Ry. Co. v. Holden*, 55 S. W. 603, 23 Tex. Civ. App. 144; *Gray v. Frontroy*, 89 S. W. 1090, 40 Tex. Civ. App. 302, and see cases cited post, "Statement of Rules as to Time," II, D. 3, c.

Where a reversal is claimed because of appellant's inability, without fault on his part, to obtain a bill of exceptions within the time required, a bill signed by the judge and filed after the

expiration of the required time is inoperative, and can not be looked to to determine whether or not exceptions were duly preserved to the rulings objected to. *London v. Crow*, 46 Tex. Civ. App. 190, 102 S. W. 177.

Insufficient Excuse for Failure to Present in Time.—A showing that one of two attorneys representing appellant was engaged in the trial of a case during the time the bill of exceptions should have been presented for settlement, is not a sufficient excuse for failure to present it in time, when no excuse is offered for failure of his associate to present it. *San Antonio & A. P. Ry. Co. v. Holden*, 55 S. W. 603, 23 Tex. Civ. App. 144.

Absence of the trial judge from the county is not an excuse for not presenting a bill of exceptions within the statutory time, when appellant knew where the judge was during such time, since the bill could have been sent to him through the mail. *San Antonio & A. P. Ry. Co. v. Holden*, 55 S. W. 603, 23 Tex. Civ. App. 144.

c. Statement of Rules as to Time.

(1) Must Be during Term.

General Rule.—It is required by statute and by supreme court rules that bills of exception shall be prepared, presented, settled and filed during the term at which the cause was tried, in order to constitute them part of the record and as such entitled to consideration in the appellate court. *Frost v. Frost*, 45 Tex. 324; *Price v. Lauve*, 49 Tex. 74; *Farrar v. Bates & Co.*, 55 Tex. 193; *Blum v. Schram*, 58 Tex. 524; *Sabine, etc., R. Co. v. Joachimi*, 58 Tex. 452; *Howard v. Mayor*, 59 Tex. 76, 78; *G. C. & S. F. R. Co. v. Eddins*, 60 Tex. 656; *Lockett v. Schurenberg*, 60 Tex. 610; *Willis v. Donac*, 61 Tex. 588; *Brack v. McMahan*, 61 Tex. 1; *International, etc., R. Co. v. Underwood*, 62 Tex. 21; *Tom v. Sayers*, 64 Tex. 339; *Hess v. Dean*, 66 Tex. 663, 2 S. W. 727; *Caldwell County v. Harbert*, 68 Tex. 321, 4 S. W.

607; *Yoe v. Montgomery*, 68 Tex. 338, 4 S. W. 622; *Heffron v. Pollard*, 73 Tex. 96, 98, 11 S. W. 165; *Schaub v. Dallas Brewing Co.*, 80 Tex. 634, 637, 16 S. W. 429; *Landa v. Heermann*, 85 Tex. 1, 19 S. W. 885; *White v. Harris*, 85 Tex. 42, 19 S. W. 1077; *Saul v. Frame*, 3 Tex. Civ. App. 596, 22 S. W. 984; *Marshall v. Spillane*, 7 Tex. Civ. App. 532, 27 S. W. 162; *Siebert v. Lott*, 20 Tex. Civ. App. 193, 49 S. W. 783; *Everett v. Galveston, etc., R. Co.*, 28 Tex. Civ. App. 528, 67 S. W. 453, affirmed in 95 Tex. 678, no op.; *St. Louis, etc., R. Co. v. McArthur*, 31 Tex. Civ. App. 205, 72 S. W. 76, affirmed in 97 Tex. 645, no op.; *Pennington v. McQueen (Sup.)*, 3 S. W. 315; *Franco-Texan, etc., Co. v. Chaptive (Sup.)*, 3 S. W. 32; *Morris v. Rhine (Sup.)*, 8 S. W. 315; *White v. Holley (Civ. App.)*, 20 S. W. 859; *Baxter v. Baker (Civ. App.)*, 22 S. W. 258; *Campbell v. Cook (Civ. App.)*, 24 S. W. 977; *Trezevant v. Rains (Civ. App.)*, 25 S. W. 1094, affirmed in 93 Tex. 652, no op.; *Maverick v. Burney (Civ. App.)*, 30 S. W. 566, reversed in 88 Tex. 560; *Youree v. League (Civ. App.)*, 31 S. W. 81; *Waco Ice, etc., Co. v. Wiggins (Civ. App.)*, 32 S. W. 58; *Niagara, etc., Co. v. Oliver (Civ. App.)*, 33 S. W. 689; *Baker v. Milde (Civ. App.)*, 33 S. W. 152; *Texas, etc., R. Co. v. Johnson*, 2 App. Civ. Cases, § 185; *Cullers v. Britton*, 2 App. Civ. Cases, § 185; *Missouri, etc., R. Co. v. Rabb*, 3 App. Civ. Cases, § 37.

A bill of exceptions, in order to be part of the record, must be made and filed during the term in which the trial was had and the objections were taken, and, if made and filed after the term, the bill is not a part of the record. *White v. Holley (Civ. App.)*, 20 S. W. 859; *Youree v. League (Civ. App.)*, 31 S. W. 81.

Bills of exception must be filed during the term of the court at which the trial was had, unless the time be extended by consent or order. *Farrar v. Bates*, 55 Tex. 193; *Locket v. Schuren-*

berg, 60 Tex. 610; *Trezevant v. Rains (Civ. App.)*, 25 S. W. 1092; *Niagara Stamping & Tool Co. v. Oliver (Civ. App.)*, 33 S. W. 689.

"The statement of facts and bills of exceptions are required in plain and unambiguous language, as has been frequently decided by the court, to be prepared and submitted to the judge and signed by him, and filed as a part of the record during the term of the court at which such bill was taken or when said cause was tried. (Paschal's Dig., arts. 149 and 217-8-9.)" *Frost v. Frost*, 45 Tex. 324.

Rule 60 of the supreme court for the government of the district courts also requires bills of exception to the admission of testimony to be filed during the term of the court at which taken. *Farrar v. Bates & Co.*, 55 Tex. 193.

To be made available on appeal, bill of exceptions must be prepared, signed by judge and filed with clerk of court before adjournment of term. *Missouri, etc., R. Co. v. Rabb*, 3 App. Civ. Cases, § 37.

A bill, signed and filed after the term at which judgment is entered, comes too late, unless it appears that it was so signed and filed by consent of parties, or in compliance with a rule of court, or an order made at the trial term, or the court's control over the record was preserved by the pendency of a motion for a new trial. *Missouri Pac. Ry. Co. v. Rabb*, 3 Willson, Civ. Cas. Ct. App. § 38; *Campbell v. Cook (Civ. App.)*, 24 S. W. 977.

Exceptions to evidence, taken at one term of court, will not be considered on appeal, where the bill of exceptions was signed by the judge, and filed at the next succeeding term. *Campbell v. Cook (Civ. App.)*, 24 S. W. 977, reversed in 86 Tex. 630.

An assignment of error based on a bill of exceptions taken to the admission of testimony, when the bill was taken and filed after the adjournment of court, can not be considered.

Hess v. Dean, 66 Tex. 663, 2 S. W. 727.

Objection to the introduction of deeds can not be considered where the bills of exception were filed after the adjournment of the term. *Willis & Bro. v. Smith*, 17 Tex. Civ. App. 543, 43 S. W. 325, affirmed in 93 Tex. 698, no op.

Where an order is entered granting the request of a party that the court file his conclusions of law and fact, the failure of the court to file his conclusions can not be reviewed on appeal, except by a bill of exceptions taken by such party before the adjournment of the court. *Landa v. Heermann*, 85 Tex. 1, 19 S. W. 885.

Bill of exceptions to exclusion of deposition should be taken at the time of suppression instead of at the trial where suppressed at previous term. *Gulf, etc., R. Co. v. Dwyer*, 75 Tex. 572, 12 S. W. 1001.

Bill of exception to order of court sustaining exceptions to plea of personal privilege must be filed at term of court at which order complained of is made, and within time allowed by law. *Marshall v. Spillane*, 7 Tex. Civ. App. 532, 534, 27 S. W. 162.

Bills of exception prepared upon the trial at a term subsequent to that at which the motions were made, the rulings on which were the subject of the exceptions, will not be considered on appeal. *Galveston, etc., R. Co. v. Eaten* (Civ. App.), 44 S. W. 562.

Where appellant's attorney made no effort to file a bill of exceptions within the term, as required by statute, a bill filed after the term will not be considered on appeal. *Adams v. State* (Cr. App.), 60 S. W. 255.

Proper at Any Time during Term under Former Practice.—Where an exception to a ruling is necessary it must be taken at the time of the ruling but by consent of the court the bill of exceptions may be drawn up and signed at any time during the term. *Price v. Lauve*, 49 Tex. 74.

Exceptions to the charge may be reduced to writing and signed by the judge at any time during the term. *Jones v. Thurmond*, 5 Tex. 318, and see *Hall v. Stancell*, 3 Tex. 401.

Effect of Adjournment before Expiration of Time Allowed by Judge to Perfect Bill.—Where the judge adjourned court before the time allowed by him to perfect the bill of exceptions had expired, the appellant will not be denied relief on the ground that the bill was not approved and filed before the adjournment. *Williams v. Dean* (Civ. App.), 38 S. W. 1024.

(2) Presentation within Ten Days after Conclusion of Trial.

Statutory Provision.—By Art. 1365, Sayle's Stats. (1363) it is provided that it shall be the duty of the party taking any bill of exceptions to reduce the same to writing and present the same to the judge for his allowance and signature during the term, and within ten days after the conclusion of the trial. *Farrar v. Bates & Co.*, 55 Tex. 193; *Blum v. Schram*, 58 Tex. 524; *Sabine, etc., R. Co. v. Joachimi*, 58 Tex. 452; *G. C. & S. F. R. Co. v. Holliday*, 65 Tex. 512; *Stephens v. Herron*, 99 Tex. 63, 87 S. W. 326; *Mi Palmo v. Slayden & Co.*, 100 Tex. 13, 92 S. W. 796, affirming 90 S. W. 908; *Saul v. Frame*, 3 Tex. Civ. App. 596, 22 S. W. 984; *Ellis v. Ellis*, 5 Tex. Civ. App. 46, 23 S. W. 996; *Marshall v. Spillane*, 7 Tex. Civ. App. 532, 27 S. W. 162; *Maxon v. Jennings*, 19 Tex. Civ. App. 700, 48 S. W. 781, affirmed in 93 Tex. 646, no op.; *San Antonio, etc., R. Co. v. Holden*, 23 Tex. Civ. App. 144, 55 S. W. 603, affirmed in 93 Tex. 694, no op.; *Western Union Tel. Co. v. Rowe*, 44 Tex. Civ. App. 84, 98 S. W. 228, affirmed in 102 Tex. 596, no op.; *International, etc., Ass'n v. Hardy* (Civ. App.), 26 S. W. 523; *Maury v. Keller* (Civ. App.), 53 S. W. 59, affirmed in 93 Tex. 714, no op.; *G. C. & S. F. R. Co. v. Lockhart*, 4 App. Civ. Cases, § 297, 18 S. W. 649; *Exon v. State*, 33 Tex. Cr. App. 461, 26 S. W. 1088.

"Our statute requires that bills of exception should be reserved at the time of the alleged erroneous act of omission or commission on the part of the court. (Rev. Stat., art. 1358.) They may, however, be reserved, and presented to the court within ten days after the conclusion of the trial. (Art. 1363.)" *G. C. & S. F. R. Co. v. Lockhart*, 4 App. Civ. Cases, § 297, 18 S. W. 649.

"Whatever may have been the practice prior to the adoption of the Rev. Stat. (Pasch. Dig., Arts. 217-219; *Houston v. Jones*, 4 Tex. 170), it is now the statutory right of a party taking a bill of exceptions, if not permitted to do so at the trial, to write out and present the same to the judge for his signature during the term, and within 10 days after the conclusion of the trial." *Exon v. State*, 33 Tex. Cr. App. 461, 26 S. W. 1088.

"The statute requires bills of exception to be presented to the judge for allowance within ten days after the case is finally disposed of; and if not presented within that time, the party complaining is not entitled to have the bill considered on appeal, although it may be allowed by the judge. *Batts' Civ. Stats.*, art. 1365, and cases there cited." *San Antonio, etc., R. Co. v. Holden*, 23 Tex. Civ. App. 144, 55 S. W. 603, affirmed in 93 Tex. 694, no op.

An interlocutory ruling will not be reviewed on appeal where a bill of exceptions thereto is not filed during the term, and within 10 days after the conclusion of the trial, as provided by Rev. Stat., arts. 1358, 1363. *Marshall v. Spillane*, 7 Tex. Civ. App. 532, 27 S. W. 162.

Noncompliance with Rule as Ground for Striking Bill from Record.—Bills of exception which have not been presented to the district judge for signature within 10 days after the refusal of a motion for a new trial will, on motion, be stricken from the

record in the supreme court. *Blum v. Schram*, 58 Tex. 524.

Mandamus to Compel Certification Refused Where Bill Not Presented in Proper Time.—A mandamus to compel a county judge, who tried a cause, to certify a bill of exceptions stating that he failed to comply with Rev. St. art. 1306, requiring him to admonish the jury, when about to disperse for the night, not to converse with any one on the subject of the trial, will not issue where no exception was reserved at the time, as required by article 1358, or presented within 10 days after the close of the trial, as allowed by article 1363. *Gulf, C. & S. F. Ry. Co. v. Lockhart*, 4 Willson, Civ. Cas. Ct. App. § 297, 18 S. W. 649.

Presumption as to Negligence of Appellant.—Where appellant's bills of exceptions were not filed within ten days after the conclusion of the trial, and the record does not disclose that the fault lay with the judge or the appellee, the presumption of negligence is against the appellant, and it can not complain if the bills are not legally before the supreme court. *G. C. & S. F. R. Co. v. Holliday*, 65 Tex. 512.

Provision Construed as Limited to Presentation of Bill.—"Art. 1363, Rev. Stat., is to the effect that the bill of exceptions must be presented to the judge for his allowance and signature during the term and within ten days after the conclusion of the trial. Art. 1364 provides that the judge shall submit the bill to the adverse party or counsel, and if the same is found correct, sign without delay, and file it with the clerk during the term. It is questionable whether or not the statute requires the filing of the bill to occur within the ten days, or only the presentation of it to the judge. If just before the expiration of the tenth day the bill should be presented to the judge, he might not be able to have it examined by the opposite counsel, and passed upon by him and filed, before

the time limited expired. The term 'without delay' is somewhat indefinite, and can not be measured well by days, but should be determined by the circumstances of each case." *Sabine, etc., R. Co. v. Joachimi*, 58 Tex. 452.

Effect of Signature and Approval within Proper Time of Statement Containing Exceptions.—Bills of exception not presented to the district judge for signature until after the expiration of 10 days after trial will be considered, where the statement of facts containing bills of exception to the admission of improper evidence was signed and approved within 10 days after trial. *Blum v. Schram*, 58 Tex. 524.

(3) Extension of Time after Adjournment, under Act of 1903.

See post, "Allowance of Twenty Days after Adjournment under Act 1903," III, D, 3, b, (2), (b), bb.

d. Application of Rules as to Time Where Bill Incorporated in Statement of Facts.

In General.—Where bills of exceptions are incorporated in statements of fact, they must be presented, settled and filed within the time prescribed for bills of exceptions in order to entitle them to consideration. *Lockett v. Schurenberg*, 60 Tex. 610; *Gulf, etc., R. Co. v. Eddins*, 60 Tex. 656; *Tom v. Sayers*, 64 Tex. 339; *Caldwell County v. Harbert*, 68 Tex. 321, 4 S. W. 607; *Yoe v. Montgomery*, 68 Tex. 338, 4 S. W. 622; *Heffron v. Pollard*, 73 Tex. 96, 11 S. W. 165; *Ivey v. Williams*, 78 Tex. 685, 688, 15 S. W. 163; *Schaub v. Dallas Brewing Co.*, 80 Tex. 634, 16 S. W. 429; *White v. Harris*, 85 Tex. 42, 19 S. W. 1077; *Saul v. Frame*, 3 Tex. Civ. App. 596, 22 S. W. 984; *Siebert v. Lott*, 20 Tex. Civ. App. 191, 49 S. W. 783; *Everett v. Galveston, etc., R. Co.*, 28 Tex. Civ. App. 528, 67 S. W. 453, affirmed in 95 Tex. 678, no op.; *St. Louis, etc., R. Co. v. McAuthur*, 31 Tex. Civ. App. 205, 72 S. W. 76, affirmed in 97 Tex. 645, no op.;

Franco-Texan Land Co. v. Chaptive (Sup.), 3 S. W. 31; *Morris v. Rhine* (Sup.), 8 S. W. 315; *Baxter v. Baker* (Civ. App.), 22 S. W. 258; *Texas, etc., R. Co. v. Johnson*, 2 App. Civ. Cases § 185; *Cullers v. Britton*, 2 App. Civ. Cases, § 281.

Bills of exception must be signed and filed during the term; and though, under rule 56, exceptions to evidence may be embraced in a statement of facts in connection with the evidence admitted, such exceptions will be disregarded, unless the statement of facts containing them be properly made out and filed during the term, and presented to the judge within ten days after the trial. *Lockett v. Schurenberg*, 60 Tex. 610.

Where there is no bill of exceptions saving any objections to the admission in evidence of certified copies of deeds, except in the body of the statement of facts, which was not filed until after the term, they stand as if admitted without objection. *Everett v. Galveston, etc., R. Co.*, 28 Tex. Civ. App. 528, 67 S. W. 453, affirmed in 95 Tex. 678, no op.

Court's order permitting filing of statement of facts after term does not legalize exceptions found in statement, as no order can authorize filing of exceptions after term. *Franco-Texan Land Co. v. Chaptive* (Sup.), 3 S. W. 31, 32.

"It is well settled that bills of exception must be signed and filed during the term; and the fact that they are incorporated in a statement of facts filed on proper order after the close of the term does not change the rule prescribed by the statute and the rules for the district courts." *Willis v. Donac*, 61 Tex. 588.

Striking from Statement Bills of Exception Not Presented within Proper Time.—A court has power at the next term after trial to correct a statement of facts, which had been inadvertently signed by the judge while

it contained a bill of exceptions filed out of time, by striking out such bill. *Maxon v. Jennings*, 48 S. W. 781, 19 Tex. Civ. App. 700.

"There were no separate bills of exceptions taken, but the objections and exceptions to the rulings were stated in the statement of facts, which was filed during the term at which the trial took place. When it was presented to the judge does not appear from his certificate. But at the next term of the court after that at which the trial was had, defendant in error filed a motion to strike the bills of exceptions from the statement of facts, on the ground that they were not presented to the judge within ten days after the conclusion of the trial, and were inadvertently allowed by the judge to remain in the statement in approving it. And these facts were found by the court below to be true and the bills of exception were ordered to be stricken out. We think under the decisions it was within the power of the court to thus correct the record. *East Line, etc., R. Co. v. Culberson*, 72 Tex. 375, 10 S. W. 706; *Willis & Bros. v. Smith*, 90 Tex. 635, 40 S. W. 401; *Bogges v. Harris*, 90 Tex. 476, 39 S. W. 565. We do not think the power of the court to correct its record is confined to cases in which it has been imposed on by undue practice, of which there is no suggestion in this case. By oversight the judge, in approving a statement of facts which included bills of exceptions, made it appear that they were properly presented when such was not the fact. The other party had the right to have this corrected." *Maxon v. Jennings*, 19 Tex. Civ. App. 700, 48 S. W. 781, affirmed in 93 Tex. 646, no op.

e. Effect of Motion for New Trial as Extending Time.

See, generally, the title NEW TRIALS.

In General.—The statute (Rev. Stat., art. 1363) which requires a bill of ex-

ceptions to be presented for the judge's allowance and signature during the term and within ten days after the conclusion of the trial, construed to mean that the presentation may be made within ten days after the date of the entry of an order overruling a motion for new trial. In contemplation of the statute, the overruling a motion for a new trial is the conclusion of the trial. *Sabine, etc., R. Co. v. Joachimi*, 58 Tex. 452; *Ellis v. Ellis*, 5 Tex. Civ. App. 46, 23 S. W. 996. And see *Blum v. Schram*, 58 Tex. 524, 528.

When there is a motion for a new trial, the time for the settlement of a bill of exceptions is extended to the term in which the motion is determined. *Sabine & E. T. R. Co. v. Joachimi*, 58 Tex. 452.

"The conclusion of the trial is held to be after verdict, or after overruling motions for a new trial or in arrest for judgment, where the same are filed." *Exon v. State*, 33 Tex. Cr. App. 461, 26 S. W. 1088.

After Second Motion Overruled.—Where a motion for new trial is overruled, and a notice of appeal given, and, during the same term such notice is withdrawn, and a second motion for new trial made and overruled, it is sufficient for the purposes of appeal that the bill of exceptions be presented within 10 days after the second motion is overruled. *International Building & Loan Ass'n v. Hardy* (Civ. App.), 26 S. W. 523.

Filing after Death of Plaintiff Pending Motion.—Death of plaintiff pending motion for new trial does not prevent filing of bills of exception and statements of facts. *Wamble v. Graves*, 1 App. Civ. Cases, § 481.

f. Presumption as to Time of Presentation and Filing.

It will be presumed that a bill of exceptions was presented and filed within the time required, where nothing to the contrary appears. *San Antonio, etc., R. Co. v. De Ham* (Civ.

App.), 54 S. W. 395, 396, affirmed in 93 Tex. 649, no op.

When record is silent as to when bills of exception were presented to trial judge, it is presumed that they were presented within ten days after trial was concluded. *Heffron v. Pollard*, 73 Tex. 96, 98, 11 S. W. 165; *San Antonio, etc., R. Co. v. De Ham* (Civ. App.), 54 S. W. 395.

It will not be presumed that the judge disregarded the law and allowed a bill of exceptions not presented within the time provided by the statute. *Heffron v. Pollard*, 73 Tex. 96, 98, 11 S. W. 165.

"The statute requires that bills of exceptions shall be filed during the term (Rev. Stat., art. 1364), and it has been accordingly held that an exception which is shown by a statement of facts filed after the final adjournment can not be considered. *Willis v. Donac*, 61 Tex. 588; *Lockett v. Schurenberg*, 60 Tex. 610. On the other hand when a bill of exceptions has been filed during term time and the date of its presentation to the trial judge does not appear the presumption is that it was presented within ten days after the trial was concluded. It is not to be presumed that the judge disregarded the law and allowed a bill of exceptions which was not presented within the time provided by the statute. We are of opinion that the same presumption should be indulged when the exceptions appear in a statement of facts which have been filed during the term." *Heffron v. Pollard*, 73 Tex. 96, 11 S. W. 165.

Bills of exception filed during term, in absence of showing to the contrary, will be presumed to have been presented to the judge within ten days after overruling of motion for new trial and will be considered. *Rushing v. Willis* (Civ. App.), 28 S. W. 921.

Where a motion for a new trial was heard on bills of exceptions, it will be presumed that the bills had been drawn

and numbered and were before the court for approval when the motion was filed, though the bills were not filed until after the motion for a new trial had been overruled. *Austin v. Forbis*, 99 Tex. 234, 89 S. W. 405.

On a motion to strike a bill of exceptions on the ground that it was not filed during the term, it appeared that the filing mark on the bill bore a date prior to the adjournment, that it was put on after the adjournment by one who had ceased to be the clerk after the court ended, that the bill was found among the papers at the time it was so indorsed, and that it was approved by the judge on the day court adjourned. Held, that the motion would be denied, in the absence of any showing that the bill was not deposited with the clerk before court adjourned. *Baker v. Milde* (Civ. App.), 33 S. W. 152.

4. Submission to Adverse Party.

Necessity.—When the bill of exceptions has been made out and tendered to the trial judge, it is the duty of the judge to submit such bill to the adverse party or his counsel, if in attendance on the court. *Sayles' Civ. Stats.*, art. 1366 ((1364). *Firebaugh v. Ward*, 51 Tex. 409; *Franklin v. Tiernan*, 62 Tex. 92; *Stephens v. Herron*, 99 Tex. 63, 87 S. W. 326, rehearing dismissed (Sup.), 87 S. W. 1144; *Owens v. Missouri, etc., R. Co.*, 67 Tex. 679, 4 S. W. 593; *Farrar v. Bates & Co.*, 55 Tex. 193; *Maury v. Keller* (Civ. App.), 53 S. W. 59, affirmed in 93 Tex. 714, no op.

It is the duty of a trial judge, before signing a bill of exceptions prepared and tendered by appellant's counsel, to submit it to the inspection of appellee's counsel. *Franklin v. Tiernan*, 62 Tex. 92.

Purpose of Provision.—The purpose of providing that the bill should be submitted to the adverse party or to his attorney was to give him an opportunity to object. *Stephens v. Herron*, 99 Tex. 63, 87 S. W. 326.

Sufficiency of Presentation Where Exception Incorporated in Statement of Facts.—In *Stephens v. Herron*, 99 Tex. 63, 87 S. W. 326, the statement of facts in which the exception was incorporated, was agreed to and signed by both parties and the trial judge. It was held that as to such bill there had been a substantial compliance with every requirement of the statute.

"The purpose of providing that the bills should be submitted to the adverse party or to his attorney was to give him an opportunity to object; and since it has been presented to him in the statement of facts, and he has objected neither to its substance nor to the irregularity of its being so incorporated, if irregularity it be, we think he should now be held estopped from making such objection." *Stephens v. Herron*, 99 Tex. 63, 87 S. W. 326.

5. Approval and Signature.

a. Essential to Validity of Bill.

(1) General Rule.

Necessity for Approval.—Under the statutes requiring bills of exception to be approved by the trial judge such approval is essential to their validity, and bills not thus approved will not be considered. *Ward v. Ward*, 34 Tex. Civ. App. 104, 77 S. W. 829; *Holt v. Cave*, 38 Tex. Civ. App. 62, 85 S. W. 309, affirmed in 101 Tex. 641, no op.; *Gray v. Frontroy*, 40 Tex. Civ. App. 302, 80 S. W. 1090; *Clitus v. Langford* (Civ. App.), 24 S. W. 325; *Durham v. Atwell* (Civ. App.), 27 S. W. 316; *Nix v. Pope* (Civ. App.), 37 S. W. 617; *Western Union Tel. Co. v. Trice* (Civ. App.), 48 S. W. 770; *Missouri, etc., R. Co. v. Cock* (Civ. App.), 51 S. W. 354; *Maury v. Keller* (Civ. App.), 53 S. W. 59; *Wade v. Galveston, etc., R. Co.* (Civ. App.), 110 S. W. 84.

Bill of exceptions not signed by the trial judge, and neither showing his approval or that he acted upon it in any way, will be disregarded on appeal. *Clitus v. Langford* (Civ. App.), 24 S. W. 325.

Where a bill of exceptions is not approved by the judge, assignments of error founded thereon will not be considered. *Nix v. Pope* (Civ. App.), 37 S. W. 617; *McCord v. Hames*, 38 Tex. Civ. App. 239, 85 S. W. 504.

Necessity for Signature.—To preserve a bill of exceptions and entitle it to consideration in the appellate court, it must be signed by the trial judge. *Davis v. State*, 75 Tex. 420, 12 S. W. 957; *Land v. Klein*, 21 Tex. Civ. App. 3, 50 S. W. 638; *Clitus v. Langford* (Civ. App.), 24 S. W. 325; *Galveston, etc., R. Co. v. Burnett* (Civ. App.), 37 S. W. 779, affirmed in 93 Tex. 639, no op.; *Texas, etc., R. Co. v. Crump* (Civ. App.), 110 S. W. 1013; and see *Bradford v. Knowles*, 11 Tex. Civ. App. 572, 33 S. W. 149, affirmed in 93 Tex. 700, no op.

A paper in the transcript, purporting to be a bill of exceptions, but not signed by the judge, can not be considered. *Davis v. State*, 75 Tex. 420, 12 S. W. 957; *Clitus v. Langford* (Civ. App.), 24 S. W. 325.

As a mode of authentication of bill of exceptions is provided by law, a mere statement of the judge, although written by him and signed officially, can not be received as its substitute. *Owens v. Missouri, etc., R. Co.*, 67 Tex. 679, 4 S. W. 593.

"The trial judge must sign the bills of exceptions and the statement of facts. To permit the counsel in a case to agree to send up original documents as those ruled upon in a bill of exceptions without his approval or order, would be to allow them to bring to this court by agreement a question not passed upon by the court below. It is against the policy of the law and the spirit of our statutes and rules to permit this." *Cunningham v. State*, 74 Tex. 511, 12 S. W. 217.

Necessity for Assignment of Error to Court's Failure to Sign.—Where no error is assigned to court's failure to sign bill of exceptions delivered to him

during the term, it can not reverse the judgment. *Landrum v. Guerra* (Civ. App.), 28 S. W. 358, 359. See, generally, the title ASSIGNMENTS OF ERROR. vol. 2, p. 185.

(2) Statutory Provision as to Consideration of Unsigned Bills.

By article 1014 of the Rev. Stat., it is provided that the court on appeal shall admit as part of the record every bill of exceptions not signed by the judge trying the case below upon it appearing that the facts are fairly stated therein, that it was prepared in accordance with the law governing the preparation of such bills, and that the trial judge refused to sign it. *Rabb v. Goodrich & Son*, 46 Tex. Civ. App. 541, 102 S. W. 910; *Ennis, etc., Co. v. Wathen*, 93 Tex. 622, 57 S. W. 946.

The truth of any such bill of exceptions shall be determined by the court on the copies of the affidavits required by law to be made in such case, such copies to be contained in and to form a part of the record transmitted to the court of civil appeals. *Ennis, etc., Co. v. Wathen*, 93 Tex. 622, 57 S. W. 946.

As to accompanying affidavits where bill authenticated by bystanders, see post, "Procedure Where Party Dissatisfied with Bill Filed by Judge," II, D, 5, e. (3).

Section 24 of the act organizing the court of civil appeals (Laws 1892, p. 29), in permitting that court to recognize bills of exceptions, under certain circumstances, although not signed by the judge below, has no reference to the recognition of conclusions of fact not filed in time. *Bradford v. Knowles*, 11 Tex. Civ. App. 572, 33 S. W. 149.

b. Validity of Approval by Other than Trial Judge.

In General.—The approval of a bill of exceptions by the trial judge is a judicial act, and, in the absence of a statute authorizing it, he can not delegate his power in that regard to any other person. *Gray v. Frontroy*, 89 S. W. 1090, 40 Tex. Civ. App. 302.

Approval by Master in Chancery Insufficient.—*Sayles' Rev. Civ. St. art.*, 1470, which authorizes the appointment of a master in chancery in case of the appointment of a receiver, who shall have the power of a master in a court of equity, and article 1470i, which provides that the rules of equity shall govern, whenever not inconsistent with the act and the general laws, do not affect the rules of practice provided by statute and established by the supreme court; and a bill of exceptions approved by a master in chancery, but not approved by the district court, can not be considered on appeal. *Ballard v. McMillan*, 5 Tex. Civ. App. 679, 25 S. W. 327.

Power of Successor to Allow and Sign.—"Whether the judge who presided at the trial or he who succeeds him should make up, sign and complete bills of exception which were reserved during the trial, presents a question upon which the authorities are in conflict. In *Encyclopedia of Pleading and Practice*, vol. 3, p. 456, it is said: 'The prevailing doctrine in case of the removal, resignation or expiration of the term of the trial judge is that the judicial function survives in him for the purpose of authenticating the bill, and he is accordingly the proper person to sign. His successor can not allow the bill, as he is a stranger to the judicial proceeding related therein.' This statement of the law is sustained by the following cases: *Hale v. Haselton*, 21 Wis. 322; *Stirling v. Wagner*, 4 Wyo. 5, 31 Pac. Rep. 1032; *Ex parte Nelson & Kelly*, 62 Ala. 376; *Davis v. President and Trustee, etc.*, 20 Wis. 194; *Connelly v. Leslie*, 28 Mo. App. 551; *Quick v. Sachsse*, 31 Neb. 312; *State v. Barnes*, 16 Neb. 37. In some jurisdictions the courts have held that such conditions require that a new trial be granted. This view is supported by the decisions of Maryland and Michigan, also by the decisions of the English courts. 3 Enc. Pl. and Pr., 453,

note 1. In other states it is held that the successor to the ex judge is authorized and required to sign the bill of exceptions, which is supported by the following cases: *Smith v. Baugh*, 32 Ind. 163; *Railway Co. v. Rogers*, 48 Ind. 427; *Hays v. McNealy*, 16 Fla. 408. The weight of authority and the better reasoning support the answer that we have made to this question. It would be impossible for a judge who had not heard the testimony to express in the form of conclusions of fact the impression which the conflicting evidence made upon the mind of one who heard it, therefore, it is especially important that the judge who tried the case should make the conclusions of fact." *Storrie v. Shaw*, 96 Tex. 618, 75 S. W. 20.

c. Effect of Uncertainty in Approval and Explanations of Bill.

Where the approval and explanations of a bill of exceptions leaves it uncertain that the recitals therein are true, it is insufficient on which to base an assignment of error. *Oriental v. Barclay*, 16 Tex. Civ. App. 193, 41 S. W. 117.

d. Duty of Judge to Sign Correct Bill.

In General.—By art. 1366, *Sayles' Civ. Stats.* (1364) after providing for the submission of the bill of exceptions to the adverse party or his counsel, it is further provided that, if the bill is found to be correct, it shall be signed by the judge without delay. *Stephens v. Herron*, 99 Tex. 63, 87 S. W. 326; *Maury v. Keller* (Civ. App.), 53 S. W. 59, affirmed in 93 Tex. 714, no op.

Under § 101 of the act to regulate proceedings in the district courts passed in 1846, the judge was required to allow and sign the bill of exceptions if true. *Houston v. Jones*, 4 Tex. 170.

A trial judge should have heard courteous objections to evidence whether he deemed them tenable or not, and after refusing to hear them

should have signed the bill of exceptions showing that fact. *McLellan v. Brownsville Land & Irrigation Co.*, 46 Tex. Civ. App. 249, 103 S. W. 206.

Right of Judge to Refuse Approval or Signature.—It is not error for the trial court to fail or refuse to approve and file bills of exceptions, where the bills, if allowed, would be of no avail. *Secord v. Eller* (Civ. App.), 63 S. W. 933.

The refusal of a district judge to sign a bill of exceptions, which it is apparent could not have affected the result in the supreme court, will afford no ground for reversal. *Belo v. Wren*, 63 Tex. 686.

Trial judge may refuse to sign a bill of exceptions to his action in the trial of a cause where such action appears otherwise in the record. *Masterson v. Little*, 75 Tex. 682, 700, 13 S. W. 154.

Remedy for Refusal to Sign.—By *Sayles Civ. Stats.*, art. 1369 (1367) after pointing out the procedure where the party is dissatisfied with the bill of exceptions filed by the judge, it is further provided that "when the judge refuses to sign a correct bill of exceptions such proceedings may be had in the court of civil appeals as is presented in article 1014." For the provisions of article 1014, see ante, "Statutory Provision as to Consideration of Unsigned Bills," II, D, 5, a, (2).

e. Procedure Where Bill Found by Judge to Be Incorrect.

(1) Suggestion of Corrections to Party Drawing Bill.

Should the judge find the bill of exceptions to be incorrect, he shall suggest to the party or his counsel, who drew it, such corrections as he may deem necessary therein and if they are agreed to he shall make such corrections and sign and file the same. *Sayles Civ. Stats.*, art. 1367 (1365). *Firebaugh v. Ward*, 51 Tex. 409, and see cases cited to succeeding paragraph.

When the bill it tendered to the

judge, if it does not fairly state the point made, or the reasons given therefor when they are attempted to be given, then he is not required to sign the same. *Firebaugh v. Ward*, 51 Tex. 409.

(2) Duty of Judge to Make Out Bill Where Corrections Not Agreed to.

In General.—Should the party not agree to the corrections suggested, the judge shall return the bill of exceptions to him with his refusal indorsed thereon, and shall make out and sign and file with the clerk such a bill of exceptions as will, in his opinion, present the ruling of the court in that behalf as it actually occurred. *Sayles' Civ. Stats.*, art. 1368 (1366). *Firebaugh v. Ward*, 51 Tex. 409; *Johnson v. Lyford*, 9 Tex. Civ. App. 85, 29 S. W. 57; *St. Louis, etc., R. Co. v. Whitaker*, 68 Tex. 630, 5 S. W. 448; *Exon v. State*, 33 Tex. Cr. App. 461, 26 S. W. 1088.

The recitation through mistake of a fact in a bill of exceptions, should be corrected during the term. The bill, when incorporated in the record with the signature of the trial judge thereto, imports verity and can not be questioned in so far as it recites facts occurring during the trial. If it contains an error as to facts referred to, counsel should decline to accept it and have the bill prepared under art. 1366, Rev. Stat. *St. Louis, etc., R. Co. v. Whitaker*, 68 Tex. 630, 5 S. W. 448.

Under § 101 of the act to regulate proceedings in the district courts, passed in 1846, if the judge refused to allow and sign the bill of exceptions, he was required to certify in writing the cause of such refusal. *Houston v. Jones*, 4 Tex. 170.

Sufficient Compliance with Requirement.—Where the court approved a bill of exceptions with qualifications, and disapproved others presented by the same counsel, the return of such bills to counsel with the qualifications and reasons for disapproval indorsed

thereon, and their subsequent incorporation in the record, substantially complies with Rev. Stat. art. 1366, requiring the judge, in case a party does not agree to his corrections of a bill of exceptions, to make out, sign, and file with the clerk such bill as in his opinion is proper. *Johnson v. Lyford*, 9 Tex. Civ. App. 85, 29 S. W. 57.

Indorsement Showing Refusal on Grounds of Incorrectness.—An indorsement over the judge's signature on a proposed bill of exceptions, "by me presented to plaintiff's counsel, who refused to agree to same, and the bill is by me disallowed, because incorrect," shows that the disallowance was not simply because counsel refused to agree, but because it was incorrect. *Galveston, H. & S. A. Ry. Co. v. Collins*, 71 S. W. 560, 31 Tex. Civ. App. 70.

Incorporation by Judge of Reason for Ruling or Action.—The presiding judge who signs a bill of exceptions may, if he desires, incorporate in it the reasons for his ruling, opinion, or action. *Firebaugh v. Ward*, 51 Tex. 409.

Where the judge appends to a bill of exceptions a statement of the facts occurring at the time of the ruling, and explanatory thereof, ordinarily such statements are given great weight. *Slaven v. Wheeler*, 58 Tex. 23.

It is ordinarily error to overrule an application for a continuance complying with the statute upon the subject. The judge acting upon a refusal may in bills of exception give the grounds of his action. That a witness was engaged in business near the courthouse does not prove that his attendance could have been had, and is no sufficient reason for refusing the continuance. See facts. *Corsicana v. Kerr*, 75 Tex. 207, 12 S. W. 982.

"The correct practice doubtless is, in no case to revise the judgment of the court refusing a continuance, unless the party seeking a reversal on that ground has reversed the point by

a bill of exceptions. It not unfrequently happens that we would be at a loss to discover upon what ground a continuance has been refused, were it not for reasons contained in the bill of exceptions. When called upon to sign a bill of exceptions, the court may state very satisfactory reasons, apparent to the court there, which would not otherwise be made to appear to this court; as, that the evidence sought was, in fact, within the reach of the party (*Hall v. York*, 16 Tex. 18), or there was evidence before the court that the affidavit was not in fact true." *Campion v. Angier*, 16 Tex. 93.

Where the trial judge overrules a motion for new trial in a case in which counsel indulged in improper remarks in his speech to the jury, it may be assumed that the judge has concluded that no injurious results from such remarks have entered the verdict; and while the supreme court will revise this conclusion, yet, it will not reverse it unless the case is a plain one. When an exception of this kind is presented, the trial judge may very appropriately give the appellate court the benefit, in an addendum to the bill, of any fact or views, not otherwise disclosed by the record, supporting his conclusion that the complaining party has suffered no injury from the unauthorized remarks of counsel. *Radford v. Lyon*, 65 Tex. 471.

Harmless Error in Qualifying Bill.—Supposed errors in qualifying appellant's bill of exceptions are harmless where the bill, unqualified, would have shown no error in the ruling. *Houston v. Washington*, 16 Tex. Civ. App. 504, 41 S. W. 135.

Interlineations Made by Judge in Bill.—Where a trial judge interlines a bill of exceptions, and states that he did not think all of the evidence was reported by the stenographer, the court of appeals must accept the facts as certified by the judge, and his statement can not be discredited by an assignment charging error in changing

the testimony of a witness as taken by a sworn stenographer. *Nacogdoches Grocery Co. v. Rushing & Smith* (Civ. App.), 82 S. W. 659.

Judge's Statement as to Facts Prior to Suit Not Regarded.—On appeal from the judgment of the court, on an issue involving the disqualification of the judge, his statement appended to a bill of exceptions, relating to facts occurring before the institution of the suit, can not be regarded. *Slaven v. Wheeler*, 58 Tex. 23.

Effect of Unsigned Explanation Appended to Bill.—An explanation appended to a bill of exceptions, but not signed by the judge, is of no force, and its statements can not be considered by the appellate court. *Morris & Co. v. Southern Shoe Co.*, 44 Tex. Civ. App. 488, 99 S. W. 178.

(3) Procedure Where Party Dissatisfied with Bill Filed by Judge.

In General.—Should the party be dissatisfied with the bill of exceptions filed by the judge, under the provisions of art. 1366 Sayles' Civ. Stats. (1366) he may, upon procuring the signatures of three respectable bystanders, citizens of the state, attesting the correctness of the bill of exceptions as presented by him, have the same filed as part of the record of the cause; and the truth of the matter in reference thereto may be controverted and maintained by affidavits, not exceeding five in number on each side, to be filed with the papers of the cause, within ten days after the filing of such bill of exceptions, and to be considered as a part of the record relating thereto. Sayles' Civ. Stat., art. 1369 (1367). *Firebaugh v. Ward*, 51 Tex. 409; *Gulf, etc., R. Co. v. Holt*, 30 Tex. Civ. App. 330, 70 S. W. 591, affirmed in 97 Tex. 634, no op.; *Ray v. Pecos, etc., R. Co.*, 40 Tex. Civ. App. 99, 88 S. W. 466; *Rabb v. Goodrich & Son*, 46 Tex. Civ. App. 541, 102 S. W. 910; *Dehougne v. Western Union Tel. Co.* (Civ. App.), 84 S. W. 1066; *Exon v. State*, 33 Tex. Cr. App. 461, 26 S. W.

1088. See, also, *Ennis, etc., Co. v. Wathen*, 93 Tex. 622, 57 S. W. 946; *Land v. Klein*, 21 Tex. Civ. App. 3, 50 S. W. 638.

By § 101 of the act of 1846 regulating proceedings in the district courts, it is provided that: "If any judge shall refuse to sign a bill of exceptions, such bill may be signed by three bystanders who are reputable inhabitants of the state, and the court shall permit such bill to be filed. And every bill of exceptions signed by the judge or bystanders, and filed in the court, shall form a part of the record in which the same may be filed." *Houston v. Jones*, 4 Tex. 170.

Where a party is dissatisfied with the bill of exceptions prepared by the court, he should present his bill prepared as prescribed by Sayles' Ann. Civ. St. 1897, art. 1369, and in the absence of such a bill the appellate court must accept the bill prepared by the court. *Ray v. Pecos & N. T. Ry. Co.*, 88 S. W. 466, 40 Tex. Civ. App. 99.

Rev. St. 1895, art. 1369, authorizing a party dissatisfied with the bill of exceptions filed by the judge to procure the signatures of three respectable bystanders, citizens of the state, attesting the correctness of his bill, and file the same as a part of the record, requires that a bill so signed should be prepared, sworn to, and filed at the time the matters to which it relates transpire. *Dehougne v. Western Union Tel. Co.* (Civ. App.), 84 S. W. 1066.

Matters Essential to Be Shown by Such Bill.—A paper filed as a bill of exceptions in a cause, not signed by the judge, but by three citizens after the trial, which fails to show that those who signed it were present at the trial, or that their certificate was given at the time when the occurrence to which it related transpired, can not be considered on appeal. *Heidenheimer v. Thomas*, 63 Tex. 287, citing *Houston v. Jones* 4 Tex. 170.

To give a bill of exceptions authenticated by bystanders the effect of a record, it must first show that it had been presented to the judge on the trial, and his refusal to sign it, and his certificate of the cause of such refusal. Second, the bystanders must certify the bill on such refusal. The certificate must show on its face that these persons were bystanders; that they were present when the disputed fact between the judge and themselves occurred, in court, and their certificate should point clearly to the matter in issue; and it should be given at the time of the occurrence of the fact. *Houston v. Jones*, 4 Tex. 170.

Necessity for Accompanying Affidavits.—Under the statute requiring that, if the court refuse to sign bills of exception, the affidavits of bystanders must be procured, bills which the court refused to sign, not accompanied by affidavits, will not be considered. *Gulf, C. & S. F. Ry. Co. v. Holt*, 70 S. W. 591, 30 Tex. Civ. App. 330.

Rev. St. 1895, art. 1369, provides that a party may, by procuring the signatures of three respectable bystanders, citizens of the state, attesting the correctness of the bill of exceptions as presented by him, have it filed as part of the record. Article 1014 provides that the court on appeal shall admit as part of the record every bill of exceptions not signed by the judge trying the case below, upon it appearing that the facts are fairly stated therein, that it was prepared in accordance with the law governing the preparation of such bills, and that the trial judge refused to sign it. Held, that bills of exceptions refused by the court, and authenticated only by the affidavit of counsel for appellant, could not be considered. *Rabb v. Goodrich & Son*, 46 Tex. Civ. App. 541, 102 S. W. 910.

Right of Judge to Forbid Filing of Bill Authenticated by Bystanders.—The judge may refuse to allow the filing of bill of exceptions, authenti-

cated by bystanders, on the ground that he does not believe it to be true, leaving facts to be ascertained by affidavits. *Houston v. Jones*, 4 Tex. 170.

"Again, the section of the act we have cited seems to require that the filing of the papers so certified should be with the knowledge and permission of the judge, and not a mere office act of the clerk. This view seems to be correct, because the subsequent section directs what shall be done if the judge will not permit it to be filed. Affidavits are to be furnished on each side, from which this court will decide on the disputed fact. The judge might well, then, refuse his permission to the filing, on the ground that he did not believe it was true; and if he thought so it would have been right and proper in him to refuse or withhold his permission to its being filed, leaving the facts in dispute to be ascertained by affidavits, as provided in section 102 of the act. The judge, for aught that appears in this case, knew nothing about the filing of the paper; it was such an entry as the clerk would make on any paper in his office handed to him by one of the counsel. To allow a record to be made of a fact adjudicated is a great innovation; and it would be dangerous to give the law a latitudinous construction. Its requisitions should therefore be strictly enforced. The paper presented, not being authenticated in the way that is believed the law required, can not be received as a part of the record. The record, stripped of this paper offered as a substitute for a bill of exceptions, shows no errors or grounds for reversing the judgment of the court below." *Houston v. Jones*, 4 Tex. 170.

(4) Effect of Failure of Judge to File Bill in Lieu of That Refused.

In General.—When a judge has refused a bill of exceptions as presented, and filed none in lieu thereof, as required by Rev. Stat., art. 1366, such bill will be treated as if it had been

approved. *Exon v. State*, 33 Tex. Cr. App. 461, 26 S. W. 1088.

"Under the plain terms of the statute, the right to resort to bystanders arises only when the court has refused the offered bill of exception, and filed his own bill in lieu thereof. Until that is done, the counsel can not assume that the court will act unfairly in preparing the bill or that he may not agree to the bill as filed by the court. When, therefore, he has within ten days after the conclusion of the trial prepared and presented his bill of exception, and it has been refused, he has done all that can be required of him until the court acts in the premises as required by the statute. The defendant can not be made to suffer from the neglect of the judge, and if the court refuses the bill as presented, and fails to file one in lieu thereof, then we will certainly look to the bill so presented and refused to ascertain whether it contains merit, and treat it as if it in fact had been approved." *Exon v. State*, 33 Tex. Cr. App. 461, 26 S. W. 1088, citing *Belo v. Wren*, 63 Tex. 686, 728.

Remedy Where Court Declines to Indorse Refusal on Bill.—If the court should decline to indorse a refusal on the bill, or refuses to permit it to be filed, appellant has simply to resort to his writ of certiorari for redress. *Exon v. State*, 33 Tex. Cr. App. 461, 26 S. W. 1088.

6. Filing.

In General.—It is expressly provided by statute that where the bill of exceptions submitted to the judge is by him found to be correct it shall be signed by him without delay, and filed with the clerk during the term. *Sayles' Civ. Stats.*, art. 1366 (1364). *Sabine*, etc., *R. Co. v. Joachimi*, 58 Tex. 452. For other cases as to time of filing see ante, "Statement of Rules as to Time," II, D, 3, c.

"The substantial requirements of our statutes in reference to bills of excep-

tion are that the exceptant shall draw his bill and present it to the trial judge for his signature within 10 days after the conclusion of the trial; that the judge shall submit it to the adverse party or his counsel, and that, if it be found correct, it shall be signed without delay and delivered to the clerk to be filed. Rev. Stat. 1895, arts. 1364-1366." *Stephens v. Herron*, 99 Tex. 63, 87 S. W. 326.

"The statement of facts and bills of exceptions are required in plain and unambiguous language, as has been frequently decided by the court, to be prepared and submitted to the judge and signed by him, and filed as a part of the record during the term of the court at which such bill was taken or when said cause was tried. (Paschal's Dig., arts. 149 and 217-8-9.)" *Frost v. Frost*, 45 Tex. 324.

Under Rev. St. art. 1366, requiring the trial judge to sign a bill of exceptions "without delay," and to file it "with the clerk during the term," a bill of exceptions submitted for allowance in due time, but not signed and filed by the trial judge until 40 days after the expiration of the term, will not be considered when it appears that the party taking it neglected to compel the trial judge to file it in time. *Maury v. Keller* (Civ. App.), 53 S. W. 59.

Striking Out Bill Not Signed and Filed in Time.—See post, "Grounds," II. E, 4, a.

Mandamus to Compel Authentication and Filing.—See the title **MANDAMUS**.

E. BILL AS PART OF RECORD.

1. In General.

A bill of exceptions and statement of facts are alike intended to be incorporated into and become parts of the record of the case. *Roundtree v. Galveston*, 42 Tex. 612. See, also, *Frost v. Frost*, 45 Tex. 324.

Generally as to what constitutes the record on appeal, see the title **APPEAL AND ERROR**, vol. 1, p. 313.

2. Bill Allowed, Signed and Filed Not Subject to Alteration by Judge.

After bills of exception have been allowed and signed by the judge, and filed by the clerk, the judge has no authority to alter the same. *Conrad v. Walsh*, 1 White & W. Civ. Cas. Ct. App. § 231.

3. Conclusiveness as against Attack in Appellate Court.

A bill of exceptions can not be attacked in the supreme court as being erroneously allowed. *East Line, etc., R. Co. v. Culbertson*, 72 Tex. 375, 384, 10 S. W. 706.

The verity of an approved bill of exceptions is not subject to attack or modification by affidavit, where the bill is regular on its face. *Wade v. Galveston, H. & S. A. Ry. Co.* (Civ. App.), 110 S. W. 84.

On appeal the court can not try on affidavits the question whether a bill of exceptions was in fact signed and filed after the term, though the record shows differently. *Von Boeckmann v. Loepp* (Civ. App.), 73 S. W. 849.

4. Striking Out Bill.

a. Grounds.

Where Altered after Signature and Approval.—The district court has jurisdiction to correct the record of the case so as to strike out a statement of facts and bill of exceptions which has been materially altered after signing and approval by the judge notwithstanding an appeal has been effected and the transcript filed in the court of civil appeals, and in such case, when a motion to strike out the statement and bill because of such alteration alleges that the bill of exceptions has been altered in many respects by blotting out and striking out a great deal of matter specifically set out in a motion previously filed and served on appellant's attorney, and the motion is sustained, and no resistance was offered by appellant or his attorney to such action of the trial court, though the record shows appellant's attorney had notice

of the motion, the bill of exceptions which was struck out can not be considered on appeal either as a whole or in part. Judgment, *Stark v. Harris* (Civ. App.), 106 S. W. 887, reversed. *Harris v. Stark*, 101 Tex. 587, 110 S. W. 737.

Bill Signed Through Misapprehension.—Where the judge, through misapprehension, signs an erroneous bill of exceptions, the same may be stricken out on motion, and others filed. *St. Louis, S. W. Ry. Co. v. Campbell* (Civ. App.), 34 S. W. 186.

If a bill of exception is erroneously signed and allowed by the trial judge, it may be stricken out on motion. *East Line, etc., R. Co. v. Culberson*, 72 Tex. 375, 384, 10 S. W. 706.

Bill Not Signed and Filed in Time.—Bill of exceptions not signed and filed in time by the trial judge, will be stricken out when the appellant knew of the judge's dereliction and did not apply for mandamus to compel signature and filing. *Maury v. Keller* (Civ. App.), 53 S. W. 59, affirmed in 93 Tex. 714, no op.

A bill of exceptions will not be stricken, as not filed within ten days from overruling of a motion for a new trial, where appellant shows that the county judge, without his knowledge, left the state, and that his whereabouts were not known; that the statement of facts was duly presented to counsel for appellee, who received it, and signed it; and that the statement was presented to the county judge immediately on his return. *Johnson v. Erado* (Civ. App.), 50 S. W. 139.

Where a bill of exceptions appears to have been filed while the court was in session, and within the time required by statute, it will not be stricken from the record, though there are affidavits that it was in fact filed long after adjournment. *Keller v. Kettner* (Civ. App.), 67 S. W. 907.

b. Judge Can Not, in Vacation, Sustain Motion to Strike.

Generally, as to power of judge in

vacation, see the title **CHAMBERS AND VACATION**, vol. 4, p. 77.

The judge's sustaining a motion in vacation to strike from the record a bill of exceptions is a nullity, and can not be considered on appeal, since a judge, not being so authorized by statute, can not adjudicate in vacation the rights of litigants. *Ford v. Liner*, 59 S. W. 943, 24 Tex. Civ. App. 353.

5. Substitution of Lost Bill.

See, generally, the title **LOST INSTRUMENTS AND RECORDS**.

An order supplying a lost bill of exceptions made at a term subsequent to that at which final judgment was rendered, and without notice to the adverse party or his attorney of the motion to supply the lost paper, is of no effect. Such substituted paper is not a part of the record in the case, and will not be considered on appeal. *Harvey v. Carroll*, 72 Tex. 63, 10 S. W. 334.

F. CONSTRUCTION OF BILL.

1. Presumption as to Completeness and Verity of Statements in Bill.

It will be presumed that the bill of exceptions states all that occurred at the trial. *St. Louis Southwestern Ry. Co. of Texas v. Boyd*, 40 Tex. Civ. App. 93, 88 S. W. 509.

In the absence of a showing to the contrary, the supreme court will presume that the statements contained in a bill of exceptions are true. *Dunham v. Forbes*, 25 Tex. 23.

A bill of exceptions signed by the judge, and containing a statement of the facts given in evidence, was presumed to contain a statement of facts as well as a bill of exceptions; and, it appearing therefrom that improper testimony had been admitted, the judgment was reversed. *Bennett v. Dowling*, 22 Tex. 660.

Where an exception is reserved to the admission of a deed in evidence, on the ground that the deed was not filed three days before the trial commenced, and notice thereof given to the ad-

verse party (as the statute, Hart. Dig., art. 745, requires for the admission of deeds in evidence, without proof of execution), it would seem that the import of the bill of exceptions must be taken to be that the execution of the deed was not proved, and that there was not other evidence before the court sufficient to admit it. *Wooten v. Dunlap*, 20 Tex. 183, 184.

In a suit for specific performance brought by the vendee, the bond for a deed, as shown in the bill of exceptions, described a note for the purchase money as maturing January 1, 1879, instead of January 1, 1876, as alleged in the petition. A receipt for the cash payment recited that the note matured January 1, 1876, and the vendor testified that it was due at that time. Held, that it would be presumed that "1879" was written in the bill of exceptions by a clerical error, and that it was error to exclude the bond for variance. *Phillips v. Herndon*, 78 Tex. 378, 14 S. W. 857.

2. Construction of Bill in Connection with Statement of Facts, Where Not Inconsistent.

Where the statement in the bill and that in the statement of facts are not inconsistent, both should be taken together as constituting the bill of exceptions upon the particular matter. *Heffron v. Pollard*, 73 Tex. 96, 11 S. W. 165.

Where the bill of exceptions showed that a deed of the land in controversy from T. to S., executed by the trustees of T., was introduced in evidence over the objection of the defendant on the ground that the authority of the trustees was not shown, but was not read in evidence, and the statement of facts showed that a deed of the same property direct from T. to S. was read in evidence without objection, it will not be presumed on appeal that the two deeds referred to are the same. *Ferguson v. Cochran* (Civ. App.), 45 S. W. 30.

3. Rule in Case of Conflict between Bill and Statement of Facts.

See the title APPEAL AND ERROR, vol. 1, p. 690.

III. Statement of Facts on Appeal.

A. ORIGIN, PURPOSE AND SCOPE.

1. Of Statutory Origin.

The statement of facts was unknown to the practice at common law and was introduced into the Texas system by statute. *Jamison v. Dooley*, 98 Tex. 206, 82 S. W. 780.

2. Purpose and Scope.

In General.—The purpose of the statement of facts is to make the evidence introduced upon the trial a part of the record in the case. *Jamison v. Dooley*, 98 Tex. 206, 82 S. W. 780; *Stephens v. Bowerman*, 27 Tex. 18.

A statement of facts is intended to embody in the record all the evidence introduced on the trial as agreed to by the parties and approved by the court; or if the parties fail to agree as certified to by the court after examining the statements prepared by them respectively. *Roundtree v. Galveston*, 42 Tex. 612.

There is no authority for bringing to the knowledge of the supreme court the facts proved upon the trial of a case through the medium of a bill of exception. Such a bill brings up rejected testimony, or testimony admitted over objections. But evidence introduced without complaint, and which formed part of the case made before the court or jury, must be put in the statement of facts; otherwise, it will not be noticed on appeal. *Dull v. Drake*, 68 Tex. 205, 4 S. W. 364.

On appeal the deposition of a witness and an affidavit that the deposition was introduced in evidence, contained in the record, but not contained in the statement of facts, are subject to a motion to strike from the record.

Western Union Tel. Co. v. Kuykendall (Civ. App.), 86 S. W. 61.

As Substitute for Bill of Exceptions.

—See ante, "Substitutes for Bill of Exceptions," II, B, 3; and see ante, "Sufficient Where Evidence Contained in Statement of Facts," II, C, 4, c, (3).

As to necessity for compliance with rules as to time of filing bills of exceptions, where bill is incorporated into statement of facts, see ante, "Application of Rules as to Time Where Bill Incorporated in Statement of Facts," II, D, 3, d.

Statement of Facts Treated as Case Stated.

—It seems that where a jury is waived and a statement of facts for the supreme court is made up as in ordinary cases, the statement of facts may be treated on appeal as a case stated, and if the judgment be reversed such judgment may be rendered as should have been rendered in the court below. *Trevino v. Fernandez*, 13 Tex. 630.

Admissibility as Evidence in another Trial.—"The statement of facts is not made up for the purposes of a new trial, and can not be used as evidence except, possibly, in cases where no other evidence can be procured." *Wootters v. Kauffman*, 67 Tex. 488, 3 S. W. 465.

A statement of facts purporting to contain the testimony of a party to a suit in a former trial, but which was not signed by him, does not stand on the footing of admissions in writing, and is not admissible against him. *Castleman v. Sherry*, 46 Tex. 228. See the title DECLARATIONS AND AD-MISSIONS, vol. 6, p. 1.

B. NECESSITY.

1. General Rules.

Essential Where Assignments of Error Involve Issues of Fact or Depend on Status of Facts.—The appellate court will not consider assignments of error involving issues of fact, or dependent on the status of the facts, where there is no statement of

facts in the record. *Beaumont Imp. Co. v. Carr*, 32 Tex. Civ. App. 615, 75 S. W. 327; *International, etc., R. Co. v. Folliard* (Sup.), 9 S. W. 259; *Chandler v. Sappington*, 36 Tex. 272; *Punderson v. Love*, 3 Tex. 60.

Assignments of error referring to matters growing out of the facts, can not be considered on appeal, in absence of a statement of facts. *Bemus v. Donigan*, 18 Tex. Civ. App. 125, 126, 43 S. W. 1052.

Matters which can only be determined from evidence can not be considered on appeal, where there is no statement of facts in record. *Victoria v. Jessel*, 7 Tex. Civ. App. 520, 27 S. W. 159, citing *Caswell v. Greer*, 4 Tex. Civ. App. 659, 23 S. W. 331, 1002.

Evidence will not be considered on appeal where there is no statement of facts. *Loonie v. Burt*, 80 Tex. 582, 16 S. W. 439.

The appellate court, on reviewing assignments of error, can not go beyond the statement of facts for the evidence on which the case was tried and the judgment rendered. *Rabb v. Texas, Loan, etc., Co.* (Civ. App.), 96 S. W. 77.

If a party seek to reverse a judgment upon the facts alone, he must bring them before the court in the mode prescribed by law; so that it may appear by a statement, either signed by the parties or certified by the judge, that they are the facts; that is, all the facts in the case. *Campbell v. Skidmore*, 1 Tex. 475.

When there is no statement of facts in the record, nothing can be assigned as error of law which could have been cured by evidence legally given at the trial. Until the contrary be shown, the appellate court is bound to presume that the evidence was sufficient to sustain the judgment. *Deweese v. Hudgeons*, 1 Tex. 192.

Statement of facts must accompany assignment of error to supreme court, where facts are not stated in opinion

below. *Hanrick v. Gurley*, 93 Tex. 458, 473, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330.

Where there are no statements of fact in the record, and no finding that property involved was a homestead, the appellate court can not consider that issue. *Featherstone v. Brown* (Civ. App.), 88 S. W. 470, affirmed in 101 Tex. 635, no op.

Where there is no statement of facts in the record, but there were special issues submitted to the jury and answered; and it is claimed that upon the verdict the judgment entered should not have been rendered, this is the only question which the appellate court can consider. *Allen v. Willis*, 60 Tex. 155.

Essential to Investigation of Merits.

—Where there is no statement of facts, the court will not investigate merits. *Punderson v. Love*, 3 Tex. 60, 61; *Sublett v. Kerr*, 12 Tex. 366, 369; *Ponton v. Bellows*, 13 Tex. 254, 256; *Raleigh v. Cook*, 60 Tex. 438, 440; *Renfro v. Harris* (Civ. App.), 72 S. W. 237.

Where there is no statement of facts in record, validity or invalidity of contract of which defendant complains can not be considered. *Williams v. Huling*, 43 Tex. 113, 120.

A statement of facts is necessary to review a judgment for appellees, in an action of trespass to try title to which they pleaded not guilty and the statutes of limitations, though appellant's title was good on its face. *Sheldon v. Benavides*, 60 Tex. 673.

Affirmance in Absence of Statement Where Record Contains No Fundamental Error.

—Where there is no statement of facts and the record contains no fundamental error, the judgment appealed from must be affirmed. *Kesler v. Robson*, 16 Tex. 119, 123; *Lewis v. Black*, 16 Tex. 652; *Ellington v. Ellington*, 29 Tex. 2; *Yeamans v. Tone*, Dallar 362; *Weede v. Board of Land Comm'rs*, Dallar 386; *Juergens v. Missouri*, etc., R. Co., 16 Tex. Civ.

App. 452, 42 S. W. 230; *Smithwick v. Kelley* (Civ. App.), 21 S. W. 690; *Anderson v. Walker* (Civ. App.), 67 S. W. 432; *Watson v. Birdwell* (Civ. App.), 98 S. W. 407.

In absence of statement of facts, only such errors as are shown by the record, which go, the foundation of the action or the merits of the case, can be considered. *McKinion v. McGowan*, 2 Posey 288, 290.

Where, in the absence of a statement of facts, the appellate court is unable to determine whether the trial court erred in any of the respects stated in the assignments of errors, the judgment of the court below will be affirmed. *Watson v. Birdwell & Son* (Civ. App.), 98 S. W. 407.

Findings of the trial court where supported by evidence, or in absence of statement of facts, will not be disturbed on appeal. *Smith v. Anderson*, 8 Tex. Civ. App. 188, 193, 28 S. W. 565, citing *Moore v. Rogers*, 84 Tex. 1, 19 S. W. 283.

Where there is no statement of facts but the findings of fact and law are in the record, the appellate court will not reverse unless the ruling affirmatively appears to be wrong from the findings of fact. *Ivey v. Harrell*, 1 Tex. Civ. App. 226, 20 S. W. 775.

In the absence of a statement of facts the appellate court will not ordinarily reverse unless able to see, not only that the lower court erred, but that such error must, with reasonable certainty, have produced substantial injury. *Lockett v. Schurenberg*, 60 Tex. 610; *Friberg v. Lowe*, 61 Tex. 436; *Stonebraker v. Friar*, 70 Tex. 202, 204, 7 S. W. 799; *Missouri*, etc., R. Co. v. *Stafford*, 13 Tex. Civ. App. 192, 35 S. W. 48, affirmed in 93 Tex. 647, no op.; *Crawford v. McGinty* (Sup.), 11 S. W. 1066.

"When the appellate court has before it a complete transcript of the proceedings of the lower court, and it is shown therefrom that the court

erred in the trial of the cause, the appellant is entitled to a reversal of the judgment, unless it is manifest that the error was harmless, and that, upon the facts, as developed upon the trial, and the pleadings, no other judgment than the one appealed from could have been correctly rendered. But the reverse of this is the rule in this court when the transcript contains no statement of facts. In such case, unless the errors complained of are shown to have worked injury to the appellant, the judgment will be affirmed." *Missouri, etc., R. Co. v. Stafford*, 13 Tex. Civ. App. 192, 35 S. W. 48, affirmed in 93 Tex. 647, no op.

Generally as to the rule that error appearing on the record will be ground for reversal, unless shown to have been harmless, see the title **APPEAL AND ERROR**, vol. 1, p. 313.

Statement Unnecessary Where All Evidence Appears by the Record.—To authorize the revision of a judgment on the merits a formal statement of facts is not essential where all the evidence legally and conclusively appears by the record. *State v. Connor*, 86 Tex. 133, 23 S. W. 1103, quoting *Salinas v. Wright*, 11 Tex. 572, 578.

Consideration of Errors of Law Apparent of Record.—If no statement of facts be presented, the supreme court must notice errors of law apparent upon the record. *Brooks v. Breeding*, 32 Tex. 752.

Fact that no statement of facts accompanies record will not preclude review where there is no dispute as to facts and question is purely one of law. *Mervin v. Murphy*, 35 Tex. 787.

Where trial judge's conclusions of fact are accepted by appellant as correct, appellate court may revise errors in applying law to such facts without statement of facts. *Cousins v. Grey*, 60 Tex. 346, 348.

Judgment will be reversed in absence of statement of facts when it appears that judgment was rendered

on what was supposed to be law and not on the facts. *Armstrong v. Nixon*, 16 Tex. 610, 615.

Consideration of Sufficiency of Pleadings.—Where, on appeal, there is no statement of facts, the court will consider such assignments of error as relate to the sufficiency of the petition to warrant the judgment. *Roundtree v. Galveston*, 42 Tex. 612.

A judgment unsupported by the pleadings must be reversed, though there be no statement of facts in the record. *Neill v. Newton*, 24 Tex. 202.

In the absence of a statement of facts, every presumption is in favor of the verdict; but when the verdict is repugnant to the admissions in the pleadings, there is no necessity of a statement of facts to show that the verdict is wrong. Nothing can be presumed to have been proved which could not legally have been proved under the pleadings. *Lucketts v. Townsend*, 3 Tex. 119.

2. Matters Not Considered in Absence of Statement of Facts.

a. Rulings on Applications for Continuance or Postponement.

Whether refusal of continuance should be reviewed in the supreme court in the absence of statement of facts, *quære*. *Pulliam v. Webb*, 26 Tex. 95, 97.

"As there is no statement of facts, the only question which can be deemed properly presented by the record for revision is the refusal of a continuance. And it is questionable whether, in the absence of the evidence, that question ought to be revised by this court." *Pulliam v. Webb*, 26 Tex. 95.

Court's ruling on requested postponement of trial can not be revised in the absence of statement of facts. *Rankin v. Oliver (Civ. App.)*, 34 S. W. 449, 450.

b. Disqualification of Trial Judge.

In the absence of a statement of facts, the appellate court can not de-

termine whether the trial judge was disqualified, as suggested in the court below; nor can it consider, for this purpose, the affidavit and exhibits attached to appellant's motion for a new trial. *Wright v. Sherwood* (Civ. App.), 37 S. W. 468, affirmed in 93 Tex. 724, no op.

c. Rulings as to Parties.

See, generally, the title PARTIES.

Court's ruling as to necessary parties can not be revised in absence of statement of facts. *Rankin v. Oliver* (Civ. App.), 34 S. W. 449, 450.

In the absence of statement of facts, appellate court will not review right of party to have intervened in lower court. *Bremond v. Manley*, 31 Tex. 6.

Where S. instituted a suit against B., and pending the suit S. died, and his wife Elizabeth, as widow, petitioned to revive as the only heir; whereupon M. claimed the negotiable security declared upon as intervenor, and upon consultation between the widow and the intervenor the right was decided in favor of the intervenor, and thereafter he prosecuted the suit in his own name. He obtained judgment against the defendant, who seems to have proved nothing at the trial. In the absence of a statement of facts there is no such error as the court can notice. If there was error as to the rightful ownership of the draft, that was a matter between the intervenor and the widow, and she not having appealed, the court can not see how the defendant, who was the acceptor, was prejudiced. *Bremond v. Manley*, 31 Tex. 6.

d. Rulings on Pleadings.

Ruling on Special Exceptions to Pleadings.—In the absence of a statement of facts, assignments of error relating to rulings on appellant's special exceptions to appellee's pleadings, can not be reviewed on appeal. *Chicago, etc., R. Co. v. Barrett*, 45 Tex. Civ. App. 73, 100 S. W. 800, affirmed in 102 Tex. 579, no op.

Sustaining Plea to Venue.—Where a plea as to venue was tried several terms after filing, and the claim that it was waived was not made below, the sustaining of such plea will not be reviewed; the record not containing the evidence. *Chamberlain v. Carroll* (Civ. App.), 59 S. W. 624.

Ruling of District Court as to Counterclaim Filed in Justice Court.

—In the absence of a statement of facts, determination of the district court on appeal as to whether a counterclaim filed in action in the justice court was for the sole purpose of obtaining jurisdiction, will not be revised. *Galveston, etc., R. Co. v. Fussell* (Civ. App.), 23 S. W. 932.

e. Matters Relating to Evidence.

(1) In General.

Where there is no statement of facts legally in the record, assignments of error relating to matters of evidence will not be considered. *Lee v. Hickson*, 40 Tex. Civ. App. 632, 91 S. W. 636, affirmed in 101 Tex. 646, no op.

In order that the evidence shall be considered on appeal or error, it must be brought up by a bill of exceptions, case, or statement of facts. *Deweese v. Hudgeons*, 1 Tex. 192; *Wade v. Buford*, 1 White & W. Civ. Cas. Ct. App. § 1334.

(2) Rulings Admitting or Excluding Evidence.

(a) General Rule Stated, Construed and Applied.

Rule Stated.—It is the general rule that in the absence of a statement of facts appellate courts will not revise the rulings of the court below in the admission or exclusion of evidence. *Harvey v. Hill*, 7 Tex. 591; *Webb v. Maxan*, 11 Tex. 678; *Hardiman v. Herbert*, 11 Tex. 656; *Sublett v. Kerr*, 12 Tex. 366; *Dalby v. Booth*, 16 Tex. 563, 565; *King v. Gray*, 17 Tex. 62; *Hutchins v. Wade*, 20 Tex. 7; *Galbreath v. Templeton*, 20 Tex. 45; *Fox v. Sturm*, 21 Tex. 406; *Fulgham v.*

Bendy, 23 Tex. 64; Blackwell *v.* Patton, 23 Tex. 670; Tucker *v.* Willis, 24 Tex. 247; Cottrell *v.* Teagarden, 25 Tex. 317; Thompson *v.* Callison, 27 Tex. 438; Jones *v.* Cavasos, 29 Tex. 428; McCarty *v.* Wood, 42 Tex. 38; Tarlton *v.* Daily, 55 Tex. 92; Texas, etc., R. Co. *v.* McAllister, 59 Tex. 349; Lockett *v.* Schurenberg, 60 Tex. 610; Endick *v.* Endick, 61 Tex. 559; Bowles *v.* Beal, 60 Tex. 322; King *v.* Pfeiffer, 62 Tex. 307; Texas, etc., R. Co. *v.* Curry, 64 Tex. 85; Devore *v.* Crowder, 66 Tex. 204, 18 S. W. 501; Rains *v.* Herring, 68 Tex. 468, 5 S. W. 369; Dull *v.* Drake, 68 Tex. 205, 4 S. W. 364; Harris *v.* Spence, 70 Tex. 616, 8 S. W. 313; Stonebraker *v.* Friar, 70 Tex. 202, 7 S. W. 799; Torrey *v.* Cameron & Co., 74 Tex. 187, 11 S. W. 1088; Missouri Pac. R. Co. *v.* Edwards, 75 Tex. 334, 12 S. W. 853; Atchison, etc., R. Co. *v.* Lochlin, 87 Tex. 467, 29 S. W. 469; National Bank *v.* Kenney, 98 Tex. 293, 83 S. W. 368; Bupp *v.* O'Connor, 1 Tex. Civ. App. 328, 330, 21 S. W. 619; Eastin *v.* Ferguson, 4 Tex. Civ. App. 643, 23 S. W. 918; Goodale *v.* Douglas, 5 Tex. Civ. App. 695, 24 S. W. 966; Victoria *v.* Jessel, 7 Tex. Civ. App. 520, 27 S. W. 159; Yeiser *v.* Burdett, 10 Tex. Civ. App. 155, 29 S. W. 912; Houston *v.* Washington, 16 Tex. Civ. App. 504, 41 S. W. 135; Mattfeld *v.* Huntington, 17 Tex. Civ. App. 716, 43 S. W. 53; Bemus *v.* Donigan, 18 Tex. Civ. App. 125, 43 S. W. 1052; Long *v.* Behan, 19 Tex. Civ. App. 325, 45 S. W. 555, affirmed in 93 Tex. 733, no op.; Castellano *v.* Marks, 37 Tex. Civ. App. 273, 83 S. W. 729; Gatlin *v.* Street, 40 Tex. Civ. App. 304, 90 S. W. 318, affirmed in 101 Tex. 638, no op.; Smith *v.* Pecos Valley, etc., R. Co., 43 Tex. Civ. App. 204, 95 S. W. 11, affirmed in 101 Tex. 659, no op.; Chicago, etc., R. Co. *v.* Edwards, 45 Tex. Civ. App. 66, 99 S. W. 1049, affirmed in 102 Tex. 580, no op.; Chicago, etc., R. Co. *v.* Barrett, 45 Tex. Civ. App. 73, 100 S. W. 800, affirmed in 102 Tex. 579, no op.; London *v.* Crow, 46 Tex. Civ. App.

190, 102 S. W. 177; Washington *v.* Eckart (Sup.), 15 S. W. 1047; Slocum *v.* Putnam (Civ. App.), 25 S. W. 52; Spicer *v.* Taylor (Civ. App.), 21 S. W. 314; Rosenfield Const. Co. *v.* Cooney (Civ. App.), 26 S. W. 1004; Galveston, etc., R. Co. *v.* Knippa (Civ. App.), 27 S. W. 730; McDonald *v.* Babb (Civ. App.), 29 S. W. 1114; Gulf, etc., R. Co. *v.* Calvert, 11 Tex. Civ. App. 30, 31 S. W. 679; Yarzombeck *v.* Grier (Civ. App.), 32 S. W. 236; Bland *v.* State (Civ. App.), 38 S. W. 252, affirmed in 93 Tex. 655, no op.; Alvarado Water Supply, etc., Co. *v.* Adoue (Civ. App.), 47 S. W. 281, affirmed in 93 Tex. 724, no op.; Greer *v.* First Nat. Bank (Civ. App.), 47 S. W. 1045, affirmed in 93 Tex. 684, no op.; Walker *v.* Boyd (Civ. App.), 48 S. W. 602; State *v.* Schall (Civ. App.), 50 S. W. 205; Brown *v.* Vizcaya (Civ. App.), 55 S. W. 191, affirmed in 93 Tex. 701, no op.; Ackermann *v.* Ackermann (Civ. App.), 65 S. W. 755; Renfro *v.* Harris (Civ. App.), 72 S. W. 237; St. Louis, etc., R. Co. *v.* Hill (Civ. App.), 103 S. W. 227; Garrison *v.* Richards (Civ. App.), 107 S. W. 861; Kimmey *v.* Abney (Civ. App.), 107 S. W. 885; Litton *v.* Thompson, 2 Posey 577; Henry *v.* Shain, 1 App. Civ. Cases, § 1074; Hardemyer *v.* Young, 1 App. Civ. Cases, § 150; Dunlap *v.* Brooks, 3 App. Civ. Cases, § 356.

In the absence of a statement of facts, before the appellate court can revise the ruling of the court below upon the admission or exclusion of testimony, it must manifestly appear from the bill of exceptions and the record that such ruling is erroneous, and that it caused injury to the party complaining. Atchison, etc., R. Co. *v.* Lochlin, 87 Tex. 467, 29 S. W. 469, and see cases cited to preceding paragraph.

"To reverse the judgment, in the absence of a statement of facts, on such grounds, this court should ordinarily be able to see, not only that the court erred, but that such error

must, with reasonable certainty, have produced a substantial injury to the party in the cause. An abstract error upon a point of law applicable to the evidence is not enough. It should appear manifestly to have been a wrongful error in reference to the cause of action or defense." *Lockett v. Schurenberg*, 60 Tex. 610, quoting and approving *McCarty v. Wood*, 42 Tex. 38.

In the absence of a statement of facts, when from the statement contained in a bill of exceptions to the introduction of evidence it can not be ascertained whether the evidence could have prejudiced the complainant, its admission can not afford ground for reversal. Abstract error will not suffice; it must be error with reference to the cause of action or defense. *Missouri Pac. R. Co. v. Edwards*, 75 Tex. 334, 12 S. W. 853.

Where there is no statement of facts, the court will not reverse for rejection of evidence. *Cottrell v. Teagarden*, 25 Tex. 217, 319.

Where there is no statement of facts contained in the record, the supreme court will not consider exceptions to the rulings of the court below excluding testimony, unless there be enough in the record to make it clearly appear that the rejected testimony was important, and that its place was not supplied by other testimony. *Thompson v. Callison*, 27 Tex. 438.

Though it has been held that a statement of facts is not necessary to invoke the action of the supreme court, when there is a bill of exceptions which shows that competent evidence was excluded by the court below, yet this rule will not apply unless the relevancy and materiality of the excluded testimony is apparent from the pleadings. *Tarleton v. Daily*, 55 Tex. 92.

Judgment will not be disturbed for admission of improper testimony unless a statement of facts is found in the record. *Devore v. Crowder*, 66 Tex. 204, 207, 18 S. W. 501.

In the absence of a statement of facts, and it not being shown that the excluded testimony was relevant to the pleadings, and material to appellant's case as made, judgment will not be reversed on account of exclusion of testimony. *Harris v. Spence*, 70 Tex. 616, 620, 8 S. W. 313.

Where error was assigned to the admission of evidence because the same was hearsay, immaterial, and irrelevant, but no such grounds of objection were disclosed on the pages of the statement of facts to which the brief referred, the assignment could not be considered on appeal. *London v. Crow*, 46 Tex. Civ. App. 190, 102 S. W. 177.

Reason for Rule.—The reason for the general rule that rulings of the lower court in admitting or excluding evidence will not be considered in the absence of a statement of facts, is that in most cases, without a statement of the whole evidence, it is impossible for the appellate court to determine whether or not the error, if error there be has operated to the prejudice of the appellant. *Blackwell v. Patton*, 23 Tex. 670; *Cottrell v. Teagarden*, 25 Tex. 317; *Jones v. Cavasos*, 29 Tex. 428; *McCarty v. Wood*, 42 Tex. 38; *Lockett v. Schurenberg*, 60 Tex. 610; *Torrey v. Cameron & Co.*, 74 Tex. 187, 11 S. W. 1088; *Missouri Pac. R. Co. v. Edwards*, 75 Tex. 334, 12 S. W. 853; *Castellano v. Marks*, 37 Tex. Civ. App. 273, 83 S. W. 729; *Walker v. Boyd* (Civ. App.), 48 S. W. 602.

"The rule that an appellate court will not consider the question of the admission or exclusion of evidence in the absence of a statement of facts is based on the reason that the court can not ascertain the materiality of such testimony without the facts necessary to show how it affected the interests of the complaining party in the trial of the cause." *Castellano v. Marks*, 37 Tex. Civ. App. 273, 83 S. W. 729.

"It is incumbent on a party seeking to reverse a judgment because the evi-

dence which was offered, and which was properly admissible, was ruled out, to bring into the supreme court a statement of the facts which were in evidence on the trial below, in order that the materiality of that which was rejected may be seen, and that the supreme court may be able to determine whether or not the evidence offered and rejected could have influenced the verdict of the jury if it had been admitted." *Cottrell v. Teagarden*, 25 Tex. 317.

"Parties wishing to have the errors of the court revised in giving or refusing charges, and in admitting or rejecting evidence, should prepare and send up a statement of facts, as it has been repeatedly decided. It will seldom happen that a case can be presented, in which such errors can be revised, without a statement of facts showing the relevancy and importance of the matter sought to be revised. See *Galbreath v. Templeton*, 20 Tex. 45." *Fulgham v. Bendy*, 23 Tex. 64.

Applications of Rule.—Where the plaintiff claimed by junior title, alleging that the elder title was fraudulent and void, and the court below rejected the plaintiff's title when offered in evidence, to which ruling the plaintiff excepted, the supreme court seemed to be of opinion that the plaintiff was not entitled to a revision of said ruling, because he did not adduce evidence of the fraud in the defendant's title, and show the same by a statement of facts. *Hardiman v. Herbert*, 11 Tex. 656.

Where the plaintiff had sued in trespass to try title, and the defendant plead in reconvention title in himself, and the plaintiff declined to prosecute his suit, and the defendant proved his title, and there was no statement of facts, the court will not consider whether or not there was error in excluding papers which did not in themselves constitute a muniment of title. *Jones v. Cavasos*, 29 Tex. 428.

In the absence of a statement of

facts, the supreme court will not revise the ruling of the district court in excluding a map offered, when the question was one of boundary, though exceptions thereto were properly taken and filed during the term. Even if it was error to exclude the map, it could not be known, in the absence of a statement of facts, whether it was such an error as prejudiced the rights of the party offering it. *Lockett v. Schurenberg*, 60 Tex. 610.

A county map representing the situation of a section of land in controversy with reference to other public lands and used in evidence in the trial court and attached to the statement of facts but not made a part of it can not be considered on appeal. *Eastin v. Ferguson*, 4 Tex. Civ. App. 643, 23 S. W. 918.

Where, in a suit on a note executed in another state, a section of its revised statutes and certain pages of a report of the supreme court thereof were introduced in evidence, but neither the article referred to nor the pages of the report were copied in the statement of facts on appeal, the appellate court could not go outside of such statement to ascertain the contents of such citations. Judgment, 80 S. W. 555, 35 Tex. Civ. App. 434, reversed. *National Bank of Commerce v. Kenney*, 83 S. W. 368, 98 Tex. 293.

The court, on appeal, can not consider deeds found in the record, but to which no reference is made in the statement of facts or stenographer's notes, though there is a page in the record having no apparent connection with the proceedings, and headed "Title papers offered in evidence," and referring, among other things, to such deeds. *Kimney v. Abney* (Civ. App.), 107 S. W. 885.

In an action against the sureties on a sheriff's bond for wrongful acts of his deputy, where the court excludes the sheriff's bond as evidence, the appellate court without a statement of

facts can not see that plaintiff in error was injured by such ruling, where the record does not show that it was proved that defendant was ever elected or qualified or acted as sheriff, and it is not shown by the record that there was ever any writ in the hands of the alleged sheriff or the alleged deputy by which the latter acted, or that he ever had any authority or color of authority whatever from defendant, or any one else, to dispossess the plaintiff, or that he was damaged or injured in any manner. *Goodale v. Douglas*, 5 Tex. Civ. App. 695, 697, 24 S. W. 966.

The plaintiff having sued the city for damages for the conversion of his horse, whether the act complained of was such that its consequences were chargeable to the city, or was that of an officer for whose conduct the city would not be liable, were questions which could only be determined from the evidence, and there being no statement of facts in the record, it can not be here decided; nor can the charge be reviewed. *Victoria v. Jessel*, 7 Tex. Civ. App. 520, 27 S. W. 159.

The appellate court can not consider a paper copied in the record, purporting to be a will and probate thereof when it is not made a part of the statement of facts or bill of exceptions. *Mattfeld v. Huntington*, 17 Tex. Civ. App. 716, 720, 43 S. W. 53.

Refusal of the trial court to quash the depositions of certain witnesses on motion will not be disturbed on appeal where there is no statement of facts in the record and it does not appear that the depositions were introduced in evidence. *Long v. Behan*, 19 Tex. Civ. App. 325, 45 S. W. 555, affirmed in 93 Tex. 733, no op.

Effect Where Statement of Facts Stricken Out.—Where statement of facts has been stricken from record error assigned for exclusion of evidence can not be considered. *Rosenfield Const. Co. v. Cooney* (Civ. App.),

26 S. W. 1004, citing *Lockett v. Schurenberg*, 60 Tex. 610.

Effect of Failure of Statement to Set Out Testimony Stated by Bill of Exception to Have Been Given.—An objection to testimony will not be considered where the testimony is not set forth in the statement of fact, though the bill of exceptions states that such testimony was given. *Galveston, etc., R. Co. v. Knippa* (Civ. App.), 27 S. W. 730.

Where the bill of exceptions states that certain evidence was introduced, but the statement of facts does not contain it, the court of appeals will not review its admissibility. *Slocum v. Putnam* (Civ. App.), 25 S. W. 52; *Dallas v. Jones* (Civ. App.), 54 S. W. 606, reversed in 93 Tex. 38.

Where the statement of facts on appeal, agreed to by the parties, fails to show that certain records were introduced in evidence, an assignment of error complaining of their admission will be overruled. *Morgan v. Oliver* (Civ. App.), 80 S. W. 111, reversed in 98 Tex. 218.

Conclusiveness of Statement Showing Introduction of Evidence Objected to.—Where a statement of facts on appeal clearly showed that evidence objected to was introduced on the trial, the ruling would be reviewed on appeal, notwithstanding the bill of exceptions taken thereto did not show that the evidence was admitted. *Judgment*, 79 S. W. 91, 34 Tex. Civ. App. 428, affirmed. *Jamison v. Dooley*, 82 S. W. 780, 98 Tex. 206.

(b) Exceptions to Rule.

If, from the bill of exceptions and the record as presented, it appears that the ruling complained of is wrong as a matter of law, and that material and admissible evidence has been excluded, which necessarily controlled the finding of the jury, and without which the action or defense could not be maintained, or if evidence has been admitted, which in no phase of the case

could be properly admitted, and in either case that the ruling must have affected the result to the injury of the complaining party, the ruling ought to be revised, although there be no statement of facts in the record. *Atchison, etc., R. Co. v. Lochlin*, 87 Tex. 467, 29 S. W. 469, citing *Harvey v. Hill*, 7 Tex. 591; *Dalby v. Booth*, 16 Tex. 563; *Galbreath v. Templeton*, 20 Tex. 45; *Fox v. Sturm*, 21 Tex. 406; and see cases cited ante, "General Rule Stated, Construed and Applied," III, B, 2, e, (2), (a).

Where the evidence appears material and relevant to the issues under any probable state of the testimony, and where the ground of objection is one that is not tenable, it would seem that the bill of exceptions ought to be considered and the ruling revised, although no statement of facts appears in the record. *Torrey v. Cameron & Co.*, 74 Tex. 187, 11 S. W. 1088.

"When a bill of exceptions discloses facts enough to show that competent testimony has been excluded by the court, it is sufficient for the action of the courts, without a statement of facts." *Tarlton v. Daily*, 55 Tex. 92, quoting *Fox v. Sturm*, 21 Tex. 406, and see *Litton v. Thompson*, 2 Posey 577.

"When the pleadings, however, clearly indicate that the excluded testimony was the very foundation of the action, and without it the trial would be an idle consumption of time, the reason for the rule no longer exists and its enforcement will not be demanded." *Castellano v. Marks*, 37 Tex. Civ. App. 273, 83 S. W. 729.

"Where the court below erroneously excludes the evidence which constitutes the foundation of the action or the defense, under such circumstances that it can not be reasonably expected that it can be supplied by other evidence then this court might be enabled to see by reference to the pleadings in the cause, that the party had

suffered an injury even in the absence of a statement of facts." *Lockett v. Schurenberg*, 60 Tex. 610, quoting *McCarty v. Wood*, 42 Tex. 38.

A statement of facts is not necessary to review a case where the foundation of the title or the right sued on is excluded from the evidence. *State v. Wharton*, 26 Tex. Civ. App. 262, 63 S. W. 915.

Where the written instrument on which the action is founded is ruled out at the trial, and the party takes his bill of exceptions, it is not necessary for him to proceed with the trial, nor, if he does proceed to verdict and judgment thereon, to prepare a statement of all the facts proved. *Sublett v. Kerr*, 12 Tex. 366.

Where there is a bill of exceptions which shows that the court excluded from the jury the instrument sued on, the ruling will be revised, although there be not a statement purporting to narrate all the facts. *Wells v. Moore*, 15 Tex. 521.

Where, on the trial of an action brought on a bond, the bond is erroneously excluded from the evidence, the absence of any statement of facts from the record on appeal will not necessitate an affirmance of the judgment. *State v. Wharton*, 26 Tex. Civ. App. 262, 63 S. W. 915.

Where, in an action on a liquor bond, the court excluded the bond and license when offered in evidence because of an alleged defect in the application for the license—such bond being the basis of the action—plaintiff was not bound to proceed and prove a cause of action for breach of the bond, and file a statement of facts on appeal, as a prerequisite to a review of the court's ruling. *Castellano v. Marks*, 37 Tex. Civ. App. 273, 83 S. W. 729.

Where a plea of privilege was overruled, in effect, on demurrer, no evidence in support of it being admissible, ruling on admission of such evidence is reviewable without a statement of

facts. *Callhan v. Pemberton* (Civ. App.), 38 S. W. 227, 228.

Though there is no statement of facts, yet if the instructions given and refused raise a strong presumption that proper evidence was excluded by the court, to the prejudice of the appellant, the judgment will be reversed. *Ragland v. Rogers*, 34 Tex. 617.

(3) Sufficiency of Evidence.

In General.—Assignments of error relating to the sufficiency of the evidence can not be considered, in the absence of a statement of facts. *Houston, etc., R. Co. v. Red Cross Stock Farm* (Civ. App.), 45 S. W. 741.

Sufficiency of Evidence to Sustain Verdict, Findings or Judgment.—The sufficiency of the evidence to sustain the verdict can not be considered without a statement of facts. *International, etc., R. Co. v. Underwood*, 67 Tex. 589, 4 S. W. 216; *Heindenheimer v. Tannenbaum*, 23 Tex. Civ. App. 567, 56 S. W. 776, affirmed in 94 Tex. 700, no op.; *Burgher v. City Nat. Bank* (Sup.), 18 S. W. 575; *Western Union Tel. Co. v. Walker* (Civ. App.), 26 S. W. 858 (see 86 Tex. 72); *McDonald v. Babb* (Civ. App.), 29 S. W. 1114; *Walker v. Boyd* (Civ. App.), 48 S. W. 602; *Tarrant County v. Reid*, 67 S. W. 785, 28 Tex. Civ. App. 425, affirmed in 95 Tex. 687, no op.; *Missouri, etc., R. Co. v. Waggoner* (Civ. App.), 109 S. W. 971; *Haby v. Koenig*, 2 Posey 439, 441.

An assignment of error that verdict is not supported by evidence will not be considered without a statement of facts unless record shows errors going to foundation of action. *Morris v. Files*, 40 Tex. 374, 379.

Where there is no statement of facts, it will be presumed that the verdict was warranted by the evidence. *Flanagan v. Ward*, 12 Tex. 209.

"The sixth assignment complains of the verdict as not being supported by the evidence and against the great weight and preponderance of the evi-

dence. This assignment, in the absence of a statement of facts, can not be considered." *Missouri, etc., R. Co. v. Waggoner* (Civ. App.), 109 S. W. 971.

Where appellant desires to attack the trial judge's conclusions of fact as not being supported by the evidence he should bring up a statement of the evidence. *Harrison v. Fryar*, 8 Tex. Civ. App. 524, 527, 28 S. W. 250.

In the absence of a statement of facts, errors in rulings on the admissibility of evidence or the insufficiency thereof to support the findings of fact can not be reviewed on appeal, except where such errors can be discerned from the bill of exceptions alone, or in connection with the pleadings and findings of fact by the court. *Garrison v. Richards* (Civ. App.), 107 S. W. 861.

When the record contains neither statement of facts nor exceptions to the conclusions of law and findings of fact of the court below, and the points raised by the assignments of error relate to the sufficiency of the evidence to support the conclusions of law, and the facts found do not affirmatively show that the conclusions of law were erroneous, the case might be disposed of on that ground alone. *Ward v. New York, etc., Land Co.*, 2 Tex. Civ. App. 533, 21 S. W. 972.

Assignments of error challenging the sufficiency of the evidence to support the judgment can not be considered in the absence of statements of fact. *Sloan v. Schumpert* (Civ. App.), 81 S. W. 1005.

An assignment in appellant's brief, that the court erred in foreclosing a vendor's lien for the reason that no evidence was adduced describing the land can not be entertained in the absence of a statement of facts. *Edling v. Burnett*, 19 Tex. Civ. App. 287, 46 S. W. 907, affirmed in 93 Tex. 704, no op.

The supreme court will not consider

an assignment of error, that the judgment was contrary to the law and evidence, if there be no statement of facts and no question of fact or of law, properly presented for revision, by the record, involving the correctness of the judgment. *May v. Ferrill*, 22 Tex. 340.

Insufficiency of Evidence to Warrant Peremptory Charge.—Insufficiency of the evidence to warrant a peremptory charge can not be considered, in the absence of a statement of facts. *Colley v. Wood*, 32 Tex. Civ. App. 306, 74 S. W. 602, affirmed in 97 Tex. 629, no op.

Insufficiency of Evidence to Authorize Submission of Issue.—An objection that there was no evidence to authorize the submission of an issue to the jury can not be considered on appeal in the absence of a statement of facts. *Ennis, etc., Co. v. Wathen* (Civ. App.), 58 S. W. 971.

Insufficient Proof in Proceedings for Probate of Lost Will.—Assignments of error in a judgment probating a lost will, in that it was not proven by the requisite number of witnesses to be in testator's hand, and was not shown to have been fully written by testator, will be overruled if there is no statement of facts. *Walker v. Boyd* (Civ. App.), 48 S. W. 602.

f. Action of Court in Giving or Refusing Instructions.

(1) General Rule Stated, Construed and Applied.

It is a well-established general rule that the action of the lower court in giving or refusing instructions will not be revised on appeal in the absence of a statement of facts. *Holman v. Britton*, 2 Tex. 298; *McMullen v. Kelso*, 4 Tex. 235; *Hill v. Crownover*, 4 Tex. 8; *Armstrong v. Lipscomb*, 11 Tex. 649; *Cannovan v. Thompson*, 12 Tex. 247; *Flanagan v. Ward*, 12 Tex. 209; *Teas v. McDonald*, 13 Tex. 349; *McMahan v. Rice*, 16 Tex. 335; *Dalby v. Booth*, 16 Tex. 563, 565; *Lewis v.*

Black, 16 Tex. 652; *McLemore v. McClellan*, 17 Tex. 122; *Dever v. Branch*, 18 Tex. 615; *Hutchins v. Wade*, 20 Tex. 7; *Bast v. Alford*, 22 Tex. 399; *Fulgham v. Bendy*, 23 Tex. 64; *Birge v. Wanhop*, 23 Tex. 441; *Neill v. Newton*, 24 Tex. 202; *Davis v. Calhoun*, 41 Tex. 554; *Koontz v. State*, 41 Tex. 570; *Keef v. State*, 44 Tex. 582; *Frost v. Frost*, 45 Tex. 324, 340; *Pfeuffer v. Maltby*, 54 Tex. 454; *Ross v. McGowen*, 58 Tex. 603; *Texas, etc., R. Co. v. McAllister*, 59 Tex. 349; *Lockett v. Schurenberg*, 60 Tex. 610; *Raleigh v. Cook*, 60 Tex. 438; *Endick v. Endick*, 61 Tex. 559, 560; *Freiberg v. Lowe*, 61 Tex. 436; *Devore v. Crowder*, 66 Tex. 204, 18 S. W. 501; *White v. Parks*, 67 Tex. 605, 4 S. W. 245; *International, etc., R. Co. v. Underwood*, 67 Tex. 589, 4 S. W. 216; *Berryman v. Schumaker*, 67 Tex. 312, 3 S. W. 46; *Stonebraker v. Friar*, 70 Tex. 204, 7 S. W. 799; *Besso v. Southworth*, 71 Tex. 765, 10 S. W. 523; *Torrey v. Cameron & Co.*, 74 Tex. 189, 11 S. W. 1088; *San Antonio, etc., R. Co. v. Moore*, 75 Tex. 643, 13 S. W. 295; *Reagan v. Copeland*, 78 Tex. 551, 14 S. W. 1031; *Hill v. Gulf, etc., R. Co.*, 80 Tex. 431, 15 S. W. 1099; *Osborne v. Prather*, 83 Tex. 208, 18 S. W. 613; *Watkins v. Tucker*, 84 Tex. 428, 19 S. W. 570; *International, etc., R. Co. v. Wolf*, 3 Tex. Civ. App. 383, 22 S. W. 187; *Victoria v. Jessel*, 7 Tex. Civ. App. 520, 27 S. W. 159; *Blackburn v. Blackburn*, 16 Tex. Civ. App. 564, 42 S. W. 132 (see 93 Tex. 700, no op.); *Fidelity, etc., Co. v. Getzendanner*, 23 Tex. Civ. App. 135, 53 S. W. 838; *Missouri, etc., R. Co. v. Elliott*, 42 Tex. Civ. App. 519, 93 S. W. 706, affirmed in 101 Tex. 648, no op.; *Smith v. Pecos Valley R. Co.*, 43 Tex. Civ. App. 204, 95 S. W. 11, affirmed in 101 Tex. 659, no op.; *Mayo v. Goldman*, 44 Tex. Civ. App. 80, 97 S. W. 1061; *Chicago, etc., R. Co. v. Barrett*, 45 Tex. Civ. App. 73, 100 S. W. 800, affirmed in 102 Tex. 579, no op.; *Jenkins v. St.*

Louis, etc., R. Co., 46 Tex. Civ. App. 560, 102 S. W. 937; *Burgher v. City Nat. Bank* (Sup.), 18 S. W. 575; *McCormick Harvesting Mach. Co. v. Gilkey* (Civ. App.), 23 S. W. 325; *McDaniel v. Martin* (Civ. App.), 25 S. W. 1041; *Ft. Worth, etc., R. Co. v. Garvin* (Civ. App.), 29 S. W. 794; *Atchison, etc., R. Co. v. Lochlin* (Civ. App.), 29 S. W. 690; *Gulf, etc., R. Co. v. Calvert*, 1 Tex. Civ. App. 30, 31 S. W. 679; *Yarzombeck v. Grier* (Civ. App.), 32 S. W. 236; *Bland v. State* (Civ. App.), 38 S. W. 252, affirmed in 93 Tex. 655, no op.; *Houston, etc., R. Co. v. Red Cross Stock Farm* (Civ. App.), 45 S. W. 741; *Scoggins v. Thompson* (Civ. App.), 45 S. W. 216; *Brown v. Vizcaya* (Civ. App.), 55 S. W. 191, affirmed in 93 Tex. 701, no op.; *Green v. Tate* (Civ. App.), 69 S. W. 486; *Renfro v. Harris* (Civ. App.), 72 S. W. 237; *Galveston, etc., R. Co. v. Perkins* (Civ. App.), 73 S. W. 1067, affirmed in 97 Tex. 633, no op.; *Luna v. Missouri, etc., R. Co.* (Civ. App.), 73 S. W. 1061; *Von Boeckman v. Loepp* (Civ. App.), 73 S. W. 849; *Avocato v. Dell' Ara* (Civ. App.), 77 S. W. 47; *Granberry v. Mussman* (Civ. App.), 90 S. W. 533; *Aultman, etc., Co. v. Moore* (Civ. App.), 95 S. W. 17; *Oliver v. Grant* (Civ. App.), 100 S. W. 1022; *Gibbs v. Mayers*, 2 Posey 215.

"Under a long line of decisions, the rule has been fixed that, in the absence of a statement of facts, the correctness of charges given will not be considered, unless, under no facts which might have been proved under the pleadings, could the charge have been correct. *Pfueffer v. Maltby*, 54 Tex. 454; *Lockett v. Schurenberg*, 60 Tex. 610." *Endick v. Endick*, 61 Tex. 539. And see cases cited to preceding paragraph.

Instructions, when not accompanied by statement of facts, are simply abstract propositions, and can not be deemed to have worked injury to appellant. *Holman v. Britton*, 2 Tex. 298.

Where there is no statement of facts before the court, judgment will not be reversed because of erroneous instructions, unless the charge is so clearly against law as to be erroneous under any state of facts. *Marx v. Caldwell*, 62 Tex. 64, 65.

Without statement of facts judgment must be affirmed, though instruction to jury be utterly erroneous. *Cannovan v. Thompson*, 12 Tex. 247, 248.

Refusal of correct requested instruction is not ground for reversal where there is no statement of facts. *Dalby v. Booth*, 16 Tex. 563, 565.

Refusal of requested charge, based on agreement of counsel which does not appear to have been brought to the trial court's attention, and is not contained in statement of facts, will not reverse. *Texas, etc., R. Co. v. Gaal*, 14 Tex. Civ. App. 459, 461, 37 S. W. 462, affirmed in 93 Tex. 721, no op.

Reason for Rule.—Objections to instructions will not be reviewed on a writ of error, where there is no statement of facts in the record, since the testimony might show defendant in error's right to recover, thus making any errors in the instructions immaterial. *Oscar v. Oscar* (Civ. App.), 107 S. W. 554.

When no statement or bill of exceptions is sent up, this court has not the means of deciding whether the instructions given or those refused operated injuriously, and so they can not furnish any ground for reversal of the judgment. *McMullen v. Kelso*, 4 Tex. 235.

"If the charges given be incorrect, or those refused be correct, as abstract propositions of law, we would yet be unable to say that under the facts the action of the court with reference to them was prejudicial to the rights of appellant. *White v. Parks*, 67 Tex. 605, 4 S. W. 245." *Osborne v. Prather*, 83 Tex. 208, 18 S. W. 613.

Effect Where Statement of Facts Stricken Out.—Where the statement

of facts has been stricken out because not filed in time, and the portions of the charge assigned as error present issues in a manner not erroneous under some state of facts which may have been developed, the charge should not be held erroneous. *Green v. Tate* (Civ. App.), 69 S. W. 486.

Applications of Rule.—Where a charge submitted a ground of recovery alleged in the petition, and the verdict, in the absence of a statement of facts, established the truth of the facts alleged, and warranted the judgment rendered, the court on appeal can not review, in the absence of a statement of facts, an instruction submitting a ground of recovery not alleged. *Missouri, etc., R. Co. v. Elliott*, 42 Tex. Civ. App. 519, 93 S. W. 706, affirmed in 101 Tex. 648, no op.

Where there is no statement of facts in the record, it can not be said that a charge stating that certain facts constitute negligence resulted in injury to defendant. *Atchison, etc., R. Co. v. Locklin* (Civ. App.), 29 S. W. 690.

Charges asked by the telegraph company were refused by the trial judge. The charges related to conditions limiting its responsibility. The statement of facts not showing the introduction in evidence of the alleged conditions the refusal of the charges can not be revised on appeal. *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406, 16 S. W. 25.

Where on appeal there is no statement of facts, alleged error in refusing to charge that there was no evidence of an implied contract of partnership is not reviewable. *Avocato v. Dell'Ara* (Civ. App.), 77 S. W. 47.

An objection that the charge erroneously placed on plaintiffs the burden of proof, after defendants admitted that plaintiffs were entitled to judgment, unless defeated by certain defenses alleged, could not be reviewed, in the absence of a statement of facts or bill of exceptions from which it could be de-

termined whether the error complained of was prejudicial. *Aultman, etc., Co. v. Moore* (Civ. App.), 95 S. W. 17.

Assignments of error relating to a refusal to give special instructions can not be considered in the absence of a statement of facts. *Alvarado Water Supply, etc., Co. v. Adoue* (Civ. App.), 47 S. W. 281, affirmed in 93 Tex. 724 no op.

(2) Exceptions to Rule.

An exception to the general rule that charges given or refused will not be revised on appeal where there is no statement of facts, is found where the error in the charge is so glaringly apparent, when taken in connection with the pleadings and the verdict, as to leave no doubt but that the finding of the jury was controlled by the improper instructions. *Bast v. Alford*, 22 Tex. 399; *McGaughy v. Bendy*, 27 Tex. 534; *Anding v. Perkins*, 29 Tex. 348; *Davis v. Calhoun*, 41 Tex. 554; *Pfeuffer v. Maltby*, 54 Tex. 454; *Devore v. Crowder*, 66 Tex. 204, 18 S. W. 501; *Hill v. Gulf, etc., R. Co.*, 80 Tex. 431, 15 S. W. 1099; *Blackburn v. Blackburn*, 16 Tex. Civ. App. 564, 42 S. W. 132 (see 93 Tex. 700, no op.); *Haight v. Turner*, 44 Tex. Civ. App. 595, 99 S. W. 196 (see 102 Tex. 584, no op.); *Missouri, etc., R. Co. v. Waggoner* (Civ. App.), 109 S. W. 971; *Litton v. Thompson*, 2 Posey 577; *Gibbs v. Mayes*, 2 Posey 215. And see cases cited ante, "General Rule," III, C, 2, a, (1), (a).

"To bring it within the exception it would have to appear from the record that the error in the charge affected the verdict, as in the case of *Anding v. Perkins*, 29 Tex. 348. For statement and illustrations of the rule and exception, see opinion in *Texas, etc., R. Co. v. McAllister*, 59 Tex. 349, and cases there collated, also *White v. Parks*, 67 Tex. 605, 4 S. W. 245; *Hill v. Gulf, etc., R. Co.*, 80 Tex. 431, 15 S. W. 1099; *Atchison, etc., R. Co. v. Lochlin*, 87 Tex. 467, 29 S. W. 469." *Missouri, etc., R.*

Co. v. Elliott, 42 Tex. Civ. App. 519, 93 S. W. 706, affirmed in 101 Tex. 648, no op.

The rule and the exception was stated in *Bast v. Alford*, 22 Tex. 399, thus: "It is the well established rule of this court, that the charge of the judge below will not be revised unless there be a statement of facts in the record; except the pleadings contain matter which shows the charge to be necessarily erroneous."

An exception can be found in a case where a charge is upon an issue not made on the pleadings, and the verdict is evidently upon that issue. *Blackburn v. Blackburn*, 16 Tex. Civ. App. 564, 42 S. W. 132 (see 93 Tex. 700, no op.); *Hill v. Gulf, etc., R. Co.*, 80 Tex. 431, 15 S. W. 1099; *Missouri, etc., R. Co. v. Waggoner* (Civ. App.), 109 S. W. 971.

In *Lucketts v. Townsend*, 3 Tex. 119, where there was no statement of facts, it was held that there was no necessity for it in that case, because it appeared from the admissions in the pleadings that the verdict was wrong.

Judgment will be reversed where the charge, in connection with pleadings and verdict, might have mislead jury, although there is no statement or bill of exceptions. *McGaughey v. Bendy*, 27 Tex. 534, 535. See, also, *Texas, etc., R. Co. v. McAllister*, 59 Tex. 349.

Judgment will be reversed where charge does not conform to pleadings though there be no statement of facts. *Anding v. Perkins*, 29 Tex. 348.

Where there are no pleadings to support the verdict of the jury, as where the petition does not disclose such facts as would entitle the plaintiff to recover punitive damages, and to the extent awarded by the verdict, the judgment will be reversed upon a charge which authorizes the jury to find such damages. *Neill v. Newton*, 24 Tex. 202; *Anding v. Perkins*, 29 Tex. 348.

g. Improper Argument of Counsel.

An assignment of error complaining of improper remarks of counsel in argument can not be considered in the absence of a statement of facts. *Atchison, etc., R. Co. v. Locklin* (Civ. App.), 29 S. W. 690.

In the absence of statement of facts on appeal reversal can not be had for error in permitting plaintiff to read account sued on and transfer and guaranty of collection of same. *Bergstrom v. Burns* (Civ. App.), 24 S. W. 1098.

h. Action of Jury in Taking with Them Documentary Evidence.

The appellate court can not review assignments of error relating to the action of the jury in taking with them documentary evidence on which was printed certain sections of law relating to the matters in controversy. *Renfro v. Harris* (Civ. App.), 72 S. W. 237.

i. Where Findings of Court Sought to Be Reviewed.

See, generally, the title FINDINGS OF COURT.

General Rule.—An assignment of errors complaining of the findings of fact by the trial court will not be considered in the absence of a statement of facts. *Harrison v. Fryar*, 8 Tex. Civ. App. 524, 28 S. W. 250; *Buchanan v. Wren*, 10 Tex. Civ. App. 560, 571, 30 S. W. 1077; *Oliver v. First Nat. Bank*, 12 Tex. Civ. App. 78, 33 S. W. 706; *Templeman v. Hutchings & Co.*, 24 Tex. Civ. App. 1, 57 S. W. 868, affirmed in 93 Tex. 650, no op.; *Sweet v. Lowrey*, 26 Tex. Civ. App. 306, 63 S. W. 166; *Tarrant County v. Reid*, 28 Tex. Civ. App. 425, 67 S. W. 785, affirmed in 95 Tex. 687, no op.; *Conner v. Downes*, 32 Tex. Civ. App. 588, 74 S. W. 781, 75 S. W. 335; *Rio Grande, etc., Co. v. Burns*, 82 Tex. 50, 17 S. W. 1043; *Texas, etc., R. Co. v. Purcell*, 91 Tex. 587, 44 S. W. 1058; *San Antonio v. Berry*, 92 Tex. 319, 48 S. W. 496, reversing 46 S. W. 273;

Texas, etc., *R. Co. v. Cole* (Sup.), 1 S. W. 631.

In the absence of a statement of facts the facts found by the trial judge will be regarded by the court of civil appeals as conclusive. *Conner v. Downes*, 32 Tex. Civ. App. 588, 74 S. W. 781, 75 S. W. 335.

Omission in the court's conclusions of law and fact is not reviewable in the absence of statement of facts. *Rio Grande, etc., Co. v. Burns & Co.*, 82 Tex. 50, 58, 17 S. W. 1043.

Where a cause was tried by the court, and there is no statement of facts in the record, the appellate court must look alone to the findings of fact for its conclusions of fact. *Peters Shoe Co. v. Murray*, 71 S. W. 977, 31 Tex. Civ. App. 259.

Where there is no statement of facts, an assignment that the court erred in a specified holding can not be sustained, when the facts found by the court fully support such holding. *Pinkard v. Willis*, 28 Tex. Civ. App. 198, 67 S. W. 135, affirmed in 95 Tex. 684, no op.

Findings of fact by a trial court can not be reviewed except on all the evidence; and a statement of facts must be authenticated by the trial judge, to be considered. Evidence omitted from such a statement can not be supplied by agreement of counsel. *Tennille v. Morgan* (Civ. App.), 35 S. W. 514, affirmed in 93 Tex. 673, no op.

"If a party intends to have a case revised on the conclusions of fact and law found by the judge who tried the case, he should except to the conclusions and have his exceptions noted in the judgment entry. *General Laws*, 1879, p. 119. When such exception is made and noted, the adverse party must take notice of it, and if in his opinion the conclusions of fact or law are not so full or accurate as they should be, for his own protection, it will be his right to have a statement of facts from which the judgment may be sustained; or in

any other respect to have a complete presentation of the case. If no exception to the conclusions of law or judgment of the court is noted, unless the failure to except be waived or not insisted on, the only inquiry will be, whether the pleadings justify the judgment; any other rule would often cause the reversal of judgments which would be affirmed if the case was fully presented. If, however, with notice that the adverse party intends to present his case for revision on the conclusions of fact and law, the successful party causes no statement of facts to be made, or the record otherwise made to exhibit the whole case, then he will be understood to acquiesce in the disposition of the case on appeal upon the pleadings, conclusions of fact and law, and the judgment and such exceptions as may be evidenced by the bills of exception taken or otherwise." *Continental Ins. Co. v. Milliken*, 64 Tex. 46.

"The assignments of error attack the findings of the court, and, in order to determine the merits of appellant's contention, the statement of facts must be looked to, when embodied in the record. The statement of facts should contain substantially all the material facts necessary for a determination of the issues involved. When the statement of facts omits material evidence to sustain the judgment, the court's conclusions can not be resorted to to supply the deficiency. The court's conclusions must be based upon the evidence, and, to determine the correctness thereof, he is controlled by what the statement of facts contains." *Davis v. Farwell Co.* (Civ. App.), 49 S. W. 656.

Applications of Rule.—A finding of the trial court as to whether there had been a ratification of an agent's acts is conclusive, where there is no statement of facts. *Greer v. First Nat. Bank* (Civ. App.), 47 S. W. 1045, affirmed in 93 Tex. 684, no op.

In an action to restrain sale of alleged homestead on execution, finding that plaintiffs were concluded by former adjudication between same parties will not be reversed, in absence of a statement of facts, or anything in record to show that plaintiffs have any interest in premises in controversy. *Finlay v. Jackson* (Civ. App.), 43 S. W. 310.

Where, in trespass to try title, the trial court found that two deeds executed by plaintiff were absolute conveyances, and not mortgages, and there was no statement of facts on appeal, the mistake of the trial court in reciting the consideration of the last deed so as to render a part of it inconsistent with defendant's pleadings does not require a reversal of a judgment for defendant. *Moore v. Lee*, 37 Tex. Civ. App. 127, 83 S. W. 420.

A finding by the court that the evidence did not show that no provision was made, at the time certain debts were created, for the levy of taxes to pay interest and sinking fund, must be sustained in the absence of a statement of facts. A statement in the findings of the court that certain testimony, and no other, was introduced upon this point, can not be considered, such findings not being a substitute for the statement of facts. *San Antonio v. Berry*, 92 Tex. 319, 48 S. W. 496, reversing 46 S. W. 273.

A finding in reconvention that defendants sustained damage, from the wrongful suing out of an injunction, to a certain sum, in the absence of an exception to the plea and a statement of facts, can not be disturbed. *Cates v. McClure*, 27 Tex. Civ. App. 459, 66 S. W. 224, affirmed in 95 Tex. 675, no op.

On appeal in action to recover land, where the court's findings are not in the form of conclusions of facts but are recitals of testimony and seem to contain but a part of the testimony on question of defendant's notice of plaintiff's claim, but reciting facts suf-

ficient to put him on inquiry, there being no statement of facts, appellant's (defendant's) assignment of error claiming that he was an innocent purchaser without notice can not be sustained. *Harris v. Von Rosenberg* (Civ. App.), 26 S. W. 308, 309, affirmed in 93 Tex. 686, no op.

Alleged error of the court in failing to find in accordance with a written agreement between the parties and on file when the cause was tried, will not be reviewed on appeal, in the absence of a statement of facts showing the absence of testimony before the court supporting its findings. *Buchanan v. Wren*, 10 Tex. Civ. App. 560, 30 S. W. 1077.

Insufficiency of Evidence to Support Findings.—See ante, "Sufficiency of Evidence," III, B, 2, e, (3).

Effect Where Statement of Facts Stricken Out on Motion.—Where a statement of facts is stricken out on motion of defendants in error, assignments of error complaining of conclusions of fact found by the trial court can not be considered. *First Nat. Bank v. Hodges* (Civ. App.), 62 S. W. 827.

j. Matters Relating to Verdict.

See, generally, the title VERDICT.

Excessive Verdict.—In the absence of statement of facts and when new trial was not asked, whether or not damages allowed for negligent delivery of telegram were excessive, can not be determined on appeal. *Western Union Tel. Co. v. Henry* (Civ. App.), 25 S. W. 1097.

Conclusiveness of Special Verdicts in Absence of Statement of Facts.—Special verdicts in response to issues submitted are conclusive of facts found in the absence of statement of facts. *Pool v. Sanford*, 52 Tex. 621, 636.

k. Insufficiency of Description of Land in Judgment.

Where error is assigned in that the description of the land in a judgment

is void for want of certainty, and there is no statement of facts, and the decree refers to certain recorded deeds in aid of description of the land, the appellate court can not review the sufficiency of the description though there are certified copies of certain deeds added to the transcript but not properly made a part of the record. *Craighead v. Bruff* (Civ. App.), 55 S. W. 764.

l. Matters Relating to Costs.

See, generally, the title COSTS, vol. 4, p. 971.

There being no statement of facts, held, that an apportionment of costs would not be disturbed. *Crow v. Jackson* (Civ. App.), 49 S. W. 920.

Where there are no conclusions nor statement of facts, to show expense of receivership, or how it occurred, ruling taxing costs thereof against appellant will not be disturbed. *Wachsmuth v. Sims* (Civ. App.), 32 S. W. 821, 823.

On petition of an administratrix for direction in paying claims against an estate, the court gave the claim of another creditor priority over her own, but charged the costs against the estate, on a finding that the proceeding was in good faith, and in the prudent discharge of her duties as administratrix. Held, on appeal, that the order as to costs will not be disturbed in the absence of a statement of facts showing that the finding was not justified. *Pierson v. Blanton*, 33 Tex. Civ. App. 620, 77 S. W. 433.

m. Rulings on Motion for New Trial.

See, generally, the title NEW TRIALS.

In the absence of statement of facts the ruling on motion for new trial will not be considered. *Heidenheimer v. Tannenbaun*, 23 Tex. Civ. App. 567, 56 S. W. 776, affirmed in 94 Tex. 700, no op.; *Gulf, etc., R. Co. v. Calvert*, 11 Tex. Civ. App. 30, 31 S. W. 679; *Drake v. Brander*, 8 Tex. 351; *Augustine v.*

State, 20 Tex. 450; *Land v. Miller*, 7 Tex. 463.

In the absence of statement of facts order granting new trial will not be revised. *Roberts v. Heffner*, 19 Tex. 130, 131; *Parrott v. Underwood*, 10 Tex. 48.

Where rulings are not assigned as error, and there is no statement of facts, charge and judgment refusing new trial will not be revised. *McLemore v. McClellan*, 17 Tex. 122, 123.

In the absence of statement of facts, refusal of new trial for newly discovered evidence will not be reviewed. *Thompson v. Callison*, 27 Tex. 438, 439; *Wade v. Buford*, 1 App. Civ. Cases, § 1334; *Worley v. McIntire* (Civ. App.), 23 S. W. 996.

Where the assignment of error is to the overruling of a motion for a new trial for insufficiency of evidence, but there is no approved statement of facts, the judgment must be affirmed. *Chicago, etc., R. Co. v. Edwards*, 45 Tex. Civ. App. 66, 99 S. W. 1049, affirmed in 102 Tex. 580, no op.

In the absence of a statement of facts, the sufficiency of a motion for new trial will not be determined, nor will the charge of the court be revised, if such charge in any case could be correct. *Keef v. State*, 44 Tex. 582.

Where an affidavit is filed for the purpose of obtaining a new trial, alleging surprise on account of some evidence adduced on the hearing, the importance of such evidence can not be determined without a statement of facts. *Arnold v. Williams*, 21 Tex. 413.

3. Substitutes for Statement of Facts.

Bill of Exceptions Can Not Supply Statement of Facts.—See ante, "As Distinguished from Statement of Facts," II, A, 2.

Want of Statement Not Supplied by Affidavits in Appellate Court.—See, generally, the title APPEAL AND ERROR, vol. 1, p. 313.

Affidavits in the supreme court are

not admissible to supply a statement of facts. *Live Oak County v. Heaton*, 39 Tex. 499.

Where there is no statement of facts, the affidavit of a juror will not be permitted on appeal to impeach the verdict, since it may be that the evidence would have warranted a peremptory instruction for the successful party. *Dennis v. Neal* (Civ. App.), 71 S. W. 387.

Attempt to bring up to the appellate court the charge to jury, by the affidavit of juror has never received judicial sanction. *Campbell v. Skidmore*, 1 Tex. 475, 477.

Depositions of Witnesses and Copying of Instructions in Transcript.—

If no statement of facts is made, and the instructions are not certified for the appellate court, their place can not be supplied by depositions of those who heard the instructions and evidence. *Garnett v. Roberts*, 16 Tex. 555.

"In this case there is no statement of facts, nor are the instructions complained of embodied in the record. As a substitute, the depositions of witnesses as to the facts in evidence, and the instructions given at the request of the plaintiff, are copied in the transcript. But this mode of completing the record, and making up the statement of facts, is unauthorized by the statute, and furnishes no authentic basis for the action of this court. Apart from the evidence and these instructions, there is no pretense of error. The charge given at the request of defendant secured to him, on a supposed state of facts, the benefit of the statute of limitations." *Garnett v. Roberts*, 16 Tex. 555.

Affidavits of Witnesses on Probate of Will.—Affidavits of witnesses on the probate of a will, taken in writing and filed conformably to Rev. Stat., 1895, art. 1906, held not a statement of facts, within art. 1379. *Walker v. Boyd* (Civ. App.), 48 S. W. 602.

"Upon the examination of the record

we find that it does not contain a statement of facts as required by art. 1379 of the Rev. Stat. of 1895. We find copied in the record what purport to be the affidavits of witnesses taken upon the trial, and filed among the records of the case. Art. 1906 of the Rev. Stat. requires that the testimony taken upon the hearing of an application to probate a will shall be committed to writing, and subscribed in open court by the witnesses, and filed by the clerk. It may be presumed that the affidavit contained in the record embraced the testimony of the witnesses so taken. Such statement of the testimony will not be considered a statement of facts. It does not purport to contain a statement of all the facts adduced in evidence upon the trial. It is not agreed to by counsel, nor is it approved by the court. We can not treat the same as a statement of facts. *Barnhart v. Clark*, 59 Tex. 552. In the absence of a statement of facts, we overrule appellants' first and second assignments of error." *Walker v. Boyd* (Civ. App.), 48 S. W. 602.

Agreements of Counsel as to Facts.

—It seems that an agreement as to a fact, in the record, which forms no part of the findings by the trial court, and is not approved by the judge as a statement of facts, can not be considered by the court on appeal. *Johnson v. Blount*, 48 Tex. 38; *Vaughn v. Bailey*, 11 Tex. Civ. App. 34, 31 S. W. 531.

Under 82a of rules of supreme court an agreement as to facts used on the trial below and not copied into the statement of facts can not be considered for any purpose, although copied into the transcript. *State v. Alcorn*, 78 Tex. 387, 14 S. W. 663.

Agreement of counsel as to facts which might be offered in evidence can not be recognized as a statement of facts, where transcript does not seem to have been offered in evidence. *Taylor v. Campbell*, 59 Tex. 315, 317.

Where there is no bill of exceptions nor a statement of facts in the record, and the only assignment of error is that the court erred in rendering judgment for the defendant, and there is only a written agreement purporting to be signed by the attorneys for both parties, stipulating that the sole question is as to the construction of a certain power of attorney, which agreement, however, has not been incorporated into a statement of facts, and does not comply with the statute as to an agreed case, with a bill of exceptions or a statement of facts, the judgment must be affirmed. *McDowell v. Fowler*, 80 Tex. 587, 16 S. W. 431.

An agreed statement of facts for submission to the trial judge can not be considered as the statement of facts on appeal where it is not signed by the judge, and counsel did not stipulate that it should be so used. *Atchison, etc., R. Co. v. Emerson* (Civ. App.), 24 S. W. 1105.

A purported statement of facts agreed to by counsel for both parties, approved by the judge and filed before the trial, reciting that what follows therein is a statement of facts of the case, and that the case may be tried thereon, can not be considered as a statement of fact on appeal where it does not appear from the record that the case was tried on the agreement, and that no other facts were put in evidence, or that the agreement itself was put in evidence, since this does not meet the requirements of the statute as to a statement of facts. Rev. Stat., art. 1379. *Scott v. Cox*, 30 Tex. Civ. App. 190, 70 S. W. 802, affirmed in 97 Tex. 646, no op.

Agreed Statement of Facts on Which Case Tried below Embodied in Judgment.—An agreed statement of facts, on which a case is tried in the court below, and which the court embodies in its judgment, is sufficient, under Rev. Stat., art. 1293, to authorize a revision of the judgment on matters

growing out of such facts, in the absence of a statement of facts or findings of fact by the court, or an agreed case for appeal, under articles 1333 and 1414. *State v. Connor*, 86 Tex. 133, 23 S. W. 1103; *State v. Connor* (Civ. App.), 25 S. W. 815.

"Article 1333, Rev. Civ. Stat., provides for the filing by the court of the findings of fact and conclusions of law or a special verdict by a jury, in either of which cases an appeal may be taken without other statement of facts. Art. 1414, Rev. Stat., permits the parties to present their case to the court of appeals upon an agreed statement of the facts and proceedings, certified to by the court after trial. In each of these methods the same result is reached of presenting to the appellate court, in condensed form, the material facts upon which the judgment was rendered. In *Salinas v. Wright*, 11 Tex. 572, 578, this court said: 'To authorize the revision of a judgment on the merits, a formal statement of facts is not essential where all the evidence legally and conclusively appears by the record.' In that case the facts appeared by bill of exceptions." *State v. Connor*, 86 Tex. 133, 23 S. W. 1103.

It is error for the appellate court to strike out an agreed statement of facts, and dismiss an appeal, for want of a formal statement on appeal, where the case was originally tried on the agreed statement, which was referred to in the judgment, and expressly made the basis thereof. *Bomar v. West*, 87 Tex. 299, 28 S. W. 519.

Where a cause is submitted in the trial court upon an agreed statement of facts, such agreed statement, with the findings of the court, the judgment rendered, the assignments of error and appeal bond, constitute the record (Rev. Stat., art. 1293); and a transcript thereof, without the pleadings or agreement as to what the issues were or are, is sufficient to authorize a consideration of said appeal and revision

of the judgment rendered. *Scott v. Slaughter*, 97 Tex. 244, 77 S. W. 949.

Exceptions to Judgment Noted in Judgment Entry.—Where exceptions to judgment are noted in judgment entry, exceptions are sufficient under statute to appeal without statement of facts and to question correctness of judgment upon facts. *Craxton v. Ryan*, 3 App. Civ. Cases, § 367.

Recitals in Judgment of Conclusions of Facts Deduced from Evidence.—While recitals in a judgment of conclusions of facts deduced from the evidence, ordinarily will not supply the place of a statement of facts, yet where the recital is to the effect that the court found against the defendants upon a specific issue, wherein they claimed to be the owners of certain merchandise, such recital should be taken as concluding that issue. *Wallace v. Bogel & Bro.*, 62 Tex. 636, citing *Chrisman v. Miller*, 15 Tex. 159, 161.

"The case was tried by the judge without a jury, and appellants excepted to the judgment, and the exception was noted in the judgment entry. This was in accordance with the statute, and entitled appellants to appeal without a statement of facts, and to call in question the correctness of the judgment upon the facts, although said conclusion had not been excepted to. (Sayles' Civ. Stat., art. 1333; Continental Ins. Co. v. Milliken, 64 Tex. 46.)" *Craxton v. Ryan*, 3 App. Civ. Cases, §§ 367, 369.

Stenographer's Transcript of Evidence as Statement of Facts.—See the title STENOGRAPHERS.

C. CONTENTS AND SUFFICIENCY.

1. **Necessity for Statement to Contain All Material Facts and Evidence.**
- a. **General Rule Stated, Construed and Applied.**

Statement of Rule.—A statement of facts must embrace the whole of the facts, and all of the evidence, whether

documentary or oral. *Board of Land Comm'rs v. Reily*, Dallam 381.

"The statement of facts should contain substantially all the material facts necessary for a determination of the issues involved." *Davis v. Farwell Co.* (Civ. App.), 49 S. W. 656.

Whether the proof of a fact be made to the court, or a jury, if it be essential to the plaintiff's right, it must appear in the statement of facts, if there be one. *Ingram v. Drinkard*, 14 Tex. 351.

The statement of facts is intended to embody in the record all the evidence introduced on the trial, as agreed to by the parties and approved by the court; or if the parties failed to agree, as certified to by the court after examining the statements prepared by them respectively. *Roundtree v. Galveston*, 42 Tex. 612, 627, and see *Campbell v. Skidmore*, 1 Tex. 475.

Evidence introduced without complaint and which formed part of the case made before the court or jury, must be put in the statement of facts; otherwise it will not be noticed on appeal. *Dull v. Drake*, 68 Tex. 205, 4 S. W. 364; *Cottrell v. Teagarden*, 25 Tex. 317.

The party giving notice of appeal is required by statute "to make out a clear and explicit statement or bill of the facts" proved upon the trial. *Hawkins v. Lee*, 22 Tex. 544.

Article 1379, Sayles' Civ. Stat., 1897, provided for "a written statement of the facts given in evidence on the trial." *Graves v. George* (Civ. App.), 54 S. W. 262.

When verdict general and review desired, and evidence on which rendered is required in the review, it ought to be clearly and fully agreed on or certified. *Bailey v. Haddy*, Dallam 376.

To enable the supreme court to revise a judgment on the merits, the facts of the case, that is, all the material facts in evidence, must be embodied in the record. *Henderson v. Trimble*, 8 Tex. 174.

Where the statement of facts is so imperfect that there is no doubt that material facts are omitted the verdict will never be disturbed, unless it be apparent from the record that some vital point in the controversy has been erroneously decided. *Pas. Dig., arts. 1490, 1581, notes 582, 613. Poag v. Williams, 31 Tex. 193.*

Where, on appeal in trespass to try title, the statement of facts is so meager as to form no basis for a decision, the judgment will be reversed. *Werlan v. Schollett, 63 Tex. 227.*

In 1872 a second action in trespass to try title was brought. The controversy was as to the locality of the north line of the *Mixon survey*. The defendant pleaded not guilty. In a bill of exceptions it is shown that defendant offered in evidence the proceedings and judgment in his favor in the first suit, insisting that the first suit was conclusive upon the matter of boundary claimed to be the matter in controversy. The jury were instructed "if they found for defendant on the issue of the old judgment * * * they will so say in their verdict. If they should find their verdict for plaintiff or for defendant on the merits of the case, without reference to the old judgment, they should return a general verdict." There was a general verdict for the defendant. In the statement of facts there is nothing tending to show the former judgment. Held: That in the absence of testimony in the statement of facts the court can not assume that the result was affected by testimony the nature or amount of which is not shown. *Mayfield v. Williams, 73 Tex. 508, 11 S. W. 530.*

Where the statement of fact embodied in the transcript is clearly not such as is required by law, as where it does not purport to state all the facts in evidence, and is otherwise defective, it will be disregarded. *Barnhart v. Clark, 59 Tex. 552.*

Statement Should Show That It Contains All Facts Proved.—The statement of facts should show, either by express statement or necessary implication, that it contains all the facts proved upon the trial. *Barnhart v. Clark, 59 Tex. 552; Phelps v. Ashton, 30 Tex. 344.* See, also, *Carter v. Wallace, 2 Tex. 206.*

It should appear, at least inferentially, that statement contains all facts given in evidence. *Phelps v. Ashton, 30 Tex. 344, 349.*

No evidence which may be sent up in the record can be noticed, unless certified or agreed to contain the facts of the case. *Curry v. York, 3 Tex. 357.*

Where the statement of facts did not purport to set out the testimony in detail, the supreme court refused to look to it for the purpose of questioning the verdict. *Bailey v. Haddy, Dallam 376.*

Necessity for Incorporation of, or Reference to Depositions.—Depositions which are not referred to in nor made a part of the statement of facts will not be considered by the supreme court. *Hillebrant v. Brewer, 6 Tex. 45.*

Incorporation of Impeaching Evidence.—Where defendant assigns error in permitting plaintiff to show his reputation for veracity when not impeached by defendant, the appellate court will look to the statement of facts to determine whether defendant's exception was well taken, since impeaching evidence, if given, was addressed to the jury, and should be in such statement. *Texas & P. Ry. Co. v. Raney, 86 Tex. 363, 25 S. W. 11.*

Omission of Material Evidence Not Supplied by Agreement.—Statement of facts omitting material evidence which influenced decision, can not be considered, though parties seek to supply omission by written agreement. *Tennille v. Morgan (Civ. App.), 35 S. W. 514, affirmed in 93 Tex. 673, no op.*

Omission Not Remedied by Resort to Court's Conclusions.—The court's conclusions of fact can not be resorted to to supply an omission from the statement of facts of material evidence to sustain the judgment, where appellant attacks the findings as being unsustained. *Davis v. Farwell Co.* (Civ. App.), 49 S. W. 656.

Effect of Failure to Mention Proof of Facts Material to Appellee's Case.—A statement of facts made up by the court contained no proof of facts material to appellee's case. Held, the defect was no ground for reversal unless urged by an assignment. *Blum v. Whitworth*, 66 Tex. 350, 1 S. W. 108.

Insufficiency of Agreement as to Use of Statement of Facts in Another Case.—The statement of facts contained an agreement that the evidence used in another case, tried in the same court, and before the supreme court at a former term, "is the same as was offered on the trial of this case, so far as it goes; and that the evidence found in the statement of facts in that case may be used in this, without copying it in the transcript in this case." Held, under Rev. Stat., arts. 1411, 1413, 1414, providing that the transcript shall, except in certain cases, contain a full and correct copy of all the proceedings had in the cause, that the evidence referred to could not be considered for any purpose. *Johnson v. Sabine & E. T. Ry. Co.*, 69 Tex. 641, 7 S. W. 379.

"If the parties desired to use in this court the evidence introduced in the case referred to in the agreement they should have made it a part of the statement of facts and had it copied, in its proper place, in the transcript in this case, and not having done so it will not be looked to for any purpose. The statute does not recognize such procedure as appears in this case and this court can not." *Johnson v. Sabine, etc., R. Co.*, 69 Tex. 641, 7 S. W. 379.

Effect of Insertions by Clerk in Transcript.—Bill of sale inserted in transcript on appeal by clerk, of his own knowledge, of what transpired at trial, can not be considered as part of statement of facts on appeal. *Davis v. Loftin*, 6 Tex. 489, 498.

Where the statement of facts was obviously imperfect, and the clerk, in making up the transcript, certified that two pages of it had been lost, and that if they had not been lost it would have appeared that a certain deed which he transcribed was admitted in evidence: Held, that the statement of the clerk respecting the contents of the statement of facts could not be received; but if there was reason to apprehend that injustice had been done upon the trial, it might become necessary to inquire what remedy is left to the party, and whether or not the judgment might not be reversed upon apparent or probable error. *Davis v. Loftin*, 6 Tex. 489.

"It is clear that we can not receive as authentic or as constituting a part of the statement of facts a paper thus supplied by the clerk upon his knowledge of what transpired at the trial. He is not the officer to whom the law has instructed the making of the statement of facts, and no statement of his respecting its contents can be received. It, however, is evident from the record, apart from the statement of the clerk, that the statement of facts is imperfect. If therefore, there were reason to apprehend that injustice had been done upon the trial, it might become necessary to inquire what remedy is left to the party, and whether he might not be authorized to reverse the judgment upon apparent or probable error and remand the case for a new trial in order to prevent wrong and injustice. But if it should appear that though the omission in the statement of facts were supplied it would not change the result, there will be no occasion for that inquiry." *Davis v. Loftin*, 6 Tex. 489.

b. Omission of Immaterial Matters.

In General.—In making up statement of facts unimportant and irrelevant matters are omitted. *Wright v. Wright*, 6 Tex. 3, 23.

Immaterial matters should not be stated so as to encumber the statement of facts. *Texas, etc., R. Co. v. Scott*, 64 Tex. 549, 550.

Unnecessary testimony should not be included in statement of facts. *Kemper v. Corporation*, 3 Tex. 135.

c. Discretion of Trial Judge as to Contents of Statement Prepared by Him.

See, generally, post, "Preparation by Judge," III, D, 2.

There is no power in the appellate court to control the action of a trial judge in making up a statement of facts as to what shall or shall not be embraced therein, except in case such statement is incomplete upon its face. *Runck v. Timon*, 47 Tex. Civ. App. 435, 105 S. W. 224.

What shall be incorporated in a statement of facts on appeal is a matter within the recollection and discretion of the trial judge, the work of the official stenographer being only for his mental assistance, and, after filing a statement unsatisfactory to an appellant, he can not be compelled by mandamus to file another, corrected by the notes of his stenographer or otherwise. *Perry v. Turner* (Civ. App.), 108 S. W. 194.

"The appellate court may review the facts as stated in the record, or it may compel the preparation and filing of a statement of facts in cases where the trial judge refuses to file one; but it is beyond its judicial authority to dictate what shall be incorporated within such a statement of facts when prepared. Those are matters that must rest within the exclusive judicial recollection and discretion of the trial judge. He alone must determine those

facts." *Perry v. Turner* (Civ. App.), 108 S. W. 194.

Effect of Prolivity Where Statement Made by Judge.—Where counsel failed to agree upon a statement of facts, one made by the judge will not be stricken because of its prolixity, it not appearing such objectionable feature was due to fault of appellant's counsel. *Triplett v. Morris*, 18 Tex. Civ. App. 50, 56, 44 S. W. 684 (see 93 Tex. 675, no op.).

When the judge makes the statement of facts, a needless incumbering of the record with interrogatories and answers of witnesses is no ground for dismissal of the appeal. *McManus v. Wallis*, 52 Tex. 534.

2. Manner and Sufficiency of Stating Evidence.**a. Rules Stated and Applied.****(1) Where Evidence Sufficient to Establish Facts Alleged.****(a) General Rule.**

Where the evidence adduced upon the trial of the cause is sufficient to establish a fact or facts alleged by either party, the testimony of witnesses, and the deeds, wills, records, or other written instruments, admitted as evidence, relating thereto, should not be stated or copied in detail into a statement of facts, but the facts thus established should be stated as facts proved in the case. *Rev. Stat. 1895, art. 1379, Rule 72 of Rules for District and County Courts. Dreiss v. Friedrich*, 57 Tex. 70.

Ordinarily, the interrogatories and answers of witnesses, and copies of papers used in evidence, should not be incorporated in the record, but the facts proved thereby, instead. The statutory rule prohibiting it lessens expense and expedites the disposition of causes. When this rule is departed from, in exceptional cases, the necessity for it should be made apparent in the record itself. *McManus v. Wallis*, 52 Tex. 534.

(b) Impropriety of Using Full Stenographic Notes of Testimony and Proceedings.

aa. In General.

The full stenographic notes of the testimony and proceedings on the trial of a cause should not incur the records as a substitute for the statement of facts, such practice violating the rules of court. *Dreiss v. Friedrich*, 57 Tex. 70.

Rule 78 of rules for the district and county courts provide that "neither the notes of a stenographer taken upon the trial, nor a copy thereof made at length, should be filed as a statement of facts; but the statement made therefrom shall be condensed throughout in accordance with the spirit of the foregoing rules upon this subject." *Juergens v. Missouri*, etc., R. Co., 16 Tex. Civ. App. 452, 42 S. W. 230; *Wentworth v. King* (Civ. App.), 49 S. W. 696 (see 93 Tex. 723, no op.); *Caswell v. Hopson* (Civ. App.), 43 S. W. 547; *Brown v. Vizcaya* (Civ. App.), 54 S. W. 636, affirmed in 93 Tex. 701, no op. See, also, *Western Union Tel. Co. v. De Jarles*, 8 Tex. Civ. App. 109, 27 S. W. 792; *Houston*, etc., R. Co. v. *Williams* (Civ. App.), 31 S. W. 556; *East Line*, etc., R. Co. v. *Culberson*, 68 Tex. 664, 5 S. W. 820.

A statement of facts made up of the stenographer's report of the evidence and including questions and answers of the witnesses, objections of counsel and rulings of the court is in violation of rule 78 of the district court (20 S. W. vii) and will be stricken. *Brown v. Vizcaya* (Civ. App.), 54 S. W. 636, affirmed in 93 Tex. 701, no op.

A statement of facts consisting of the testimony as taken by the stenographer, except that the questions have been left off, and the answers adjusted to that change, shows such a gross violation of the rule prohibiting the filing of the stenographer's notes, and requiring the statement to be condensed, that it will be stricken out.

Caswell v. Hopson (Civ. App.), 43 S. W. 547.

One who, in violation of the district court rules 72-78, which are intended to secure a condensed statement of the facts proved on the trial, sets out the testimony of the witnesses in detail, and incorporate objections to evidence and rulings thereon, though he has procured bills of exception to all rulings complained of, runs the risk, not only of a pecuniary penalty, but of having the statement of facts stricken out. *Texas*, etc., R. Co. v. *Flanary* (Civ. App.), 45 S. W. 214.

A stenographer's report of a trial is only intended to furnish assistance in making a statement of fact and it is improper to have such report with all the frivolous details and repetition certified and filed as a statement of facts. *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324.

It is improper to set forth in the statement of facts all the evidence as it is detailed by the witness and taken down by the stenographer and where that is done, the costs will be taxed to the appellant. *Texas & New Orleans Ry. Co. v. Tatman*, 10 Tex. Civ. App. 434, 31 S. W. 333.

"This practice of copying questions and answers in a statement of facts has been condemned by this court in more than one case." *East Line*, etc., R. Co. v. *Culberson*, 68 Tex. 664, 5 S. W. 820, citing *Dreiss v. Friedrich*, 57 Tex. 70; *Hawkins v. Lee*, 22 Tex. 544.

Where statement of facts is prepared in violation of rule forbidding notes of stenographer taken at the trial or copy thereof to be filed as a statement of facts, it will be stricken. *Juergens v. Missouri*, etc., R. Co., 16 Tex. Civ. App. 452, 453, 42 S. W. 230.

When Statement May Properly Contain Questions and Answers from Stenographers' Notes.—A statement of facts may properly contain questions and answers from the stenographer's notes, where necessary to an under-

standing of the testimony; and will not be struck out as too voluminous where it appears that appellant had prepared a shorter statement which was disapproved by opposite counsel. *Gulf, etc., R. Co. v. Mitchell*, 21 Tex. Civ. App. 463, 51 S. W. 662.

"The third motion is to strike out the statement of facts upon the ground that it is a copy of the stenographer's notes and unnecessarily voluminous. The first charge does not appear to be sustained. As a general thing, the testimony of the witnesses is stated in narrative form, though in some instances questions and answers are inserted, but in these instances this appears to have been necessary to a proper understanding of the testimony. The statement of facts could properly have been curtailed; and it is shown by the verified response to the motion to strike out, that counsel for the railway company tendered to counsel for the other side a much shorter statement of facts, to which the latter refused to agree. Under these circumstances, we do not think the motion to strike out should prevail, and it will be overruled." *Gulf, etc., R. Co. v. Mitchell*, 21 Tex. Civ. App. 463, 51 S. W. 662.

Propriety of Inserting Questions and Answers to Show Evasiveness of Answers.—A statement of facts, agreed to by the parties and approved by the trial judge, will not be stricken out because it contains both the questions and answers of the witnesses, in apparent violation of the rules of court, where some of the questions were inserted for the purpose of revealing the evasive and contradictory nature of the answers of the witnesses. *Feist v. Boothe* (Civ. App.), 27 S. W. 33.

bb. Under Stenographers Acts 1905 and 1907.

See the title **STENOGRAPHERS**.

(2) Where Doubt as to Sufficiency of Evidence to Establish Fact.

In General.—When there is any rea-

sonable doubt of the sufficiency of the evidence to constitute proof of any one fact under rule 72 there may then be inserted such of the testimony of the witnesses and written instruments or parts thereof, as relate to such facts. *Rev. Stat. 1895, art. 1379. Rule 73 of Rules for District and County Courts. Dreiss v. Friedrich*, 57 Tex. 70; *Texas, etc., R. Co. v. Flanary* (Civ. App.), 45 S. W. 214.

Rev. Stat., 1895, art. 1879, does not, where parties fail to agree as to sufficiency of the evidence allow it, under all circumstances, to be set out in full. *Texas, etc., R. Co. v. Flanary* (Civ. App.), 45 S. W. 214.

"The statement of facts in this case is certainly very imperfect, as is manifest from the transcript itself. In the statement frequent reference to papers and the indorsements upon them is made, which purport to have been read to the jury on the trial, and yet they are not copied into the record, so as to enable this court to determine upon their legal effect, and to ascertain their legitimacy as evidence in the cause. Hence, it is impossible for this court to revise the finding of the jury, and determine upon its correctness or incorrectness. The uncertainty about the precise nature of the testimony introduced before the jury, and the imperfectness in its presentation, so glaringly obvious to the court from the transcript, will always be a sufficient ground to leave the verdict in the court below undisturbed, unless it should be apparent from the record that some vital point in the controversy has been erroneously decided by the court." *Poag v. Williams*, 31 Tex. 193, 194.

Showing as to Holding or Ruling in Decision Offered in Evidence.—If there is a dispute or controversy as to what is decided by a decision offered in evidence, then so much of the decision should be copied into the statement of facts as may be necessary to

enable the appellate court to determine what was decided by such decision. *Western Union Tel. Co. v. Sloss*, 45 Tex. Civ. App. 153, 100 S. W. 354, affirmed in 102 Tex. 596, no op.

Reference to Judgments in Other Suits.—Where statement of facts on appeal refers to judgment in another suit, but does not set it out in full, its effect may be determined by reference to record. *Craddock v. Edwards*, 81 Tex. 609, 613, 17 S. W. 228.

(3) Description or Insertion of Written Instruments Adduced in Evidence.

(a) In General.

Rule Stated.—Where there is no dispute about, or question made upon the validity or correctness in the form of a deed, or its record, a will or its probate, record of a court, or any written instrument adduced in evidence, it should be described (and not copied), or its legal effect as evidence stated, as a fact established. Rule 74 of Rules for District and County Courts. *Heidenheimer v. Tannenbaum*, 23 Tex. Civ. App. 567, 56 S. W. 776, affirmed in 94 Tex. 700, no op.

By rule 75 of the rules for the district and county courts, it is provided that "when questions are raised on such instruments as are mentioned in the preceding rules, only so much or such parts of them shall be copied into the statement of facts as may be necessary to present the question and the balance of them shall only be described, or presented as prescribed in the proceeding rule."

Appellant's statement of facts contained many duplicate copies of documents, some of which should not have been copied therein, but their substance stated in condensed form; an officer's jurat and the official authentication of several instruments set out in full, when such authentication was not questioned; appellee's testimony as to certain items admitted by appellant; and the statement of all the testimony, which might have been ma-

terially condensed. Held, that such statement constituted a flagrant violation of Dist. Ct. Rules 72-78 (20 S. W. xvi), prescribing the manner of the preparation of statements of fact on appeal, and it would be disregarded under rule 53 (31 S. W. vii) authorizing the court of appeals to disregard statements so prepared. *Heidenheimer v. Tannenbaum*, 56 S. W. 776, 23 Tex. Civ. App. 567.

Recital Held Sufficient to Show That Certain Exhibits Were before the Jury as Evidence.—A recital in the statement of facts that "the following evidence was submitted to the jury.

The pleadings of the plaintiffs and defendants having been read to the jury, the plaintiff introduced in evidence the following," etc., was sufficient to show that the documents annexed to the petition as exhibits were before the jury as evidence. *Byers v. Thacker*, 42 Tex. Civ. App. 492, 94 S. W. 138, affirmed in 101 Tex. 630, no op.

Effect of Omission in Statement Caused by Loss of a Paper.—Where

there is an omission in the statement of facts, caused by the loss of a paper by the appellant's attorney, the court said, if it were uncertain what the evidence was, and we could not certainly know that its presence in the statement of facts would not affect our opinion of the case, the objection (that the appellant could not claim a revision of the judgment upon a defective statement of facts) would be entitled to weight. But as our opinion proceeds on grounds which render the evidence immaterial, giving the appellee the benefit of everything it can be supposed to contain, we do not think its loss should deprive the appellant of the right to have the judgment revised. *Wheeler v. Hollis*, 19 Tex. 522.

(b) Propriety of Copying Instrument on Which Cause of Action or Defense Based.

An instrument, such as a note or other contract, mortgage or deed of

trust, that constitutes the cause of action, on which the petition, or answer, or cross bill, or intervention is founded, may be copied once into the statement of facts. Rev. Stat. 1895, art. 1379; Rule 72 of Rules for District and County Courts. *Runck v. Timon*, 47 Tex. Civ. App. 435, 105 S. W. 224.

Rev. Stat. 1895, art. 1379, which provides that an instrument such as a note or other contract, mortgage or deed of trust, that constitutes the cause of action, may be copied once in the statement of facts, is not a mandatory provision; it being sufficient if such statement contain clearly and fully the substance of the instrument in question. *Runck v. Timon*, 47 Tex. Civ. App. 435, 105 S. W. 224.

Where the trial judge is called upon to prepare a statement of facts in a case resting upon the construction of a written contract, it is sufficient if he sets out in the statement the substance of the contract; and, where this has been done, a writ of mandamus to compel him to insert an exact copy of the contract will be denied. *Runck v. Timon*, 47 Tex. Civ. App. 435, 105 S. W. 224.

Where, on appeal by defendants from a judgment recovered by plaintiff in an action against the principal and sureties on a liquor bond for violation of its conditions, a copy of the bond is not inserted in the statement of facts, the judgment will be reversed, as there is nothing in the record to show who the sureties were, and whether its conditions were such as to create an obligation on their part. *Bowden v. Davis* (Civ. App.), 71 S. W. 47.

In an action for injuries received while riding on defendant's train, the question of error in charging that the conductor might waive conditions in the contract of transportation may not be reviewed, where the contract is neither set out in *hæc verba* nor in substance in the statement of facts.

Chicago, etc., R. Co. v. Burns, 101 Tex. 329, 107 S. W. 49, affirming 104 S. W. 108.

The failure of the statement of facts to show that the instrument sued on was read in evidence is ground for reversal where a general denial was pleaded, although such instrument is in the record as an exhibit to the petition. *Knights v. Fortson*, 78 Tex. 475, 14 S. W. 922, in which case it was held that the failure to introduce such instrument (a benefit certificate of a beneficial society), left the judgment unsupported by the evidence.

(c) Time and Manner of Incorporating Written Instrument When Necessary.

aa. General Rule.

When it becomes necessary to insert in a statement of facts any instrument in writing, the same shall be copied into the statement of facts before it is signed by the judge, and instruments therein only referred to and directed to be copied shall not be deemed a part of the record. Rule 74 of Rules for District and County Courts. *Bowden v. Davis* (Civ. App.), 71 S. W. 47; *Haberzette v. Trinity, etc., R. Co.*, 46 Tex. Civ. App. 527, 103 S. W. 219. See, also, *International, etc., R. Co. v. Scott*, 58 Tex. 187; *Trewitt v. Blundell*, 59 Tex. 253; *McGuire v. Newbill*, 58 Tex. 314; *Vaugh v. Bailey*, 11 Tex. Civ. App. 341, 31 S. W. 531; *Conner v. Williamson*, 26 Tex. Civ. App. 285, 62 S. W. 961, affirmed in 95 Tex. 676, no op.

Under district court rule 74, where the statement of facts does not contain a copy of the bond sued on, but merely a direction to the clerk to insert a copy, the bond can not be considered. *Bowden v. Davis* (Civ. App.), 71 S. W. 47.

An instrument not having been copied into the statement of facts or made a part of it, the trial court could not, after the adjournment of the term at which judgment was entered,

authorize or require the clerk to make it a part of the record, entitling it to be considered a part of the statement of facts. *Haberzettler v. Trinity, etc., R. Co.*, 46 Tex. Civ. App. 527, 103 S. W. 219.

Under district court rules 74, 86 (20 S. W. xvi, xvii), a statement of facts which stated that defendant also introduced the judgment in a certain case, and directed the clerk to make a copy of the judgment attached to defendant's answer, does not show the existence of the judgment referred to, and defendant can claim no rights thereunder. *Conner v. Williamson*, 26 Tex. Civ. App. 285, 62 S. W. 961, affirmed in 95 Tex. 676, no op.

Documents inserted by clerk in statement of facts, after it has been signed by the clerk, will be stricken out by the supreme court on its own motion. *Thurman v. Blankenship, etc., Co.*, 79 Tex. 171, 15 S. W. 387.

A statement of facts calling for material documents, directing them to be inserted, but not containing them, is so far defective that the court can take no notice of such documents merely called for; nor will questions dependent upon them be passed upon by the court. *Taul v. Wright*, 45 Tex. 388.

Under district court rules 74, 86 (20 S. D. xvi, xvii), prohibiting clerks of courts from copying into the transcript on appeal any instrument merely referred to in the statement of facts and directed to be copied, and declaring that instruments so referred to and directed to be copied shall not be deemed a part of the record, a statement of facts which stated that defendant also introduced the judgment in a certain case, and directed the clerk to make a copy of the judgment attached to defendant's answer, does not show the existence of the judgment referred to, and defendant can claim no rights thereunder. *Conner v. Williamson*, 26 Tex. Civ. App.

285, 62 S. W. 961, affirmed in 95 Tex. 676, no op.

A statement of facts when approved did not have copied into it or otherwise made a part of it certain reports of the administrator, who with his sureties were sued for devastavit. The reports were copied into the statement of facts in the transcript, but were stricken out on motion. The verdict for plaintiffs being sustained only by the excluded reports, the want of testimony to support it is ground for reversal. *Mason v. Rodgers*, 83 Tex. 389, 18 S. W. 811.

"At the last term of this court at Tyler, upon motion made by appellees, we struck out and excluded from the record so much of the statement of facts as sets out written documents and instruments, for the reason that the statement of facts as originally prepared did not contain such written instruments, but simply referred to them, with a request that they be copied into the statement of facts. It is these instruments that were copied into the statement of facts after its approval and filing that we excluded. It seems that the evidence relied on by plaintiffs to establish the liability of Mason as administrator for the amount for which he sold the Cass and McCulloch county lands, and for which they allege he failed to account, consists solely of the statements made and contained in his final report. This final report was one of the instruments excluded by us for failure to comply with the rules in preparing statements of facts. The absence of this excluded report from the record leaves the appellees without sufficient evidence to support the verdict and judgment. This is not a case in which there is no statement of facts, and for which reason we would presume everything necessary so far as the evidence is concerned that would support the judgment. But here there is a statement of facts for what it is worth, left

after these instruments are excluded. It was the exclusion of these instruments, which were inserted in violation of law, that renders the statement of facts incomplete." *Mason v. Rodgers*, 83 Tex. 389, 18 S. W. 811.

bb. Attachment to Statement as Exhibit.

The contents of a deed may be shown in the record on appeal by attaching a copy of the deed as an exhibit to the statement of facts; and the bill of exceptions and statement of facts will be considered together in determining whether the deed is sufficiently identified. *Leon, etc., Land Co. v. Dunlap*, 4 Tex. Civ. App. 315, 23 S. W. 473.

Where it was agreed that bills of lading should not be copied in statement of facts, but that reference should be made to them as attached to pleadings, omission to insert them at end of pleading and inserting them at end of statement of facts is immaterial. *Houston, etc., R. Co. v. Williams* (Civ. App.), 31 S. W. 556, 560.

(4) Manner of Setting Out Commissions, Notices and Interrogatories.

In General.—The commissions, notices, and interrogatories in depositions, adduced in evidence, shall in no case be inserted or copied into a statement of facts, but the evidence thus taken and admitted shall appear in the statement of facts, in the same manner as though the witness had been on the stand in giving his evidence, and not otherwise, in form or substance. Rule 77 of Rules for District and County Courts.

The statement of facts should be a statement of facts, and not a copy of all the depositions, officers' certificates, etc., especially where many of the depositions are to the same facts. *Hawkins v. Lee*, 22 Tex. 544.

Such a practice is not a compliance with either the letter or spirit of the statute, which requires the party giving notice of appeal, "to make out a

clear and explicit statement or bill of the facts" proved upon the trial; and if parties do not see proper to comply with the plain requirements of the statute, in preparing their statement of facts, they will have no cause to complain, if the court should decline to recognize anything as a statement of facts, which is not such as the law contemplates. *Hawkins v. Lee*, 22 Tex. 544.

The fifteenth rule for the government of district courts, adopted April, 1847, required the statement to contain all the essential facts introduced in evidence, collected from the depositions used and the oral testimony of witnesses. *Wright v. Wright*, 6 Tex. 3.

Insufficient Statement to Authorize Consideration of Objections to Answers.—Where the statement of facts gives a witness' answers to two questions together, so that it can not be determined what either answer alone contains, an objection to either answer can not be considered. *Barnet v. Houston*, 18 Tex. Civ. App. 134, 44 S. W. 689.

Where a motion to suppress the answers to certain interrogatories does not recite the answers, and the statement of facts gives the testimony in connected form without reference to the questions, the refusal of the court to sustain the motion can not be assigned as error, since the matter is not sufficiently presented. *Galveston, H. & S. A. Ry. Co. v. Barnett* (Civ. App.), 26 S. W. 782.

(5) Manner and Sufficiency of Reference to Other Parts of Record for Evidence.

The province of the statement of facts is to bring before the supreme court, clearly and unmistakably, the evidence upon the trial; and when references are made in the statement of facts to other parts of the record for portions of the evidence, they should be so made as to indicate with cer-

tainty the evidence intended. *Stephens v. Bowerman*, 27 Tex. 18.

The supreme court will not recognize as a statement of facts a paper containing a mere reference to certain papers and orders, without any circumstances of identification by which the court can be advised that those copied into the record are the same which were before the court below on the trial. *Stephens v. Bowerman*, 27 Tex. 18.

b. Necessity for Compliance with Statutes and Rules of Court.

In General.—Statute must be strictly complied with in preparing statement of facts on appeal. *Hawkins v. Lee*, 22 Tex. 544, 549.

When rule of the court as to preparation of statement of facts is departed from, the necessity for departure should appear in the record. *McManus v. Wallis*, 52 Tex. 534, 540.

Fact that large amount is involved in suit neither justifies nor excuses violation of rules prescribed for making statements of facts. *Oriental, etc., Co. v. Barclay*, 93 Tex. 425, 429, 55 S. W. 1111.

An appellant's violation of the rule requiring condensation of the statement of facts, is not cured by a compliance by him with the rule requiring a statement of the material facts in his brief. *Caswell v. Hopson* (Civ. App.), 43 S. W. 547.

Rules for preparation of statements of facts and transcripts discussed and stated. *Maud v. Coppinger*, 23 Tex. Civ. App. 128, 129, 56 S. W. 127, affirmed in 93 Tex. 667, no op.

Effect of Noncompliance with Rule.—"When an appellant agrees to a statement of facts, he makes himself responsible for the manner in which it has been prepared, and if the rules in reference thereto have been flagrantly violated, he is not entitled to have such statement considered. *Caswell v. Hopson* (Civ. App.), 43 S. W. 547; *Brown v. Vizcaya* (Civ. App.), 54 S. W. 636,

affirmed in 93 Tex. 701, no op.; *Texas, etc., R. Co. v. Flanary* (Civ. App.), 45 S. W. 214." *Heidenheimer v. Tannenbaum*, 23 Tex. Civ. App. 567, 56 S. W. 776, affirmed in 94 Tex. 700, no op.

The court will not strike out statement of facts, except where disregard of rules for making is flagrant. *Oriental, etc., Co. v. Barclay*, 93 Tex. 425, 430, 55 S. W. 1111.

"The existing rule 53 for the government of the courts of civil appeals is the first rule of the court which expressly authorized the appellate court to disregard a statement of facts when not made out according to the requirements of law. But the power to do so under the previous rules has been frequently recognized by this court. *Hawkins v. Lee*, 22 Tex. 544; *Dreiss v. Friedrich*, 57 Tex. 70; *Wynne v. Logan*, 3 Texas Law Rev., 387; *East Line, etc., R. Co. v. Culbertson*, 68 Tex. 664, 5 S. W. 820. This power was rarely, if ever, exercised by this court. In the cases just cited, the violation of the rules was gross, the statements in most of them embracing depositions of witnesses in which both questions and answers were copied at length; and yet the court declined to administer the harsh remedy of suppressing them. In amending rule 53 in 1895, it was sought to be more specific with reference to this matter and it was there provided that 'if the violation of the rule be flagrant, the court may disregard the statement of facts altogether, unless,' etc.; and in a recent case in which a writ of error was refused by this court, we upheld the court of civil appeals of the fourth district in striking out the statement of facts because it was evidently a copy of the stenographer's notes, which, in setting out the testimony, gave both question and answer. *Brown v. Vizcaya* (Civ. App.), 55 S. W. 191, present term." *Oriental, etc., Co. v. Barclay*, 93 Tex. 425, 55 S. W. 1111, reversing 41 S. W. 130.

The rules of the supreme court (rule 71, et seq.) relating to the method of preparing a statement of facts for appeal, were made for the convenience of the court, and to expedite the disposition of appeals. When they are disregarded, and the questions to, and answers of witnesses on the trial are incorporated at length in the statement of facts, the costs of the statement and of a motion to strike out will be adjudged against the appellant, without regard to the final disposition of the appeal. *East Line, etc., R. Co. v. Culberson*, 68 Tex. 664, 5 S. W. 820.

Where, for failure to comply with the rules the statement of facts is unnecessarily voluminous, but has not delayed the decisions of the case, it will not be stricken, but appellant will be charged with the unnecessary expense of copying it in the record—although the judgment is reversed. *Louisiana, etc., R. Co. v. Carstens*, 19 Tex. Civ. App. 190, 196, 47 S. W. 36. See the title COSTS, vol. 4, p. 971.

A statement of facts will not be stricken out because not fully complying with rules 72 to 78, but all the costs, including those on motion to strike out, will be taxed against appellant. *Williams v. House* (Civ. App.), 45 S. W. 960.

Bills of exception will not be stricken out, though they might have been greatly reduced in number, and have taken up much less space in the record. *Galveston, etc., R. Co. v. Eaton* (Civ. App.), 44 S. W. 562, affirmed in 33 Tex. 639, no op.

The failure of appellant, in making up the statement of the case, to comply with rules 72-78, requiring a condensed statement of the facts proved, the statement being instead a transcript of the stenographer's report in narrative form, does not necessitate a dismissal of the appeal. *Houston & T. C. Ry. Co. v. Williams* (Civ. App.), 31 S. W. 556.

Although a statement of facts embodies too much of the testimony, it will not be stricken out on appeal, especially where the briefs remove the necessity of examining the record. *Galveston, etc., R. Co. v. Eaton* (Civ. App.), 44 S. W. 562, affirmed in 93 Tex. 639, no op.

For instances in which the statement was stricken out for violation of the rules, see the appropriate subdivisions under ante, "Rules Stated and Applied," III, C, 2, a.

3. Effect of Copying Charge into Statement Where Recitals Not Admitted.

Where the charge is copied into the agreed statement, but it does not appear that the parties intended to admit the recitals of the charge, such recitals can not be considered as part of the agreed statement. *Missouri, etc., R. Co. v. Fisher* (Civ. App.), 47 S. W. 284.

D. PREPARATION, PRESENTATION, SETTLEMENT, AUTHENTICATION AND FILING.

1. Preparation by Parties.

After the trial of any cause, either party may make out a written statement of the facts given in evidence on the trial. Rev. Stat., art. 1378-1379. *Texas, etc., R. Co. v. Flanary* (Civ. App.), 45 S. W. 214; *Meyer v. Mattes*, 15 Tex. Civ. App. 11, 37 S. W. 963; *Graves v. George* (Civ. App.), 54 S. W. 262.

The district court act (art. 788, Hart. Dig., Pasch. Dig. 1490) provides that "after the trial of any cause when the party has given notice of appeal or intends to give such notice, it shall be the duty of the parties respectively to make out a clear and explicit statement or bill of facts given in evidence on the trial of the cause," etc. *Kelso v. Townsend*, 13 Tex. 140; *Mi Palmo v. Slayden & Co.*, 100 Tex. 13, 92 S. W. 796, affirming 90 S. W. 908.

Duty of Appellant's Counsel to Prepare.—In *Burford v. Rosenfield*, 37 Tex. 42, it was held that it was the duty of appellant's counsel to prepare for the record a full and complete statement of facts, and not having done so, he admits facts of a material nature, which ought to have been found in the record.

Duty of Appellee to See That Record Is Complete.—It is the duty of the party bringing up the record to see that it contains a statement of facts, and it is also the duty of the party against whom the appeal is taken to see that the record is complete. *Gardner v. Broussard*, 39 Tex. 372, and see *Carolan v. Jefferson*, 24 Tex. 229.

2. Preparation by Judge.

a. Power and Duty to Prepare and File.

(1) In General.

When Proper.—It is expressly provided by statute that if the parties do not agree upon a statement of facts, or if the judge do not approve or sign it, the judge may make out, sign and file with the clerk a correct statement of the facts proven on the trial, and such statement shall constitute a part of the record. Rev. Stat., arts. 1378-1380. *Withee v. May*, 8 Tex. 160; *Harlan v. Haynie*, 9 Tex. 459; *Kelso v. Townsend*, 13 Tex. 140; *Bateman v. Bateman*, 16 Tex. 541; *Roundtree v. Galveston*, 42 Tex. 612; *Frost v. Frost*, 45 Tex. 324; *Steinbeck v. Stone*, 53 Tex. 382; *Barnhart v. Clark*, 59 Tex. 552; *Collins v. Kay*, 69 Tex. 365, 6 S. W. 313; *Middlehurst v. Collins-Gunther Co.*, 100 Tex. 349, 99 S. W. 1025; *Meyer v. Mattes*, 15 Tex. Civ. App. 11, 37 S. W. 963; *Triplett v. Morris*, 18 Tex. Civ. App. 50, 56, 44 S. W. 684 (see 93 Tex. 675, no op.); *Stubbs v. Landa, etc., Co.*, 28 Tex. Civ. App. 56, 66 S. W. 213; *Yecker v. San Antonio Tract Co.*, 33 Tex. Civ. App. 239, 76 S. W. 780, affirmed in 97 Tex. 652, no op.; *Walker v. Allen*, 42 Tex. Civ. App. 630, 95 S. W. 585; *Mayo v. Gold-*

man, 44 Tex. Civ. App. 80, 97 S. W. 1061; *Texas, etc., R. Co. v. Flanary* (Civ. App.), 45 S. W. 214; *Guerquin v. McGown* (Civ. App.), 53 S. W. 585; *G. C. & S. F. R. Co. v. Bell*, 4 App. Civ. Cases, § 119, 16 S. W. 908.

It is only in the case where the parties can not agree that the judge is required to give his statement of the facts under his seal. When they agree, and he approves, he is only required to sign the same. *Kelso v. Townsend*, 13 Tex. 140.

Where a case was tried prior to the enactment of acts 29th Leg. (laws 1906, p. 219, c. 112), providing that the stenographer's report might be made to operate as a statement of facts and for the appointment of an official stenographer who is an officer of the court, such act did not apply to a statement of facts prepared in such case which on failure of the parties to agree should have been made up by the trial judge as required by Rev. Stat. 1895, art. 1380. *Houston, etc., R. Co. v. Burnett* (Civ. App.), 95 S. W. 741.

Duty of Judge Both to Make and File.—Where the parties fail to agree on a statement of facts, it is the duty of the trial judge not only to prepare a statement, but to file the same with the clerk. *Mayo v. Goldman*, 44 Tex. Civ. App. 80, 97 S. W. 1061.

Preparation by Judge after Death of One Party.—In *Wamble v. Graves*, 1 App. Civ. Cases, § 481, the court, in reference to the proper practice in case of the death of a party, said: "Such bills of exception and statement of the facts are not technically 'other and new proceedings' taken after the death, but are parts of the trial, and binding upon both parties. It is true they are made out in this instance after the death of one of the parties, but they must of necessity have been made out from matters actually transpiring during the trial within the personal knowledge of the

judge, whose province and duty it is to certify such bills, and in justice to the rights of parties to see to it that the record he makes of the trial shall speak the truth with regard to his administration of the law pertaining to those rights. And we see no reason why, in such cases of necessity, the judge can not make out and certify a proper statement of the facts in the same manner and to the same extent as he is by law authorized and required to do in case of failure and disagreement of parties. We say we can not see why these things can not be done, and especially where a motion for new trial had been properly and legally made before the death of the party."

Presumption as to Performance of Duty by Judge.—It will be presumed, in the absence of a showing to the contrary, that the trial judge did his duty and prepared and filed a statement of facts as soon as he could after it was presented to him. *Guyer v. Snow*, 40 Tex. Civ. App. 407, 90 S. W. 71.

Parties May Not Object to Manner of Making Statement.—When a statement of facts is made by the judge, the parties can not object to the manner in which it is done. *McManus v. Wallis*, 52 Tex. 534, 539.

(2) Failure to Prepare as Reversible Error.

In General.—Failure of a trial judge to make out and file a statement of facts within the time required by law, where the parties failed to agree on a statement, constitutes reversible error, the default of the judge not having been occasioned by any fault or negligence on the part of the appellant or his counsel. *Mayo v. Goldman*, 44 Tex. Civ. App. 80, 97 S. W. 1061; *Hodges v. Peacock*, 2 App. Civ. Cases, § 824; *Sullivan v. White*, 4 App. Civ. Cases, § 56, 15 S. W. 126. And see *Collins v. Kay*, 69 Tex. 365, 6 S. W. 313.

A refusal or failure of the judge to prepare a statement on request of appellant, where counsel for appellees would not agree to the statement, is reversible error. *Southern Ins. Co. v. Levy*, 3 Willson, Civ. Cas. Ct. App. § 29; *North v. Lambert*, Id. § 53; *Herdig v. Walker*, Id. § 288.

Parties failing to agree on statement of facts, on the seventh day after adjournment, each presented the trial judge with their respective statements, but the court failed to file statement until after ten days, held, such failure to file statement required reversal of cause. *Collins v. Kay*, 69 Tex. 365, 6 S. W. 313.

Where, on appeal, it appears from the indorsement on a purported statement of facts that it was filed within the time prescribed by law, and from an affidavit of counsel, and certificate of the district clerk, that it was not filed within such time, and that appellant did everything he could to have a proper statement of facts prepared and filed within the time, and has, through no fault of his, been deprived of a statement of facts by the failure of the judge to prepare and file it in time, the judgment will be reversed. *Hilburn v. Preston* (Civ. App.), 32 S. W. 702.

On appeal, the certificate of the trial judge and the affidavit of appellant's counsel showed that appellant did everything required of him by law to procure a statement of facts, and his failure to do so arose from the neglect of appellee's counsel to prepare, as he promised and as was his duty, a statement, and present it to the judge. Held, that the judgment would be reversed, and a new trial granted. *Meyer v. Mattes*, 37 S. W. 963, 15 Tex. Civ. App. 11.

Appellant's counsel prepared a statement of facts and in due time submitted it to appellee's counsel, who declined to agree to it, but promised to make out one himself, and though sev-

eral times called on for it, had not done so on the last day of the time allowed, whereupon appellant's counsel took his own statement to the trial judge who declined to approve it, or to make out one himself, for want of time and because, having no independent recollection of the facts, he needed the aid of a statement by appellee's counsel. Held, that the case would not be considered on its merits for want of a legal statement of facts, but, as appellant had done all the law required of him, the cause would be reversed in order to protect his rights. *Meyer v. Mattes*, 15 Tex. Civ. App. 11, 37 S. W. 963.

Where appellant, four days prior to the limit of time allowed, presented statement of facts to appellee's attorney, who failed to agree to it, and therefore presented it to the county judge for his approval, who delivered it to appellee, who never filed it, judgment will be reversed because of appellant being deprived of such statement without fault on his part. *Solin-skey v. Young*, 4 App. Civ. Cases, § 269, 17 S. W. 1083.

When Not Ground for Reversal.—Where the statement of facts is stricken out because not properly authenticated by the trial judge, appellant can not, on the ground that he was deprived of the statement through no fault of his own, have the judgment reversed, under Sayles' Civ. Stat. Tex. art. 1379a, requiring the judge to file a statement of facts if the parties disagree as to their statement. *G., C. & S. F. R. Co. v. Bell*, 4 App. Civ. Cases, § 119, 16 S. W. 908.

Where defendant is not prejudiced by the court's failure to file a statement of facts on appeal within the required 10 days from the adjournment of the term, such failure does not justify a reversal. *Bland v. State* (Civ. App.), 38 S. W. 252, affirmed in 93 Tex. 655, no op.

Necessity for Application to Judge.

—Where the statement of facts is not agreed to by the appellee, it is the duty of the appellant to apply to the judge for a certificate of the same; and unless he make such application and use due diligence to procure the same, the appellate court will not aid him by mandamus or otherwise, in bringing up the facts from below; much less will his default be permitted to damage the appellee or work a reversal of the judgment. *Allen v. Ward*, Dallam 371.

Failure to File Must Be Excepted to or Assigned as Error.—Action of lower court in failing to file a statement of facts in time, if not excepted to, or assigned as error, is not a subject of revision. *International, etc., R. Co. v. Underwood*, 67 Tex. 589, 4 S. W. 216.

More than two months after the trial of a cause, and more than a month after a motion for new trial was overruled, the term of a court closed. On the last day of the term, opposing counsel presented to the judge each a statement of facts, with notice that they could not agree. Twenty-seven days after the close of the term the judge filed with the clerk a statement of facts, with directions to file it as if on the last day of the term, and certified in substance to the facts above stated, with his statement that he had prepared the statement of facts as soon as "other engagements would admit." The appellant treated the paper so prepared as a statement of facts, and brought it up with the record. After the paper was stricken from the record appellant asked a reversal of the judgment because the judge had failed to file a statement of facts in time, held: The action of the court not having been excepted to, or assigned as error, was not the subject of revision. *Quære*. Whether, when a statement of facts is presented on disagreement for approval to the judge so long after trial, he may not refuse, either to make out a statement of facts or allow additional time for that pur-

pose. *International, etc., R. Co. v. Underwood*, 67 Tex. 589, 4 S. W. 216.

Effect of Waiver by Counsel.—A trial judge need not make a statement of facts, where such statement is waived by counsel. *Secord v. Eller* (Civ. App.), 63 S. W. 933.

• **(3) Procedure to Compel Preparation and Filing.**

Power of Appellate Court to Compel.—The appellate court may review the facts as stated in the record, or it may compel the preparation and filing of a statement of facts in cases where the trial judge refuses to file one. *Perry v. Turner* (Civ. App.), 108 S. W. 194.

Remedy by Mandamus.—See, generally, the title MANDAMUS.

Mandamus is the proper remedy to obtain a statement of facts where a trial judge fails to do his duty in the preparation of such statement, as required by law. *Reagan v. Copeland*, 78 Tex. 551, 555, 14 S. W. 1031; *Trinity, etc., R. Co. v. Lane*, 79 Tex. 643, 648, 15 S. W. 477, 16 S. W. 18; *Osborne v. Prather*, 83 Tex. 208, 210, 18 S. W. 613; *Middlehurst v. Collins-Gunther Co.*, 100 Tex. 349, 99 S. W. 1025; *Yeiser v. Burdett*, 10 Tex. Civ. App. 155, 29 S. W. 912; *Capps v. Russell*, 25 Tex. Civ. App. 257, 60 S. W. 993; *Kruegel v. Nash*, 28 Tex. Civ. App. 306, 68 S. W. 61; *Guerguin v. McGown* (Civ. App.), 53 S. W. 585; *Wilson v. Tyler Coffin Co.* (Civ. App.), 82 S. W. 664.

The application should, however, be made without delay. *Capps v. Russell*, 25 Tex. Civ. App. 257, 60 S. W. 993; *Osborne v. Prather*, 83 Tex. 208, 210, 18 S. W. 613; *Houston v. Booth* (Civ. App.), 107 S. W. 887.

Mandamus will not issue to compel a trial judge to make up and file a statement of facts for appeal, when relator fails to apply therefor till after expiration of the time for filing the record in the appellate court. *Capps*

v. Russell, 25 Tex. Civ. App. 257, 60 S. W. 993.

"It has been suggested in this state that, when appellant has failed to obtain his statement, and has exercised the high degree of statutory diligence required in such case, and has been defeated in his right to have a statement of facts, he is entitled to a reversal of the judgment, and to have the cause remanded; and this form of relief is suggested by appellant. *Collins v. Kay*, 69 Tex. 365, 6 S. W. 313; *International, etc., R. Co. v. Underwood*, 67 Tex. 589, 4 S. W. 216; *Rains v. Wheeler*, supra. But it has been held by the supreme court that appellant should resort to mandamus. *Osborne v. Prather*, 83 Tex. 208, 18 S. W. 613. This has not been attempted. It would seem, however, that he would not be entitled to mandamus when it appears he had never placed himself in a position to ask the signature and approval of the judge to the statement in time to file it as required by law, and that, to entitle him to such remedy, he should, in any event, invoke it promptly." *Owen v. Cibolo Creek Mill, etc., Co.* (Civ. App.), 43 S. W. 297.

Where a trial judge erroneously refused to make and file a statement of facts for use on appeal, as expressly required by Rev. Stat. 1895, art. 1380, the aggrieved party's remedy was by mandamus to compel him to do so; the matter not being reviewable on bill of exceptions or an assignment of error. *Middlehurst v. Collins-Gunther Co.*, 100 Tex. 349, 99 S. W. 1025.

Appellants can not complain of the failure of the trial judge to prepare a statement of facts, when they neglected to use the remedy by mandamus. *Yeiser v. Burdett*, 10 Tex. Civ. App. 155, 29 S. W. 912.

An appellant, who is apprised of the trial judge's refusal to prepare a statement of facts on failure of the parties to agree on the statement, and who

fails to apply for a mandamus to compel the judge to do so, can not have a reversal for failure of the judge to discharge his statutory duty. *Gueguin v. McGown* (Civ. App.), 53 S. W. 585.

Plaintiff's statement, in support of his assignment of error, of having been deprived of a statement of facts on appeal, showed that the attorneys of the parties failed to agree on a statement, and so informed the trial judge, and requested him to prepare a statement in ample time, and that plaintiff's attorney at said time delivered to the judge the statement prepared by them to which defendant's attorneys failed to agree. Held that, as plaintiff might have maintained mandamus to compel the judge to make and file a statement, he had not availed himself of all means at his command, and was not entitled to a reversal for want of statement. *Houston v. Booth* (Civ. App.), 107 S. W. 887.

Where appellant's counsel might have compelled the filing of a statement of facts within the time prescribed by mandamus, but failed to do so, and the statement was filed after the time had expired, such statement will be stricken on motion. *Wilson v. Tyler Coffin Co.* (Civ. App.), 82 S. W. 664.

Where a trial judge did not refuse to prepare what he considered to be a sufficient and legal statement of facts, but refused to make up a statement as required by Rev. Stat. 1895, art. 1380, because he believed that acts 29th leg. (laws 1905, p. 219, c. 112); providing that the stenographer's report may be made to operate as a statement of facts applied to the case, mandamus was not available to compel him to make up a statement under art. 1380. *Houston, etc., R. Co. v. Burnett* (Civ. App.), 95 S. W. 741.

Showing as to Applicant's Freedom from Fault.—An appellant is not entitled to a mandamus to compel the trial judge to make out and file a state-

ment of facts unless he shows that he has been deprived of such statement by the acts of the judge or the opposite party, and that he has himself not been wanting in diligence. *Kruegel v. Nash*, 28 Tex. Civ. App. 306, 68 S. W. 61, writ of error dismissed.

Where counsel for plaintiff, thirty days after the trial and two weeks after the stenographer's transcript of the evidence had been placed in their hands, presented the statement of facts to defendant's counsel on the last day before the expiration of the time for filing the same, and for want of the necessary time it was impossible for defendant's counsel to properly examine and complete the voluminous statement and for the judge to make out and file a statement, and no excuse for the failure to sooner present the statement is shown, a mandamus will not be granted to compel the judge to make out and file a statement of facts. *Kruegel v. Nash*, 28 Tex. Civ. App. 306, 68 S. W. 61, writ of error dismissed.

The fact that an appellant has been deprived of the benefit of a statement of facts by the unnecessary and intentional adjournment of court before such statement could possibly have been prepared, and that the judge, for the purpose of depriving appellant of the benefit of an appeal, had refused, after adjournment, and also at the next term of court, to sign and certify a statement of facts, or to give a bill of exceptions to his action in refusing so to do, is not ground for mandamus to the judge to compel him to sign and certify a statement of facts. *Frost v. Frost*, 45 Tex. 324.

Facts Held to Excuse Resort to Mandamus.—Where the trial judge promised to prepare a statement of facts for the case on appeal, but, on account of sickness in his family and being afflicted with sore eyes, was unable to do so until the statutory time had elapsed, and he was unable

to recollect the facts, such conditions were a sufficient excuse for a failure to resort to mandamus to compel the judge to prepare such statement, and appellant was entitled to have the cause remanded. *Paddock-Hawley, etc., Co. v. Gidcumb & Co.*, 26 Tex. Civ. App. 211, 62 S. W. 1091.

(4) Preparation by Successor of Trial Judge Unauthorized.

If the trial judge should die or become insane after the adjournment of his court, and before certifying the statement of facts within the time allowed, a new trial could not be granted by his successor, for on adjournment the trial judge loses all power over the judgment. The successor could not furnish a statement of facts, for he could not have been officially present at the trial. *Paddock-Hawley, etc., Co. v. Gidcumb & Co.*, 26 Tex. Civ. App. 211, 62 S. W. 1091.

(5) Preparation by Judge after Resignation Improper.

A statement of facts, made out by a late judge, after resigning his office, can not be received on appeal. *Prewitt v. Woods*, 1 Tex. 521.

b. Presumption as to Disagreement Where Statement Prepared by Judge.

When the judge makes out the statement as on disagreement of parties, such disagreement will be presumed. *Harlan v. Haynie*, 9 Tex. 459; *Kelso v. Townsend*, 13 Tex. 140; *Darcy v. Turner*, 46 Tex. 30; *McManus v. Wallis*, 52 Tex. 534; *Sabine & E. T. Ry. Co. v. Joachimi*, 58 Tex. 452. See, also, *Bateman v. Bateman*, 16 Tex. 541; *Willis & Bro. v. Smith*, 17 Tex. Civ. App. 543, 43 S. W. 325, affirmed in 93 Tex. 698, no op.; *Lacey v. Ashe*, 21 Tex. 394. See, however, *Barnhart v. Clark*, 59 Tex. 552; *Sloan v. Schumpert* (Civ. App.), 81 S. W. 1005; *Schneider v. Stephens*, 60 Tex. 419, 420.

Where though the statement of facts is signed by the presiding judge only, it does not appear that there was any disagreement of counsel, it will be presumed that the contingency had happened, which, under the statute authorized the judge to make out the statement alone. *Steinbeck v. Stone*, 53 Tex. 382.

Where a statement of facts properly entitled, numbered and filed purported to give the testimony in the case and none other, and at the end of the testimony was indorsed "Approved," followed by the signature of the trial judge, but it was not signed by the attorneys, and the judge did not certify that they had not agreed upon a statement, or that they had disagreed and he had thereupon made out the statement, it will be presumed in favor of the regularity of official action that before he so approved the statement the attorneys had disagreed, and such approval is therefore held sufficient. *Bath v. Houston, etc., R. Co.*, 34 Tex. Civ. App. 234, 78 S. W. 993.

c. Basis of Statement.

In General.—The statement of facts is to be prepared by the judge, from the respective statements submitted to him by the parties, and from his own knowledge. *Wright v. Wright*, 6 Tex. 3; *Withee v. May*, 8 Tex. 160; *Harlan v. Haynie*, 9 Tex. 459; *Roundtree v. Galveston*, 42 Tex. 612; *Collins v. Kay*, 69 Tex. 365, 6 S. W. 313; *Meyer v. Mattes*, 15 Tex. Civ. App. 11, 37 S. W. 963; *Mayo v. Goldman*, 44 Tex. Civ. App. 80, 97 S. W. 1061; *Yecker v. San Antonio Tract. Co.*, 33 Tex. Civ. App. 239, 76 S. W. 780, affirmed in 97 Tex. 652, no op.

Where the parties fail to agree on a statement of the facts, the judge should, during the term, make out a statement, from the statements furnished him by the parties and his own knowledge (if only one party furnish a statement, then from such statement

and his knowledge), and sign and seal the same, and cause it to be filed in the records of the cause, as a part thereof; otherwise, it will not be considered. *Withee v. May*, 8 Tex. 160.

The transcript shows that the statement of facts was made out by the judge trying the cause, he certifying that counsel had "failed to agree." A motion was made, supported by affidavit, to strike out the statement of facts because appellant's counsel did not submit his statement of facts to appellee or his counsel for inspection, as required by art. 1377, Rev. Stat. It being shown that the judge had in his possession appellee's statement of facts when that of appellant was presented to him, and that the statement of facts made up by the judge was made up partly from each, the motion was overruled. *Sabine, etc., R. Co. v. Joachimi*, 58 Ga. 452.

Duty of Parties to Present Statements before Close of Term.—It is the duty of the district judge before whom a cause is tried to conform to the rules of court in the preparation of the statement of facts, when counsel disagree. When such disagreement occurs, he should require each party to make his statement of facts, and present it, before the close of the term, in time to enable the judge to make a proper statement; and, if necessary, the call of the docket should be suspended until this is done. *McManus v. Wallis*, 52 Tex. 534.

If either party fail to present to the presiding judge a statement of facts in proper time, the judge may, in a proper case, punish the party guilty in such appropriate manner as the facts warrant, without depriving his adversary of his legal right. If this can not be done, the record should show the facts in this regard, that they may be understood in the supreme court. *McManus v. Wallis*, 52 Tex. 534.

3. Time for Preparation, Settlement and Filing.

a. In Absence of Statute.

Though it is the better practice to have the statement of facts made up at the term of the county court during which the action was tried, there is no statutory provision requiring this to be done, and therefore the facts may be certified by the county court in vacation. *Allen v. Ward*, Dall. Dig. 371.

There is no limitation to the time in which a statement of facts may be made out. *Allen v. Ward*, Dallam 371.

A statement of facts is good, although not given at the term of court at which the trial is had, and may be furnished by the parties or the inferior judge at any time before the docketing of the cause in the appellate court; nor will the length of time which may have elapsed between the trial and the sending up of the statement of facts constitute a valid objection to its admission. *Allen v. Ward*, Dallam 371.

On an appeal from the district to the supreme court, the facts must be agreed upon by the parties or their attorneys, or certified by the judge before the rising of the court. *Walker v. McNeils*, Dallam 541.

b. Statutory Provisions as to Time.

(1) General Rule Stated and Construed.

Rule Stated.—Under the Texas statutes, the statement of facts must be prepared, settled and filed during the term at which the case was tried, unless the time be extended after adjournment in the manner prescribed by statute. *Withee v. May*, 8 Tex. 160; *Teas v. McDonald*, 13 Tex. 349, 355; *McCown v. Schrimpf*, 21 Tex. 22; *Piegzar v. Twohig*, 37 Tex. 225; *Swift v. Trotti*, 52 Tex. 498; *International, etc., R. Co. v. Scott*, 58 Tex. 187; *Ross v. McGowen*, 58 Tex. 603; *McGuire v. Newbill*, 58 Tex. 314; *Blum v. Neilson*.

59 Tex. 378, 380; *Armstrong v. Bean*, 59 Tex. 492, 494; *Lanier v. Perryman*, 59 Tex. 104; *Texas, etc., R. Co. v. McAllister*, 59 Tex. 349; *Trewitt v. Blundell*, 59 Tex. 253; *Raleigh v. Cook*, 60 Tex. 438; *Lockett v. Schurenberg*, 60 Tex. 610; *Hill v. Osborne*, 60 Tex. 390; *Whitaker v. Gee*, 61 Tex. 217, 218; *Tyler v. Davis*, 61 Tex. 674, 675; *Marx v. Caldwell*, 62 Tex. 64; *Chance v. East Texas R. Co.*, 63 Tex. 152; *Berryman v. Schumacher*, 67 Tex. 312, 3 S. W. 46; *Caldwell County v. Harbert*, 68 Tex. 321, 4 S. W. 607; *San Antonio, etc., R. Co. v. Moore*, 75 Tex. 644, 13 S. W. 295; *Kirby v. Giddings*, 75 Tex. 679, 680, 13 S. W. 27; *Brousard v. Sabine, etc., R. Co.*, 75 Tex. 703, 13 S. W. 68; *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324; *Northern Assur. Co. v. Samuels*, 11 Tex. Civ. App. 417, 33 S. W. 239; *Bradford v. Knowles*, 11 Tex. Civ. App. 572, 33 S. W. 149, affirmed in 93 Tex. 700, no op.; *Blackburn v. Blackburn*, 16 Tex. Civ. App. 564, 42 S. W. 132 (see 93 Tex. 700, no op.); *Ellis v. Cunningham*, 16 Tex. Civ. App. 571, 41 S. W. 522; *Pinkard v. Willis*, 24 Tex. Civ. App. 69, 57 S. W. 891, affirmed in 94 Tex. 692, no op.; *Continental Fire Ass'n v. Stilwell Bros.*, 26 Tex. Civ. App. 338, 63 S. W. 950, affirmed in 95 Tex. 678, no op.; *Hollywood v. Wellhausen*, 28 Tex. Civ. App. 541, 68 S. W. 329, affirmed in 95 Tex. 679, no op.; *Stubbs v. Landa, etc., Co.*, 28 Tex. Civ. App. 56, 66 S. W. 213; *Wilcox v. League*, 31 Tex. Civ. App. 109, 71 S. W. 414; *Conner v. Downes*, 32 Tex. Civ. App. 588, 74 S. W. 781, 75 S. W. 335; *Gray v. Fronroy*, 40 Tex. Civ. App. 302, 89 S. W. 1090; *Smith v. Pecos Valley, etc., R. Co.*, 43 Tex. Civ. App. 204, 95 S. W. 11, affirmed in 101 Tex. 659, no op.; *Streeper v. Ferris* (Sup.), 2 S. W. 581; *Attoway v. Goldsmith* (Sup.), 18 S. W. 604; *White v. Holley* (Civ. App.), 20 S. W. 859; *Worley v. McIntire* (Civ. App.), 23 S. W. 996; *Folts v. Ferguson* (Civ. App.), 24 S. W. 657, affirmed in

93 Tex. 66, no op.; *Beville v. Rush* (Civ. App.), 25 S. W. 1022, affirmed in 93 Tex. 655, no op.; *Marsalis v. Garrison* (Civ. App.), 27 S. W. 929; *Sen v. Rehling* (Civ. App.), 29 S. W. 1114; *Matthews v. Boydstun* (Civ. App.), 31 S. W. 816; *Rousseau v. Grozdanich* (Civ. App.), 31 S. W. 321; *Hilburn v. Preston* (Civ. App.), 32 S. W. 702; *Thompson v. Hawkins* (Civ. App.), 38 S. W. 236; *Williams v. Dean* (Civ. App.), 38 S. W. 1024; *Taylor v. Dupuy* (Civ. App.), 38 S. W. 531; *Akes v. Sanford* (Civ. App.), 39 S. W. 952, affirmed in 93 Tex. 678, no op.; *Brown v. Durham* (Civ. App.), 41 S. W. 369; *Thornton v. Foster* (Civ. App.), 42 S. W. 1027; *Peoples v. Terry* (Civ. App.), 43 S. W. 846; *Galveston, etc., R. Co. v. Eaten* (Civ. App.), 44 S. W. 562, affirmed in 93 Tex. 639, no op.; *Blount v. Lewis* (Civ. App.), 47 S. W. 681; *Western Union Tel. Co. v. Bedell* (Civ. App.), 57 S. W. 706, affirmed in 94 Tex. 708, no op.; *Keller v. Kettner* (Civ. App.), 67 S. W. 907, affirmed in 95 Tex. 681, no op.; *Anderson v. Walker* (Civ. App.), 67 S. W. 432, reversed in 95 Tex. 596; *Sisk v. Joyce* (Civ. App.), 68 S. W. 50, affirmed in 95 Tex. 686, no op.; *Dennis v. Neal* (Civ. App.), 71 S. W. 387; *Galveston, etc., R. Co. v. Perkins* (Civ. App.), 73 S. W. 1067, affirmed in 97 Tex. 633, no op.; *Rapid Transit Co. v. Miller* (Civ. App.), 85 S. W. 439, affirmed in 101 Tex. 653, no op.; *Wade v. Buford*, 1 App. Civ. Cases, § 1334; *Hardemeyer v. Young*, 1 App. Civ. Cases, § 151.

Statement of facts must be filed during the term of the court when taken, or when cause was tried. *Frost v. Frost*, 45 Tex. 324, 339.

Assignments of error based on a statement of facts filed after adjournment of the term at which a cause is tried can not be considered. *Northern Assur. Co. v. Samuels*, 11 Tex. Civ. App. 417, 33 S. W. 239.

Where the record on appeal does not show that the statement of facts

copied therein was filed in the court below within the time required by statute, such statement can not be considered. *Folts v. Ferguson* (Civ. App.), 24 S. W. 657.

It is not competent for the judge, after the adjournment of the term, to make up a statement of facts. *Hart*. Dig. art. 788. *Withee v. May*, 8 Tex. 160.

A district judge has no legal authority to sign a statement of facts after the close of the term at which the cause was tried. *Piegzar v. Twohig*, 37 Tex. 225.

Under a statute imperatively requiring that the statement of facts should be made out and signed during the term, a statement of facts filed after adjournment of court will not be considered, though made out and corrected in term time, but inadvertently left unsigned by the judge. *Harde-myer v. Young*, 1 White & W. Civ. Cas. Ct. App. § 151.

"Touching the matter of the statement of facts, there is an agreement filed in this court on the twenty-second day of February, 1873, with the evidence of Collins, which clearly establishes the fact that both parties considered that there was a statement of facts in the record, and agreed to regard it as such; and yet the signature of the judge to the approval of this statement is shown by the record not to have been made during the term at which the cause was tried." *Gardner & Co. v. Broussard & Co.*, 39 Tex. 372, 373.

A statement of facts filed nearly three months after the time allowed will not be considered on appeal. *Smith v. Pecos Valley, etc., R. Co.*, 43 Tex. Civ. App. 204, 95 S. W. 11, affirmed in 101 Tex. 659, no op.

Statement of facts made out and certified to one year after trial, not purporting to contain all the evidence adduced in the case, is insufficient. *Teas v. McDonald*, 13 Tex. 349, 355.

The record recited an agreement between counsel (not certified by the judge) that the statement of facts in another case tried at the same time, and appealed, might be used, and such statement copied into the record did not purport to be a statement of facts in the case under consideration. No statement had been filed during the term, nor was there any order allowing it to be filed in 10 days, and the agreement was dated after the expiration of the term. Held, that the statement in the record could not be considered. *Taylor v. Dupuy* (Civ. App.), 38 S. W. 531.

Under a statute imperatively requiring that the statement of facts should be made out and signed during the term, a statement of facts filed after adjournment of court will not be considered, though made out and corrected in term time, but inadvertently left unsigned by the judge. *Harde-myer v. Young*, 1 White & W. Civ. Cas. Ct. App. § 151.

An announcement by the trial judge that court would not adjourn until a day fixed (meaning the court could not adjourn before that time if the business was not finished then) will not excuse a failure to file a statement of facts where the court adjourned before the time fixed. *Akes v. Sanford* (Civ. App.), 39 S. W. 952, affirmed in 93 Tex. 678, no op.

As to time of preparation, presentation and filing, where bill of exceptions incorporated in statement of facts, see ante, "Application of Rules as to Time Where Bill Incorporated in Statement of Facts," II, D, 3, d.

Preparation and Settlement at Term at Which Judgment Entered Nunc Pro Tunc.—Entry of judgment nunc pro tunc at a term after that at which the verdict was found is part of the trial, within Rev. Stat. 1895, art. 1379, authorizing the making of a statement of facts "after the trial" for the purpose of appeal. *Palmo v. Slayden & Co.*,

100 Tex. 13, 92 S. W. 796, affirming 90 S. W. 908.

"Plaintiff in error contends that the trial court had no authority after the adjournment of the term at which the trial was had, to make up a statement of facts proved at the hearing. Article 1379, Rev. Stat., contains this provision: 'After the trial of any cause, either party may make out a written statement of the facts given in evidence on the trial, and submit the same to the opposite party, or his attorney, for inspection, etc. It is also provided by an act of the twenty-eighth legislature that, 'by an order entered during the term, the court may authorize a statement of the facts to be made up in vacation, within twenty days after the adjournment of the term.' (Laws 28th Leg., 32.) It is true that without such order, no statement of facts can be made after an adjournment of the term of the court at which the trial is concluded; but the phrase, 'after the trial,' denoting the time when the statement may be made, is broad enough to embrace the entry of the judgment *nunc pro tunc* as a part of the trial, justifying the court in making and certifying to the statement of facts after judgment was actually entered. (*Hill v. State*, 41 Tex. 253, 255; *Sabine, etc., R. Co. v. Joachimi*, 58 Tex. 452; *Jenks v. The State*, 39 Ind. 1.)" *Mi Palmo v. Slayden & Co.*, 100 Tex. 13, 92 S. W. 796, affirming 90 S. W. 908.

"In *Sabine, etc., R. Co. v. Joachimi*, 58 Tex. 452, before cited, the exceptions were taken at the time of the trial, but the motion for a rehearing was not acted upon for more than ten days after the judgment had been entered, and the objection was made that the bills of exception were not presented within the time prescribed. This court sustained the bills of exception on the ground that the trial was not concluded until the motion for a new trial was overruled, and Judge

Willie for the court said: "The statutory limit is ten days after the conclusion of the trial. The appellee's counsel construes this to be the date of the rendition of the verdict and judgment. This may be the ordinary acceptance of the term "conclusion of a trial," but we are disposed not to confine it to that time, but to extend it to the date of the entry of the order overruling a motion for a new trial. We consider that so long as the case stands open for the consideration of the court at the term during which the trial occurs, it can not be considered as concluded.' The construction which the foregoing cases have placed upon the terms of statutes similar to that under consideration, we think, fully justifies the conclusion we have reached, that the entry of judgment *nunc pro tunc* was a part of the trial of the case, and that after that judgment was entered, the parties had a right to have a statement of facts made up and filed upon which to prosecute their appeal. This conclusion is strengthened by consideration of the fact that this court has held that an appeal may be prosecuted from a judgment *nunc pro tunc*, although it may be entered at a subsequent term." *Mi Palmo v. Slayden & Co.*, 100 Tex. 13, 92 S. W. 796, affirming 90 S. W. 908.

Pending of Motion for New Trial as Determining Time for Preparation.—Appellant is not required to prepare and present statement of facts on appeal until after overruling of motion for new trial. *Southern Ins. Co. v. Levy*, 3 App. Civ. Cases, § 29.

(2) **Extension of Time.**

(a) **By Agreement of Parties.**

Under Former Practice.—It would seem that in civil cases, by agreement of counsel in writing filed during the term at which the cause is tried, with the approbation of the court, the statement of facts may be prepared and certified in vacation. *McCown v. Schrimpf*, 21 Tex. 22, 23.

Agreement by parties that the court make statement of facts after adjournment without bill of exceptions is respected on appeal. *Barnette v. Hicks*, 6 Tex. 352.

Where the certificate of the judge, of December 15, 1877, to a bill of exceptions filed June 20, 1877, stated the failure of the counsel to agree on statement of facts, but did not mention an agreement that it might be made after the term, held that, under the statute then in force, requiring the statement to be made during the term, unless otherwise agreed by the parties, the same constituted no part of the record. *Swift v. Trotti*, 52 Tex. 498.

It seems that, where the parties agree that the judge may file a statement of facts within a given time after the term, time is of the essence of the agreement, and a statement filed after the time agreed on is a nullity. *Chambers v. Miller*, 9 Tex. 236.

Under Present Statutes.—An oral agreement in violation of the statute requiring the statement of facts to be filed within a given time is no cause for failure to file it within the time required. *Thornton v. Foster* (Civ. App.), 42 S. W. 1027.

Even if time for approval by the trial judge of the statement of facts for appeal can be extended by the parties, their agreement that the statement may be approved by him any time after his return does not contemplate approval after the transcript has been prepared and filed in the appellate court. *Watkins v. Hale*, 37 Tex. Civ. App. 243, 84 S. W. 386, affirmed in 101 Tex. 665, no op.

(b) By Order of Court Entered of Record.

aa. Allowance of Ten Days after Adjournment, under Rev. Stat., Art. 1379.

(aa) Provisions Stated, Construed and Applied.

Provision Stated.—Under art. 1379

of the Rev. Stat., the court may, by an order entered upon the record during the term, authorize the statement of facts to be made up, and signed and filed in vacation, at any time not exceeding ten days after the adjournment of the term. *Swift v. Trotti*, 52 Tex. 498; *International, etc., R. Co. v. Scott*, 58 Tex. 187; *McGuire v. Newbill*, 58 Tex. 314; *Ross v. McGowen*, 58 Tex. 603; *Texas, etc., R. Co. v. McAllister*, 59 Tex. 349; *Trewitt v. Blundell*, 59 Tex. 253; *Gulf, etc., R. Co. v. Eddins*, 60 Tex. 656; *Ball v. Collins*, 66 Tex. 467, 17 S. W. 371; *White v. Parks*, 67 Tex. 605, 4 S. W. 245; *Collins v. Kay*, 69 Tex. 365, 6 S. W. 313; *San Antonio, etc., R. Co. v. Moore*, 75 Tex. 643, 13 S. W. 295; *Wilcox v. League*, 31 Tex. Civ. App. 109, 71 S. W. 414; *White v. Holley* (Civ. App.), 20 S. W. 859; *McDonald v. Babb* (Civ. App.), 29 S. W. 1114; *Rousseau v. Grozdanich* (Civ. App.), 31 S. W. 321; *Akes v. Sanford* (Civ. App.), 39 S. W. 952, affirmed in 93 Tex. 678, no op.; *Cullers v. Britton*, 2 App. Civ. Cases, § 281. And see cases cited ante, "General Rule Stated and Construed," III, D, 3, b, (1).

Purpose of Provision.—The provision in art. 1379 as to extension of time, was intended to prevent delay in preparing a paper the correctness of which depended so much upon the memory of the attorneys engaged in the cause and of the judge presiding at its trial. Also to insure its being deposited with the papers and not remaining too long in the hands of the judge, whose official duties might call him to other counties of his district. Hence the two very necessary requirements: first, that an order should be entered of record during the term; and second, that the paper should be made up, signed and filed, within ten days after adjournment. The general rule which the statute was designed to enforce was the preparation and filing of the paper in term time. If for satis-

factory reasons this could not be done, then special leave of the court must be had to vary from it, which must be evidenced by an order entered on the minutes during the term. The utmost limit allowed is ten days after the adjournment, and within that time the statement must not only be made up and signed, but it must be filed also. These two conditions must be complied with, or the statement of facts will be of no avail. There is no provision made for any relaxation of the statutory requirement for any reason or excuse whatever, and the courts have no power to extend its provisions. *McGuire v. Newbill*, 58 Tex. 314.

Essential That Order of Allowance Appear of Record.—A statement of facts, filed after adjournment of the court, can not be regarded on appeal where the record shows no order permitting it to be filed after adjournment. *Wade v. Buford*, 1 White & W. Civ. Cas. Ct. App. § 1334; *Ross v. McGowen*, 58 Tex. 603; *Trewitt v. Blundell*, 59 Tex. 253; *Blum v. Neilson*, 59 Tex. 378; *Armstrong v. Bean*, 59 Tex. 492; *Marx v. Caldwell*, 62 Tex. 64; *Texas & P. Ry. Co. v. McAllister*, 59 Tex. 349; *Streeper v. Ferris* (Sup.), 2 S. W. 581; *Caldwell County v. Harbert*, 68 Tex. 321, 4 S. W. 607; *Broussard v. Sabine & E. T. Ry. Co.*, 75 Tex. 702, 13 S. W. 68; *Attoaway v. Goldsmith* (Sup.), 18 S. W. 604; *White v. Holley* (Civ. App.), 20 S. W. 859; *Beville v. Rush* (Civ. App.), 25 S. W. 1022; *Marsalis v. Garrison* (Civ. App.), 27 S. W. 929; *Sen v. Rehling* (Civ. App.), 29 S. W. 1114; *Rousseau v. Grozdanich* (Civ. App.), 31 S. W. 321; *Matthews v. Boydston*, Id. 814, and see cases *v. Boydston* (Civ. App.), 31 S. W. 814, and see cases cited ante, "General Rule Stated and Continued," III, D, 3, b, (1).

A statement of facts filed after the adjournment of the court, without an order of the court allowing it, is no part of the record, and can not be

considered on appeal. *Hollywood v. Wellhausen*, 68 S. W. 329, 28 Tex. Civ. App. 541; *Rapid Transit Ry. Co. v. Miller* (Civ. App.), 85 S. W. 439.

Under Rev. St. art. 1379, which provides that the court may, by an order, entered of record during a term of court, authorize a statement of facts to be perfected in vacation, at any time not exceeding 10 days after adjournment of the term, a statement of facts, which was not filed until seven days after adjournment, can not be considered on appeal, where the transcript discloses no order allowing ten days after adjournment for filing the same. *San Antonio & A. P. Ry. Co. v. Moore*, 75 Tex. 643, 13 S. W. 295.

Where the transcript on appeal does not contain any assignment of error, and the statement of facts appears to have been filed after the final adjournment of the court for that term, and there is no order in the record showing that such filing was authorized, a point made by appellant's counsel in his brief can not be determined on its merits. *Attoaway v. Goldsmith* (Sup.), 18 S. W. 604.

When there is nothing in the transcript showing that a statement of facts, filed after the adjournment of the court for the term, was filed under an order of court entered of record during the term, no assignment of error referring to charges of the court can be considered, unless the charges were so clearly against the law as to be erroneous under any state of facts that could be possibly shown under the pleadings in the case. *Marx v. Caldwell*, 62 Tex. 64, citing *Ross v. McGowen*, 58 Tex. 603; *Texas, etc., R. Co. v. McAllister*, 59 Tex. 349; *Lanier v. Perryman*, 59 Tex. 104; *Trewitt v. Blundell*, 59 Tex. 253.

Where no order appears in the record authorizing the filing of the statement of facts after adjournment, the statement will be disregarded on appeal though no motion to strike it out

has been made. *Dennis v. Neal* (Civ. App.), 71 S. W. 387.

Effect of Agreement Reciting Procurement of Order.—In *Pinkard v. Willis & Bro.*, 24 Tex. Civ. App. 69, 57 S. W. 891, affirmed in 94 Tex. 692, no op., the court, in the main opinion, declined to dispose of the assignment complaining of the amount of the judgment, on the ground that the statement of facts was filed after the term and without an order of the court permitting it, but upon the attention of the court being called to the fact that an agreement accompanied the record reciting that such an order had been procured, the question was considered.

Order Must Be Obtained in Term Time.—The necessity for obtaining an order of record in term time, for the approval and filing of a statement of facts after the adjournment of the term, again announced. *Chance v. East Texas R. Co.*, 63 Tex. 152.

Neither the approval of the judge in vacation, or the filing of written consent of counsel, made by them during term time, will answer, if the order be not made during the term. *Trewitt v. Blundell*, 59 Tex. 253.

Judge Can Not Reopen Court after Adjournment to Allow Motion.—After adjournment of term, district judge can not reopen court and allow a motion for leave to prepare a statement of facts within ten days after adjournment of the court to be filed, and grant an order in accordance with motion. *I. & G. N. R. Co. v. Smith*, 62 Tex. 185, 186.

Propriety of Filing Order Nunc Pro Tunc.—Order allowing filing of statement of facts after adjournment of term can not be entered nunc pro tunc at subsequent term unless some memoranda of granting thereof be found in judge's docket or files of case; here statement of judge that he granted application held sufficient. *Blum v. Neilson*, 59 Tex. 378, 380.

Where a statement of facts was filed

after adjournment of the court for the term, but within the time allowed by an order not entered in the minutes on an oral motion made therefor at the trial, the court at a subsequent term had jurisdiction to permit the filing of such order nunc pro tunc on the recollection of the judge and other parol testimony that the order had been applied for and granted during the previous term, without any memorandum or other written evidence thereof. Judgment (Civ. App.), 78 S. W. 1000, reversed. *Ft. Worth & D. C. Ry. Co. v. Roberts*, 81 S. W. 25, 98 Tex. 42.

(bb) Application for Order.

In General.—The court is not bound to enter the order for the extension of time for making and filing the statement of facts, upon mere oral request, but may do so, or the order may be entered without any request upon motion of the court. It would not, however, be error for the court to refuse to enter the order without written motion for that purpose. *Akes v. Sanford* (Civ. App.), 39 S. W. 952, affirmed in 93 Tex. 678, no op.

Where it becomes necessary that statement of facts should be made up, signed and filed after adjournment of court, an order to that effect must be applied for by a written motion entered of record. *Blum v. Neilson*, 59 Tex. 378, 380:

A rule of court that the order for time to file a statement of facts must be applied for in writing does not invalidate an order made without a written application, since the statute allows the court of its own motion to authorize the statement of facts to be made up within ten days after adjournment of the term. *Ball v. Collins*, 66 Tex. 467, 17 S. W. 371.

It is only in cases where it is desired to have the judge's refusal to grant such leave reviewed in the supreme court that it is necessary that a written motion, asking leave to file a statement of facts within ten days

after the term, should appear in the record of the case. *Ball v. Collins*, 66 Tex. 467, 17 S. W. 371.

"It was intended to point out to the profession how they should proceed, in case they wished, upon bill of exceptions, to have the refusal of the order below reviewed by this court. In all such cases it should appear that the application was made in writing, and we would not hold the district judge bound to grant the order upon a mere oral request. But when the order is granted, there is no necessity that this should appear to have been done in pursuance of a written application. The statute allows the court of its own motion to authorize the statement of facts to be made up within ten days after adjournment of the term, and as its action when the order is granted can not be revised here, it is a matter of no concern upon what kind of motion it was based, or that it was granted without any application whatever. This has been held by us in a great many cases, but, as the decisions were oral, they may not have come to the knowledge generally of the profession. This opinion is put in writing so that there may be no reason for urging the same grounds for striking out a statement of facts in the future." *Ball v. Collins*, 66 Tex. 467, 17 S. W. 371.

Where, on refusal of counsel for appellee to agree to statement of facts presented by appellant, appellant presents statement to judge and requests him to prepare, sign and file proper statement of facts, if the court has not time to do so before term of court expires, the court has power of his own motion and it is his duty to enter order allowing statement of facts to be filed in vacation. *Southern Ins. Co. v. Levy*, 3 App. Civ. Cases, § 29.

Duty of Counsel to Inquire as to Duration of Term and to Request Further Time.—When counsel are aware that end of term is near at hand,

and desire to know definitely, so as to prepare statement of facts, they should apply to the judge and not the clerk for such information. *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324.

Where judgment was rendered May 8th, new trial denied the 13th, and adjournment did not occur until the 27th, counsel show want of diligence in not asking for additional time to prepare statement of facts before adjournment. *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324.

(cc) Refusal of Court to Extend Time as Ground for Reversal.

It seems if time before adjournment be too short to allow proper preparation of statement of facts, and judge refuses to allow additional ten days after adjournment for that purpose, such refusal is ground for reversal. *Raines v. Wheeler*, 76 Tex. 390, 13 S. W. 324.

Where appellant has done everything required of him by law to get a statement of facts prepared and filed within the proper time, and has been prevented from doing so by the negligent failure of the district judge to do his duty, the judgment will be reversed. *Blount v. Lewis* (Civ. App.), 49 S. W. 405, citing *Hilburn v. Preston* (Civ. App.), 32 S. W. 702.

A party can not complain of the trial court's failure upon a mere request to enter an order permitting a statement of facts to be filed within ten days after adjournment, where he has not complied with Rev. Stat. of 1895, art. 1382, relating to filing statements without such order. *Akes v. Sanford* (Civ. App.), 39 S. W. 952, affirmed in 93 Tex. 678, no op. See post, "Diligence as Excusing Failure to File in Time Prescribed," III, D, 3, c, (2).

(dd) Necessity for Making and Filing within Time Allowed.

In General.—The statutory provision allowing the filing of statements

within ten days after the adjournment of the term must be strictly complied with and a statement filed after the expiration of the ten days will not be considered a part of the record on appeal. *Johnson v. Sabine, etc.*, R. Co., 69 Tex. 641, 7 S. W. 379; *Galveston v. Dazet (Sup.)*, 16 S. W. 20; *White v. Parks*, 67 Tex. 605, 4 S. W. 245; *Lanier v. Perryman*, 59 Tex. 104; *Berryman v. Schumacher*, 67 Tex. 312, 3 S. W. 46; *International, etc.*, R. Co. v. Scott, 58 Tex. 187. And see cases cited ante, "General Rule Stated and Construed," III, D, 3, b, (1).

Where leave is given to make and file a statement of facts within ten days after adjournment of the term, which statement is not filed until after the expiration of said time, the supreme court will not, upon appeal, consider the statement so filed. *White v. Parks*, 67 Tex. 605, 4 S. W. 245.

The trial judge may not, after the expiration of the time allowed by order of court to file a statement of facts and bill of exceptions, make out or approve either such statement or bill, and his act in attempting so to do gives the document no validity. *Gray v. Frontroy*, 40 Tex. Civ. App. 302, 89 S. W. 1090.

Order of Court Ineffective beyond Time Fixed by Statute.—Where the term of court at which the case was tried expired April 2d, a statement of facts filed June 19th can not be considered, and is not aided by an order of court authorizing it to be filed in vacation within ten days after adjournment. The requirement of the law as to filing is mandatory, and the appellate court is without discretion in the matter. *Wilcox v. League*, 31 Tex. Civ. App. 109, 71 S. W. 414.

A judge has no power after adjournment of term, to authorize or require clerk to receive statement of facts not really signed within ten days after term, to file it as of date within ten days after term. *International, etc.*,

R. Co. v. Scott; 58 Tex. 187, 190; *Thompson v. Hawkins (Civ. App.)*, 38 S. W. 236.

Counsel are not bound to take notice of verbal announcement made by district judge of his intention to extend time for making statement of facts, beyond ten days after adjournment. *International, etc.*, R. Co. v. Scott, 58 Tex. 187, 189.

Agreement of Parties for Extension beyond Ten Days Ineffective.—A statement of facts filed more than ten days after the adjournment of the court for the term can not be considered, although the parties agreed that it might be filed later. *Conner v. Downes*, 32 Tex. Civ. App. 588, 74 S. W. 781, 75 S. W. 335, following *Wilcox v. League*, 31 Tex. Civ. App. 109, 71 S. W. 414.

Failure of opposing counsel to sign a statement of facts, and an agreement by them that the time of filing might be dated back so as to come within ten days after adjournment, would not excuse failure to file such statement within the time required by law. *Keller v. Kettner (Civ. App.)*, 67 S. W. 907, affirmed in 95 Tex. 681, no op.

bb. Allowance of Twenty Days after Adjournment, under Act 1903.

In General.—Act February 28, 1903 (Laws 1903, p. 32, c. 25), authorizes courts to grant twenty days after adjournment to present the statement of facts and bills of exceptions. A bill of exceptions complaining of the remarks of counsel was approved and filed within twenty days after the adjournment of the term. Held, that the bill of exceptions authorized the court to consider the objections set forth. *Colorado Canal Co. v. Sims (Civ. App.)*, 82 S. W. 531.

Where an order granting twenty days after adjournment to present and have approved and filed a statement of facts and bills of exception was entered in the minutes of the court, and copied therefrom into the transcript

of the record on appeal, such record sufficiently showed a proper exercise of the authority conferred by Acts 1903, p. 32, c. 25, providing that parties may, by having an order to that effect entered on the docket, be granted twenty days after adjournment to present and have approved and filed a statement of facts and bills of exception, to warrant consideration of the same by the reviewing court, though the transcript of the record did not contain "an order entered on the docket." *Slaughter v. Cooper* (Civ. App.), 107 S. W. 897.

Provision Held Inapplicable to Bills of Exception.—The statutory provision permitting the court of civil appeals to consider a statement of facts filed more than twenty days after adjournment of the court under certain conditions does not extend to bills of exceptions. *London v. Crow*, 46 Tex. Civ. App. 190, 102 S. W. 177.

Where the court grants the request of a party that the court file his conclusions of law and fact, the failure of the court to file his conclusions can not be reviewed, where the bill of exceptions was taken and filed after the term, though within the twenty days allowed for filing. *Lumpkin v. Marress*, 46 Tex. Civ. App. 374, 102 S. W. 1169.

c. Effect of Noncompliance with Provisions as to Time.

(1) In General.

As Excluding Statement from Consideration on Appeal.—As has already been stated, a statement of facts not prepared and filed during the term or within ten days thereafter, upon order of court, will not constitute a part of the record, or be considered on appeal. See cases cited ante, "General Rule Stated and Construed," III, D, 3, b, (1); and "Provisions Stated, Construed and Applied," III, D, 3, b, (2), (b), aa, (aa).

Statement of facts made up and filed after adjournment of term, no

order permitting it, will be disregarded by the court, of its own motion. *Matthews v. Boydstun* (Civ. App.), 31 S. W. 814, 816, affirmed in 93 Tex. 734, no op.

As Ground for Striking from Record.—Under Rev. Stat., arts. 1379-1382, a statement of facts filed after the statutory time must be stricken from the files, where no sufficient excuse is shown. *Stubbs v. Landa, etc., Co.*, 28 Tex. Civ. App. 56, 66 S. W. 213. See, also, *McGuire v. Newbill*, 58 Tex. 314; *Chance v. East Texas R. Co.*, 63 Tex. 152; *Continental Fire Ass'n v. Stilwell Bros.*, 26 Tex. Civ. App. 338, 63 S. W. 950, affirmed in 95 Tex. 676, no op.; *Brown v. Durham* (Civ. App.), 41 S. W. 369; *Blount v. Lewis* (Civ. App.), 47 S. W. 681; *Keller v. Kettner* (Civ. App.), 67 S. W. 907, affirmed in 95 Tex. 681, no op.

The appellate court having no authority to consider affidavits setting forth reasons for failure to file a statement of facts within proper time, where such statement is not so filed it will be stricken, though there are affidavits showing reasons for the failure to file. *Keller v. Kettner* (Civ. App.), 67 S. W. 907, affirmed in 95 Tex. 681, no op.

Evidence held to show that failure to file a statement of facts on appeal within required time did not arise from a cause beyond the control of appellant or counsel, and hence that such statement, when filed too late, should be stricken out. *Continental Fire Ass'n v. Stilwell Bros.*, 26 Tex. Civ. App. 338, 63 S. W. 950, affirmed in 95 Tex. 676, no op.

(2) Diligence as Excusing Failure to File in Time Prescribed.

(a) In General.

Under the present statutes it is provided that when a statement of facts is filed after the time prescribed, and the party filing it shows that he used due diligence, and that the delay resulted from causes beyond his con-

trol, the court shall allow said statement as part of the record. Sayles' Civ. Stats., art. 1379a, Rev. Stat., 1895, art. 1382. *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324; *Osborne v. Prather*, 83 Tex. 208, 18 S. W. 613; *Anderson v. Walker*, 95 Tex. 596, 68 S. W. 981, reversing 67 S. W. 432; *Blackburn v. Blackburn*, 16 Tex. Civ. App. 564, 42 S. W. 132 (see 93 Tex. 700, no op.); *Ellis v. Cunningham*, 16 Tex. Civ. App. 571, 41 S. W. 522; *Willis & Bro. v. Smith*, 17 Tex. Civ. App. 543, 43 S. W. 325, affirmed in 93 Tex. 698, no op.; *Strickland v. Sandmeyer*, 21 Tex. Civ. App. 351, 52 S. W. 87; *Continental Fire Ass'n v. Stilwell Bros.*, 26 Tex. Civ. App. 338, 63 S. W. 950, affirmed in 95 Tex. 676, no op.; *Stubbs v. Landa, etc., Co.*, 28 Tex. Civ. App. 56, 66 S. W. 213; *Worley v. McIntire* (Civ. App.), 23 S. W. 996; *Hilburn v. Preston* (Civ. App.), 32 S. W. 702; *Akes v. Sanford* (Civ. App.), 39 S. W. 952, affirmed in 93 Tex. 678, no op.; *Owen v. Cibolo Creek Mill, etc., Co.* (Civ. App.), 43 S. W. 297; *Blount v. Lewis* (Civ. App.), 49 S. W. 405; *Moody v. First Nat. Bank* (Civ. App.), 51 S. W. 523; *Carter v. Thompson* (Civ. App.), 52 S. W. 92, affirmed in 93 Tex. 701, no op.; *Sisk v. Joyce* (Civ. App.), 68 S. W. 30, affirmed in 95 Tex. 686, no op.; *Galveston, etc., R. Co. v. Perkins* (Civ. App.), 73 S. W. 1067, affirmed in 97 Tex. 633, no op.; *Wilson v. Tyler Coffin Co.* (Civ. App.), 82 S. W. 664.

The statute (art. 1382, Rev. Stat.), provides that: "Whenever a statement of facts shall have been filed after the times respectively prescribed in the preceding articles 1379, 1380, and 1381 of this chapter, and the party tendering or filing the same shall show to the satisfaction of the courts of civil appeals that he has used due diligence to obtain the approval and signature of the judge thereto, and to file the same within the time in this chapter prescribed for filing the same, and that his failure to file the same within said

time is not due to the fault of laches of said party, or his attorneys, and that such failure was the result of causes beyond his control, the courts of civil appeals shall permit said statement of facts to remain as part of the record, and consider the same in the hearing and adjudication of said cause, the same as if said statement of facts had been filed in time." *Anderson v. Walker*, 95 Tex. 596, 68 S. W. 981, reversing 67 S. W. 432. And see cases cited to preceding paragraph.

A statement of facts may be considered, though not filed until after ten days prescribed by law had elapsed, where there were no laches on the part of appellant; the delay being due solely to the acts of the opposing counsel and the court. *Anderson v. Walker* (Civ. App.), 70 S. W. 1003.

When reasonable excuse was shown for failure to file statement of facts in time, refusal of trial court to strike it was not error. *Willis & Bro. v. Smith*, 17 Tex. Civ. App. 543, 549, 43 S. W. 325, affirmed in 93 Tex. 698, no op.

(b) Provision Construed and Applied.

Does Not Dispense with Prerequisites of Approval and Signature.—Sayles' Civ. St. art. 1379a, providing that whenever a statement of facts shall have been filed after the times respectively prescribed, and the party tendering or filing the same shall show to the satisfaction of the supreme court or court of appeals that he has used due diligence to obtain the approval and signature of the judge thereto and to file the same within the time prescribed and that his failure to so file was not due to his own fault or laches or that of his attorney but was due to causes beyond his control, the court shall permit the statement to remain as part of the record and consider it only dispenses with the limitation as to time when there has been no lack of diligence in preparing the state-

ment and does not dispense with the essential prerequisite of the approval and signature of the judge, nor does it authorize parties to depend on the stenographer to make up the statement. *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324.

Rev. Stat., art. 1382, authorizing the reviewing court to consider a statement of facts, when signed, approved, and filed after the time limited, on a showing of diligence to obtain the same within the time, does not authorize the consideration of a statement of facts not signed or approved at all. *Owen v. Cibolo Creek Mill, etc., Co.* (Civ. App.), 43 S. W. 297.

Necessity for Exercise of Greatest Possible Diligence.—Under the statute permitting filing statement of facts after prescribed time, the greatest possible diligence to file it within the prescribed time is essential. *Blackburn v. Blackburn*, 16 Tex. Civ. App. 564, 42 S. W. 132 (see 93 Tex. 700, no op.). See, also, *Continental Fire Ass'n v. Stillwell Bros.*, 26 Tex. Civ. App. 338, 63 S. W. 950, affirmed in 95 Tex. 676, no op.; *Ellis v. Cunningham*, 16 Tex. Civ. App. 571, 41 S. W. 522.

Such diligence was the rule before the statute. *Blackburn v. Blackburn*, 16 Tex. Civ. App. 564, 42 S. W. 132 writ of error dismissed (see 93 Tex. 700, no op.), citing *Proctor v. Wilcox*, 68 Tex. 219, 4 S. W. 375.

Burden on Appellant to Prove Facts Bringing Him within Statute.—An appellant failing to file a statement of facts within the time fixed by the court, and seeking to excuse such failure under Rev. Stat., 1895, art. 1382, has the burden on appeal of proving facts necessary to bring him within the statute. *Sisk v. Joyce* (Civ. App.), 68 S. W. 50, affirmed in 95 Tex. 686, no op. And see *Stubbs v. Landa, etc., Co.*, 58 Tex. Civ. App. 26, 66 S. W. 213.

Application of Provision to Cases Where Statement Prepared by Judge.—Article 1382, Rev. Stat., applies and

permits proof of diligence used in cases where the statement of facts was made out and filed by the trial judge, as well as in those where it was prepared by the party seeking to use it on appeal. *Anderson v. Walker*, 95 Tex. 596, 68 S. W. 981, reversing 67 S. W. 432.

Sayles' Civ. St. art. 1370a, providing that when a statement of facts is filed after the time prescribed therefor, and the party tendering it shows to the satisfaction of the reviewing court that he has used due diligence to obtain the approval and signature of the judge, and to file the same within the proper time, the court may permit such statement to remain a part of the record, does not apply where the statement of facts is prepared by the judge after failure of the parties to agree on such statement, and the judge fails to file it within the proper time through no fault of appellant. *Hilburn v. Preston* (Civ. App.), 32 S. W. 702.

Facts Held to Excuse Delay.—Statement of facts on appeal will not be stricken out as not having been filed in time, when delay was due to judge's failure to approve statement after it had been submitted to him. Rev. Stat., § 1382. *Strickland v. Sandmeyer*, 21 Tex. Civ. App. 351, 352, 52 S. W. 87.

Where appellant, after using due diligence to obtain approval and signature of trial judge to statement of facts prepared by appellant, and fails until time limit has expired, he may file it after the time. *Hilburn v. Preston* (Civ. App.), 32 S. W. 702.

Plaintiff's attorney being unable to procure a transcript of the evidence from the stenographer by reason of his inability to pay therefor, statements of facts were prepared and filed by each party with the judge within the statutory time. The parties were unable to agree on the statement, and under the statute requiring, in such case, the parties to submit their statements to the judge, who shall, from

his own knowledge, with the aid of the statements, file a correct statement of the facts, such statement was prepared by the judge, but not until after the time for filing had expired. Held, that plaintiff sufficiently showed due diligence in trying to obtain the approval of the judge to the statement of facts in due time, so that a motion to strike out the statement will be denied. *Yecker v. San Antonio Tract Co.*, 33 Tex. Civ. App. 239, 76 S. W. 780, affirmed in 97 Tex. 652, no op.

Facts Held Insufficient to Excuse Delay.—Under the statute (Rev. Stat. 1895, art. 1382) providing for the filing of a statement of facts after the prescribed time, where diligence has been shown in attempting to file it in time, such diligence is not shown when appellant did not begin preparation of any statement until four days after notice of appeal. *Ellis v. Cunningham*, 16 Tex. Civ. App. 571, 572, 41 S. W. 322.

Where a term of court does not adjourn for two weeks after judgment, and after motion for new trial is overruled, the facts that the court stenographer was unable to write out the testimony before court adjourned, that the term might by law have continued several days longer, and that its adjournment was unexpected, do not excuse delay in preparing the statement of facts until after court adjourned, where it does not appear that the judge announced that the term would continue for the statutory time, but simply that the clerk informed counsel to that effect. *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324.

Appellant's leading attorney, living at some distance from the place of trial, which was not readily accessible by rail, left the case in the hands of a local associate before verdict was rendered, with directions to file a bill of exceptions, and send him the papers for the preparation of a statement of facts for appeal, if the cause was

adversely decided. The local attorney informed him that court adjourned on a certain day, when in fact it adjourned the day preceding, and that they had ten days to prepare a statement of facts, and after much correspondence, containing repeated requests for the papers, forwarded them so late that though appellant's attorney, by exercise of great diligence, succeeded in preparing a statement and transmitting it to the clerk so that it would have been in time had the local counsel not been mistaken as to the date of adjournment, yet, under the circumstances, it was one day late. Held, that the failure to file the statement in the required time did not arise from a cause beyond the control of appellant or counsel, and hence that such statement should be stricken out. *Continental Fire Ass'n v. Stilwell Bros.*, 26 Tex. Civ. App. 338, 63 S. W. 950, affirmed in 95 Tex. 676, no op.

1 Sayles' Civ. St. art. 1379a, provides that when a statement of facts is filed after time, and the party filing it shows that he used due diligence, and that the delay resulted from causes beyond his control, the court shall allow said statement as part of the record. Held, that an affidavit that the statement was before adjournment presented to the judge, who agreed to approve and file it, but failed to do so, showed no sufficient diligence on the part of appellant. *Worley v. McIntire* (Civ. App.), 23 S. W. 996.

Where appellant had over a month in which to prepare a statement of facts, and he depended therefor on attorneys who had, with his knowledge, withdrawn from the case, until it was too late to prepare the statement himself, he does not show such diligence as would entitle him to have the judgment reversed on the ground that he had been defeated of his right to have a statement of facts. *Owen v. Cibolo Creek Mill & Mining Co.* (Civ. App.), 43 S. W. 297.

Where a statement of facts, on failure of counsel to agree, was made out and filed too late by the trial judge, the diligence of appellant in presenting to the judge on the last day of the ten days after adjournment allowed for making it by his order, and while he was engaged in trying a case in another court, a statement to which he found himself unable to agree, was insufficient, in the absence of a showing of facts excusing such delay, and the statement was stricken out. *Stubbs v. Landa, etc., Co.*, 28 Tex. Civ. App. 56, 66 S. W. 213.

A sufficient excuse for failure to file a statement of facts on a writ of error was not shown by an affidavit of the attorney of plaintiffs in error, reciting that he had prepared such statement at the term of court at which the judgment was rendered, and had delivered it to opposing counsel for approval, insisting that it should be acted upon; that such counsel suggested a delay until they should meet at a certain place, to which they were both going to attend court, after the adjournment of the court rendering the judgment; that affiant agreed to this, and that for more than two years the matter was deferred at the request of such counsel, made with no intent to deceive or defraud. *Smithwick v. Kelley* (Civ. App.), 21 S. W. 690. See, also, to same effect, *Smithwick v. Browne* (Civ. App.), 21 S. W. 690; *Smithwick v. Vuittonnet* (Civ. App.), 21 S. W. 691; *Smithwick v. Fernandez* (Civ. App.), 21 S. W. 691; *Smithwick v. Jagan* (Civ. App.), 21 S. W. 691; *Smithwick v. Schodts* (Civ. App.), 21 S. W. 691.

Where a statement of facts was not filed within the twenty days prescribed, and appellant's counsel contributed to the delay, appellant was not entitled to have the statement considered under Sayles' Ann. Civ. Stat. 1897, art. 1382. *Wilson v. Tyler Coffin Co.* (Civ. App.), 82 S. W. 664.

Statement of facts filed two days after the time allowed therefor can not be considered under Sayles' Civ. Stat., art. 1382, allowing it, on a showing of due diligence, to obtain the approval and signature of the judge, and to file it in time, and that failure to file it in time was not due to fault or laches of the party, but was the result of causes beyond his control, where it is merely shown that appellant sent a statement to the other party on the seventh of the ten days allowed for filing it, with a request that it be returned on the next day, which was done without it being agreed to, and that on the next it was presented to the trial judge, it not appearing when it was approved, or what was done with it after approval, or that it was not approved in time for filing within the ten days. *Moody v. First Nat. Bank* (Civ. App.), 51 S. W. 523.

Where, on appeal, it is claimed that the failure to secure the approval of the statement of facts was caused by sickness of one of the counsel, and business on the part of the other, but it is not claimed that diligence was used to obtain the approval, or that it was through the fault of the trial judge that it was not obtained, the statement can not be considered. *Galveston, etc., R. Co. v. Perkins* (Civ. App.), 73 S. W. 1067, affirmed in 97 Tex. 633, no op.

Where an appellant forwarded his statement of facts to the trial judge by mail on September 12th, but they did not reach the judge until the evening of September 20th, and, though the judge immediately completed the preparation of the statement of facts and mailed it to the place where it was to be filed, it did not reach there in time to be filed in the trial court within the required time, it appearing that appellant might at any time after the sending of the statement of facts have communicated with the judge by telephone or telegraph, but did not do so.

and relied on the judge notifying him as to any delay, a motion to strike the statement of facts because not filed within the required time would be granted. *Western Union Tel. Co. v. Kuykendall* (Civ. App.), 86 S. W. 61.

A statement of facts tendered for filing at a late hour on the last day allowed therefor, under circumstances preventing its approval and filing on that day, will not be considered, in the absence of any showing of diligence on the part of the party tendering it, or excuse for not tendering it in time, as required by Savles' Rev. Civ. Stat., art. 1382, allowing the consideration of a statement not filed in time, upon showing diligence or excuse. *Carter v. Thompson* (Civ. App.), 52 S. W. 92, affirmed in 93 Tex. 701, no op.

An appellant, who was allowed ten days after adjournment to file a statement of facts for appeal, mailed a statement to the judge so that the latter, who was holding court in a county other than that in which the judgment was rendered, received it on the tenth day after adjournment, but it was not filed till ten days thereafter, the judge certifying that his failure to file it sooner was through want of time to examine it. Held, that such facts were insufficient, in the absence of a showing that the statement would have been filed in time if approved by the judge immediately on receipt thereof, to authorize its consideration by the court of civil appeals, under Rev. Stat. 1895, art. 1382. *Sisk v. Joyce* (Civ. App.), 68 S. W. 50, affirmed in 95 Tex. 686, no op.

Where motion for new trial overruled on last day of term and ten days allowed for statement, and defendant refused to agree to statement presented by defeated plaintiff, and five days thereafter plaintiff's counsel mailed his statement to judge, who was holding court in another county, held that no proper diligence to obtain

statement of facts was shown, since it should not have been sent by mail. *Proctor v. Wilcox*, 68 Tex. 219, 221, 4 S. W. 375.

(3) Waiver of Objection That Statement Was Not Filed within Time Prescribed.

Failure to file a properly allowed statement of facts within the time prescribed was not a jurisdictional defect, but one which appellee could waive. *Brown v. Orange County*, 48 Tex. Civ. App. 470, 107 S. W. 607, affirmed, no op.

d. Conclusiveness of Indorsement as to Time of Filing.

Where a statement of facts is indorsed as filed in the trial court on a certain day, the affidavit of the clerk of such court is insufficient to show that it was filed at a later date, and dated back by order of the judge. *Blount v. Lewis* (Civ. App.), 47 S. W. 681.

The court of civil appeals can not disregard the file mark on a statement of facts included in the transcript, on affidavits showing that such statement was filed out of term; the record being subject to correction only in the court in which it was made. Judgment, *P. J. Willis & Bro. v. Smith* (Civ. App.), 39 S. W. 377, reversed. *Willis v. Smith*, 40 S. W. 401, 90 Tex. 635, citing *Bogges v. Harris*, 90 Tex. 476, 39 S. W. 565.

Court of civil appeals can not strike out statement of facts not filed within prescribed time, if file-mark indicates that statement was filed in time. *Brown v. Durham* (Civ. App.), 41 S. W. 369, 370.

"Since we granted the motion to strike out the statement of facts, the supreme court, in *Willis & Bros. v. Smith*, 90 Tex. 635, 40 S. W. 401, has held that the courts of civil appeals have no power to ascertain, contrary to what is shown in the transcript, that a statement of facts was filed

after the time permitted by law. While we shall observe that ruling, we do not agree with it." *Brown v. Durham* (Civ. App.), 41 S. W. 369.

Where a bill of exceptions appears to have been filed while the court was in session, and within the time required by statute, it will not be stricken from the record, though there are affidavits that it was in fact filed long after adjournment. *Keller v. Kettner* (Civ. App.), 67 S. W. 907, affirmed in 95 Tex. 681, no op.

Where a statement of facts, although indorsed as filed within the time allowed, is shown by the certificate of the trial judge to have been filed after the expiration of that time, it will be stricken from the record. *Blount v. Lewis* (Civ. App.), 47 S. W. 681.

Court of civil appeals can not consider statement of facts not filed within time prescribed, if proper diligence is not shown, although it appears from file-mark that statement was filed in time. *Brown v. Durham* (Civ. App.), 41 S. W. 369, 370.

Where the indorsements of the clerk of the trial court show that the statement of facts was filed within the time required, but that it was not received by him until after the expiration of such time, the reviewing court will consider an affidavit of appellant's attorney, and a certificate by the clerk attached thereto as an exhibit, filed in the case, for the purpose of determining whether such statement of facts was filed in time. *Hilburn v. Preston* (Civ. App.), 32 S. W. 702.

4. Submission to Opposite Party or Attorney.

Where a party has made out his statement of facts, the same is to be presented to the opposite party or his attorney for inspection. Rev. Stat., art. 1379. *Kelso v. Townsend*, 13 Tex. 140; *Greer & Co. v. Featherston*, 95 Tex. 654, 69 S. W. 69; *Mi. Palmo v. Slayden & Co.*, 100 Tex. 13, 92 S. W. 796, affirming 90 S. W. 908; *Meyer v.*

Mattes, 15 Tex. Civ. App. 11, 37 S. W. 963; *Stubbs v. Landa, etc., Co.*, 28 Tex. Civ. App. 56, 66 S. W. 213; *Graves v. George* (Civ. App.), 54 S. W. 262; *Rice v. Reese* (Civ. App.), 110 S. W. 502.

5. Approval and Signature.

a. When Statement Agreed to.

(1) By Parties or Counsel.

In General.—If the parties or their attorneys agree as to the facts given in evidence they must sign and seal the statement of facts. Rev. Stat., art. 1378-1379. *Kelso v. Townsend*, 13 Tex. 140; *Renn v. Samos*, 42 Tex. 104; *Barnhart v. Clark*, 59 Tex. 552; *Greer & Co. v. Featherston*, 95 Tex. 654, 69 S. W. 69; *Brown v. Masterson* (Civ. App.), 38 S. W. 1027, affirmed in 93 Tex. 701, no op.; *Texas, etc., R. Co. v. Flanary* (Civ. App.), 45 S. W. 214; *Maury v. Keller* (Civ. App.), 53 S. W. 59, affirmed in 93 Tex. 714, no op.; *Graves v. George* (Civ. App.), 54 S. W. 262; *Cupples, etc., Co. v. Hill* (Civ. App.), 59 S. W. 318; *Sloan v. Schumpert* (Civ. App.), 81 S. W. 1005.

Statement of facts not agreed to or signed by all the parties to the cause, nor prepared and filed by trial judge, is insufficient. *Brown v. Masterson* (Civ. App.), 38 S. W. 1027, affirmed in 93 Tex. 701, no op.

Statement of facts must appear by agreement of parties or certificate of the judge. Paper signed by counsel of one party, and marked "approved" and signed by judge, will not be treated as a "statement of facts." *Renn v. Samos*, 42 Tex. 104; *Peet v. Hereford Bros.*, 1 App. Civ. Cases, § 869.

Under Sayles' Ann. Civ. Stat. 1897, art. 1379, providing that, where the parties agree upon a statement of facts, they shall sign the same and submit to the judge, who shall, if he find it to be correct, approve and sign it, an alleged agreed statement of facts following and not preceding a signed agreement that "the above statement of facts is a fair and com-

plete statement of the facts introduced in evidence," etc., is not a compliance with the statute, and such a statement can not be considered on appeal. *Walker v. Allen*, 42 Tex. Civ. App. 630, 95 S. W. 585.

A paper stating, "The following facts were admitted in evidence," and at the conclusion of which appears the indorsement, "The foregoing statement of facts is hereby approved," signed by the county judge, but not signed by the counsel for either party, and containing no certificate that the attorneys failed to agree, and not purporting to contain a statement of all the facts proven on the trial, can not be received as a statement of facts. *Sloan v. Schumpert* (Civ. App.), 81 S. W. 1005.

The approval of the judge without the signature of counsel would be sufficient only when there was a disagreement on their part clearly expressed or necessarily implied. *Barnhart v. Clark*, 59 Tex. 552.

Effect of Statement upon Rights of Persons Not Agreeing to and Signing Same.—A statement approved by the trial judge as one agreed to by the parties, and not as one made up by him on disagreement, will not be considered on the appeal of a party who did not sign or agree to it, but may be stricken out as to him. *Willis & Bro. v. Smith*, 17 Tex. Civ. App. 543, 43 S. W. 325, affirmed in 93 Tex. 698, no op.

Where a statement of facts made up by the plaintiff and defendant, without reference to the intervener, who prosecutes a writ of error, is not signed by the intervener's counsel, it will not affect the rights of the intervener, whatever errors may have been committed as between the plaintiff and defendant. *Blow v. De La Garza*, 42 Tex. 232.

The testimony contained in a statement of facts to which the intervener was not a party, made up between the other parties to the suit, can not be considered to determine whether deeds

constituting the intervener's evidence of title, and set forth as exhibits in his petition of intervention, were used in evidence. *Blow v. De La Garza*, 42 Tex. 232.

A statement of facts was not signed by the counsel for the intervener, nor certified to by the judge as to the facts, so far as the evidence on the trial related to her. Held, on writ of error, that the intervener was not bound by such statement of facts. *Hudson v. Morris*, 55 Tex. 595.

Where a judgment is based on an agreed statement of facts made by the parties, which is not signed by the guardian ad litem of a minor defendant, or by any person representing the guardian or the minor, it will not affect the rights of the minor. *Cupples, etc., Co. v. Hill*, 59 S. W. 318.

Presumption Where Statement Certified Though Signed Only by Counsel for One Party.—A statement of facts certified to by the judge as an agreed statement, though signed by counsel for one party only, will be presumed on appeal to have been properly certified. *Schneider v. Stephens*, 60 Tex. 419.

"In the beginning the paper purports to be a statement of facts, and it concludes, 'We agree that the above is a correct statement of the facts given in evidence on the trial of this case,' and is signed by counsel for one of the parties, and is indorsed 'approved' and signed by the judge who tried the case. Held, that the paper was sufficiently authenticated to require it to be considered as a statement of facts. This paper differed from the one held insufficient in *Renn v. Samos*, 42 Tex. 104. There, there was nothing in the beginning or conclusion of the paper to indicate that it was intended as a statement of facts. A case more in point is *McManus v. Wallis*, 52 Tex. 534, where a statement of facts authenticated as the one found in this record was held sufficient."

Dwyer v. Testard, 1 App. Civ. Cases, §§ 1228, 1229.

Effect Where Attorney for Several Parties Signs Only as Attorney for One.—A statement of facts on appeal signed by an attorney for several of the parties to the cause, but signed only as attorney for one, is binding on all. *McMillan v. Hendricks* (Civ. App.), 46 S. W. 859.

(2) By Trial Judge.

(a) Necessity for Approval and Signature.

In General.—Where the parties or their attorneys have agreed to the facts given in evidence, and have signed and sealed the statement, they must submit the same to the judge for his approval and signature. Rev. Stat., art. 1379. *Kelso v. Townsend*, 13 Tex. 140; *Greer & Co. v. Featherston*, 95 Tex. 654, 69 S. W. 69; *Texas, etc., R. Co. v. Flanary* (Civ. App.), 45 S. W. 214; *Graves v. George* (Civ. App.), 54 S. W. 262.

It has been repeatedly held that the approval and signature of the trial judge is essential to the validity of a statement of facts although the same has been agreed to by the parties. *Sheldon v. Boyce*, 20 Tex. 828; *Smith v. Tucker*, 25 Tex. 594; *Witten v. Poin-dexter*, 25 Tex. Supp. 378; *Wampler v. Walker*, 28 Tex. 598; *Roundtree v. Galveston*, 42 Tex. 612; *Keef v. State*, 44 Tex. 582; *Frost v. Frost*, 45 Tex. 324; *Johnson v. Blount*, 48 Tex. 38; *Farley v. Deslonde*, 58 Tex. 588; *Caswell v. Greer*, 4 Tex. Civ. App. 659, 23 S. W. 331, 1002; *Victoria v. Jessel*, 7 Tex. Civ. App. 520, 27 S. W. 159; *Watkins v. Hale*, 37 Tex. Civ. App. 243, 84 S. W. 386, affirmed in 101 Tex. 665, no op.; *Gray v. Frontroy*, 40 Tex. Civ. App. 302, 89 S. W. 1090; *Gulf, etc., R. Co. v. Loony*, 42 Tex. Civ. App. 234, 95 S. W. 691; *Smith v. Pecos Valley, etc., R. Co.* 43 Tex. Civ. App. 204, 95 S. W. 11, affirmed in 101 Tex. 659, no op.; *Mayo v. Goldman*, 44 Tex. Civ. App. 80, 97 S. W. 1061; *Motl v. Stephens*, 49 Tex.

Civ. App. 8, 108 S. W. 1018; *Texas, etc., R. Co. v. Cole* (Sup.), 1 S. W. 631; *Ficklin v. Strickland* (Sup.), 13 S. W. 272; *Western Union Tel. Co. v. Walker* (Civ. App.), 26 S. W. 858 (see 86 Tex. 72); *Gulf, etc., R. Co. v. Calvert*, 11 Tex. Civ. App. 30, 31 S. W. 679; *Nix v. Pope* (Civ. App.), 37 S. W. 617; *Pace v. Pace* (Civ. App.), 45 S. W. 203; *Western Tel. Union Co. v. Trice* (Civ. App.), 48 S. W. 770; *Missouri, etc., R. Co. v. Cock* (Civ. App.), 51 S. W. 354; *Maury v. Keller* (Civ. App.), 53 S. W. 59, affirmed in 93 Tex. 714, no op.; *Graves v. George* (Civ. App.), 54 S. W. 262; *Galveston, etc., R. Co. v. Perkins* (Civ. App.), 73 S. W. 1067, affirmed in 97 Tex. 633, no op.; *Galveston, etc., R. Co. v. Keen* (Civ. App.), 73 S. W. 1074, affirmed in 97 Tex. 633, no op.; *Kennedy v. Birch* (Civ. App.), 74 S. W. 593; *Watson v. Birdwell* (Civ. App.), 98 S. W. 407; *Rice v. Reese* (Civ. App.), 110 S. W. 502; *Henry v. Shain*, 1 App. Civ. Cases, § 1074; *Gibson v. Schoolcraft*, 1 App. Civ. Cases, § 49.

Where the statement of facts has not the approval of the presiding judge, as the statute requires, the supreme court will not revise the charge given by the judge, or other questions raised upon the record with which the facts would be connected, or material to be considered. *Smith v. Tucker*, 25 Tex. 594.

A statement of facts can only be considered by the supreme court when approved by the trial judge as a correct statement of the facts as produced in evidence. *Texas & P. R. R. v. Cole* (Sup.), 1 S. W. 631, 632.

A statement of facts, agreed to and signed by the attorneys of both parties, and presented to the judge at the term, but not indorsed "Approved," will not be considered on appeal, though certified by the judge after adjournment to be genuine. *Keef v. State*, 44 Tex. 582.

Under Sayles' Civ. Stat. 1897, art. 1379, authorizing agreed statement of facts on appeal, signed by the parties

and approved by the judge, a statement not so approved, nor embodied, in the judgement, can not be considered, though signed by the parties. A statement so signed is not an "agreed case," within Sayles' Civ. Stat. 1897, art. 1414, authorizing the parties to substitute an agreed case for the proceedings, if signed by the judge. *Graves v. George* (Civ. App.), 54 S. W. 262.

The judgment below will be affirmed where the only proposition urged by appellants is one which can not be considered in the absence of a statement of facts, and the statement in the record does not appear to have been approved or ordered filed by the trial judge. *Kennedy v. Birch* (Civ. App.), 74 S. W. 593.

Where the statement of facts is not signed by the presiding judge, the sufficiency of the evidence to sustain the judgment will not be reviewed. *Victoria v. Jessel*, 7 Tex. Civ. App. 520, 27 S. W. 159.

Where the alleged error rested upon facts said to be proven, and it did not appear that the statement of facts was submitted to the judge for his "approval and signature," and that he signed it, the judgment was affirmed. Pas. Dig., art. 1490, note 582. *Witten v. Poindexter*, 25 Tex. Supp. 378.

Where statement of facts was stricken out because improperly authenticated, appellant can not reverse the judgment on ground that he has been deprived of statement of facts without fault on his part. *G., C. & S. F. R. Co. v. Bell*, 4 App. Civ. Cases, § 119, 16 S. W. 908.

Requirement May Not Be Waived by Parties.—The requirement as to approval being statutory can not be waived by the parties. *Johnson v. Blount*, 48 Tex. 38; *Watkins v. Hale*, 37 Tex. Civ. App. 243; 84 S. W. 386, affirmed in 101 Tex. 665, no op.; *Gray v. Frontroy*, 40 Tex. Civ. App. 302, 89 S. W. 1090; *Galveston, etc., R. Co. v.*

Keen (Civ. App.), 73 S. W. 1074, affirmed in 97 Tex. 633, no op.

A stipulation of counsel that the statement of facts should be filed and should be considered without the approval of the trial judge, will not dispense with the necessity of such approval. *Johnson v. Blount*, 48 Tex. 38.

In the record of a cause pending on error, and attached to what purported to be a statement of facts, was the following agreement, signed by the counsel for plaintiff and defendant, viz.: "It is hereby agreed that this statement of facts in this case may be filed as a part of the record in this case, and may be so treated and considered by the supreme court, without the approval of the presiding judge who tried the cause." Held—That such an agreement can not supersede the necessity of the approval of the presiding judge, so as to entitle the agreed statement to be regarded and treated as would a statement of facts, made out and certified to in accordance with the statute. (Paschal's Dig., 1490.) *Johnson v. Blount*, 48 Tex. 38.

On appeal from a recommitment on habeas corpus (in a criminal case, at least), the supreme court will not recognize a statement of facts which is not approved by the judge who heard the application, or authenticated in the mode prescribed by the statute where the judge refuses to sign a bill of exceptions, although such approval be waived by the attorneys of both parties, by agreement filed in the supreme court. *Sheldon v. Boyce*, 50 Tex. 858.

Insufficient Approval.—The instrument signed by the trial judge, reciting, "This statement of facts, filed as of * * * in accordance with an agreement of the counsel * * * at the time the above statement was agreed to by them," is not an approval of the statement of facts. *Watkins v. Hale*, 37 Tex. Civ. App. 243, 84 S. W. 386, affirmed in 101 Tex. 665, no op.

Omission Must Be Assigned as Error.—Failure of district judge to sign statement of facts will not be considered unless assigned as error. *Reagan v. Copeland*, 78 Tex. 551, 14 S. W. 1031.

Failure of county judge to sign statement of facts does not affect court of civil appeals' jurisdiction, and, hence, is not matter to be examined by that court unless shown by record. *Ennis, etc., Co. v. Wathen*, 93 Tex. 622, 625, 57 S. W. 946.

The omission of the trial judge to approve and file a statement of facts can not be considered on appeal when it is not assigned as error, and the objection is only raised by a written motion for reversal of the judgment. *Ennis. Mercantile Co. v. Wathen* (Civ. App.), 58 S. W. 971.

(b) Time.

"The statute requiring the trial judge's approval of the statement of facts contemplates that the approval shall be made before the statements of facts is filed, and, if the approval itself can not be waived, we doubt if the time of approval can be extended by agreement of the parties." *Watkins v. Hale*, 37 Tex. Civ. App. 243, 84 S. W. 386, affirmed in 101 Tex. 665, no op.

Generally as to time of approval and signing, see ante, "Time for Preparation, Settlement and Filing," III, D, 3.

(c) Power of Judge to Make Corrections before Approving Statement.

Where the statement of facts has not been approved by the judge, if he was satisfied that any part of the evidence had been omitted, it was proper to make the correction, and incorporate into the statement the omitted testimony. *King v. Russell*, 40 Tex. 124.

The approval of the trial judge is necessary to constitute a statement of facts, and the judge is not bound by what the parties have agreed to, but may make such corrections as he deems proper before approving the statement, and the case on appeal must

be disposed of on the statement as corrected and approved by the judge, especially where the right of the trial court to correct the statement and the justification of the corrections made are not denied. *Motl v. Stephens*, 49 Tex. Civ. App. 8, 108 S. W. 1018.

(d) Remedy Where Judge Refuses Approval.

Where the trial judge neglects to approve a statement of facts for appeal, appellant should apply to the supreme court for a writ of mandamus, and, if he fails to do so, the case will not be reversed for want of the statement, though the judge was often requested by appellant to approve a statement, and promised to do so. *Osborne v. Prather*, 83 Tex. 208, 18 S. W. 613.

"We suggest that in any case of the refusal of the district judge to approve a statement of facts the proper practice for the aggrieved party is to apply to this court without delay for the writ of mandamus." *Reagan v. Copeland*, 78 Tex. 551, 14 S. W. 1031.

Where, on appeal, the statement of facts has not been approved by the trial court, certiorari will not lie to have the statement signed or approved nunc pro tunc. *Galveston, etc., R. Co. v. Perkins* (Civ. App.), 73 S. W. 1067, affirmed in 97 Tex. 633, no op.

(e) Remedy Where Judge Misled into Signing Statement.

Where the trial judge was misled by the misrepresentations of appellant's attorney into signing a statement of facts not agreed to by the parties, nor made out by the judge, and which did not give a true statement of the facts adduced at the trial, it was proper for the trial court to strike out such statement upon motion with due notice thereof to appellant. *Corralitos Co. v. Mackay*, 31 Tex. Civ. App. 316, 72 S. W. 624, affirmed in 97 Tex. 630, no op.

The statement of the judge, made out and filed after the adjournment of the term, and improperly copied into

the transcript, in reference to whether or not a statement of facts was properly certified or approved by him, will not be considered on appeal, in the absence of a motion to strike out and suppress the statement on account of deceit practiced by one of the parties, or their counsel. *Schneider v. Stephens*, 60 Tex. 419.

"The statement of the presiding judge, filed subsequent to the adjournment of the term at which the case was tried, will not be considered in reference to whether or not the statement of facts was properly certified or approved by him. Upon a motion to strike out and suppress a statement, on the ground that the judge had been induced to approve or certify the same on account of deceit practiced by one of the parties or their counsel, supported by proper affidavits, the question might be entertained. But this court will not entertain that question upon the statement of the judge made and filed subsequent to the adjournment of the term. The statement of the judge was improperly copied into the transcript." *Schneider v. Stephens*, 60 Tex. 419.

b. Of Statement Prepared by Judge.

(1) Necessity for Authentication.

Where the statement is made out by the judge in case of disagreement of counsel, such statement is to be signed and sealed by him. Rev. Stat., art. 1379. *Kelso v. Townsend*, 13 Tex. 140; *Meyer v. Mattes*, 15 Tex. Civ. App. 11, 37 S. W. 963; and see cases cited ante, "Preparation by Judge," III, D, 2.

(2) Form and Sufficiency of Certificate.

Showing as to Disagreement of Parties.—The certificate to a statement of facts made by the judge before whom the cause was tried, should, when the statement of facts has been prepared by the judge, show upon its face that the attorneys had failed to agree. The presumption is, however, that the attorneys had failed to agree, when the

statement of facts is made by the judge. *McManus v. Wallis*, 52 Tex. 534; *Darcy v. Turner*, 46 Tex. 30. See ante, "Presumption as to Disagreement Where Statement Prepared by Judge," III, D, 2, b.

Showing That Statement Contains all Evidence Adduced on Trial.—A certificate to a statement of facts prepared by the judge is insufficient which does not purport that it certainly contains all the evidence adduced in the case, but only that it is all that the judge can recollect "after the lapse of so long a period of time." *Teas v. McDonald*, 13 Tex. 349.

When the statement of facts is only certified to by the judge, as containing "all the evidence material in the case," the statutory meaning of the certificate is not thereby changed by such qualifying words. *Darcy v. Turner*, 46 Tex. 30.

In making up a statement of facts, unimportant and irrelevant matters stated by ignorant witnesses, having no influence on the decision of the cause, should be omitted. And where the parties fail to agree, it is sufficient for the judge to certify "all the material facts proved;" but in case of a difference of opinion between the judge and either of the parties, as to whether certain evidence was material or not, he would doubtless, on motion or suggestion, insert it, although deemed by him to be immaterial. *Wright v. Wright*, 6 Tex. 3.

c. Effect of Alteration after Certification by Judge.

A statement of facts which is changed without authority by appellant, after being signed by the judge, should at least be stricken from the record. *Newman v. Dodson*, 61 Tex. 91.

It was error for the court of civil appeals to strike out the statement of facts from a transcript duly certified, on determining, after hearing affidavits, that it had been changed by appellants' counsel inserting matter therein

after it was certified by the judge presiding in the trial court, and to proceed to determine the case as though no statement were in the record. Such court might delay proceedings till appellee could, by appropriate proceedings, have the court below determine the question and make its record speak the truth, and thereupon issue a certiorari to bring up the corrected record. *Bogges v. Harris*, 90 Tex. 476, 39 S. W. 565.

d. Effect of Mutilations and Interlineations in Statement Prepared by Judge.

Where a statement containing the facts proved at the trial was prepared by the trial judge, it will not be stricken because mutilated and interlined in violation of district court rule 90; the erasures and interlineations not being shown to have been made after the approval of the statement, and not being chargeable to appellants. *Young v. Moore* (Civ. App.), 110 S. W. 546.

6. Seal.

The want of a seal is not sufficient to invalidate a statement of facts on an appeal, though such seal is required by statute. *Lacey v. Ashe*, 21 Tex. 394.

7. Filing.

Necessity.—The statement of facts, when made out, approved and authenticated, is to be filed with the clerk. Rev. Stat., arts. 1379-1380. *Kelso v. Townsend*, 13 Tex. 140; *Harlan v. Haynie*, 9 Tex. 459; *Greer & Co. v. Featherston*, 95 Tex. 654, 69 S. W. 69; *Texas, etc., R. Co. v. Flanary* (Civ. App.), 45 S. W. 214; *Graves v. George* (Civ. App.), 54 S. W. 262; *Mayo v. Goldman*, 44 Tex. Civ. App. 80, 97 S. W. 1061; *Rice v. Reese* (Civ. App.), 110 S. W. 502.

As to duty of the judge to file the statement prepared by him where the parties disagree, see ante, "Power and Duty to Prepare and File," III, D. 2, a.

Time.—See ante, "Time for Preparation, Settlement and Filing," III, D, 3.

A statement of facts bearing undated approval of trial judge but not marked "filed" by the clerk is insufficient and should be disregarded on appeal. *Folts v. Ferguson* (Civ. App.), 24 S. W. 657, affirmed in 93 Tex. 66 no op.

Gen. Laws 1905, p. 219, c. 112, provides that when a transcript of the evidence, etc., is made, the court shall approve the same as correct; but before such approval it shall be submitted to the interested parties for objections, and after it is then approved and signed by the judge it shall be a part of the record. The only statement of facts on appeal was signed by the official stenographer and certified to be a correct transcript of the evidence in the cause, but did not appear to have been submitted to the parties, nor to have been approved by the trial court or filed therein. Held, that the document could not be treated as a statement of facts proven within the statute, and, there being no statement of facts, judgment below would be affirmed. *Rice v. Reese* (Civ. App.), 110 S. W. 502.

E. STATEMENT AS PART OF RECORD.

1. In General.

Where the statement of facts has been prepared, approved, authenticated and filed as prescribed by statute, it constitutes a part of the record. Rev. Stat., arts. 1378-1380. *Kelso v. Townsend*, 13 Tex. 140; *Rice v. Reese* (Civ. App.), 110 S. W. 502; *Meyer v. Mattes*, 15 Tex. Civ. App. 11, 37 S. W. 963; *Mayo v. Goldman*, 44 Tex. Civ. App. 80, 97 S. W. 1061; *Graves v. George* (Civ. App.), 54 S. W. 262.

A bill of exceptions and statement of facts are alike intended to be incorporated into and become parts of the record of the case. *Roundtree v. Galveston*, 42 Tex. 612.

Procedure Where Statement Not Transmitted to Appellate Court with Transcript.—

"It has been satisfactorily shown to this court that a statement of facts was duly prepared by the court stenographer, agreed to by the parties, approved by the trial court, and within the time allowed by law filed with the clerk of the court below. The failure to transmit it with the transcript to the appellate court has been shown to have been the result, not of negligence on appellants' part, but of a mistake whereby a copy, instead of the original statement, was sent with the transcript on appeal. That the appeal may be disposed of on its merits, the motion for a rehearing has been granted, and the statement of facts tendered for the purpose has been ordered filed. *Gonzales v. Galveston, etc., R. Co.* (Civ. App.), 107 S. W. 896; *Harris v. Hopson*, 5 Tex. 529, 534; *Western Union Tel. Co. v. O'Keefe*, 87 Tex. 423, 28 S. W. 945; *Wichita Valley Co. v. Peery*, 87 Tex. 597, 30 S. W. 435; *Gulf, etc., R. Co. v. Cannon*, 88 Tex. 312, 31 S. W. 498; *Gilbough v. State Building Co.*, 91 Tex. 621, 624, 45 S. W. 385." *Rice v. Reese* (Civ. App.), 110 S. W. 502.

2. Conclusiveness.

a. Estoppel of Appellant to Show Error.

The statement of facts showed that the action had been begun "May 3, 1890," and that a certain deed in defendant's chain of title had been filed in the cause "August 5, 1889," which date was confirmed by the file mark on the deed itself. Held, that appellant, having brought up the record, could not claim that the statement therein was erroneous. *Pearson v. Davis* (Civ. App.), 37 S. W. 602.

b. Inadmissibility of Affidavits on Appeal to Sustain or Discredit Statement.

See, generally, the title APPEAL AND ERROR, vol. 1, p. 313.

Affidavits of the attorneys in the

case and the trial judge can not be considered in aid and explanation of the requisite approval of a statement of facts,—such matters not having relation to the jurisdiction of the appellate court. Rev. Stat., art. 998. *Bath v. Houston, etc., R. Co.*, 34 Tex. Civ. App. 234, 78 S. W. 993.

An affidavit filed in the supreme court, having for its object to discredit a statement of facts made out and signed by the judge who tried the case below, can not be regarded. *Albright v. Corley*, 40 Tex. 105.

"The affidavit of Thomas J. Calhoun, attached to the brief of appellant's counsel, in which an effort is made to discredit the statement of facts made out and signed by the special judge who tried the case, is entitled to but slight consideration; considering what it sets forth, it amounts to little. So far as it is intended to discredit the testimony of defendant Corley, the statements are not inconsistent with his evidence on the trial. The letter, so far as it is intended to contradict the statement of facts, is simply an attempt, by an ex parte affidavit of a volunteer witness, to discredit the official statement of one alone authorized to certify to 'a statement of facts.' As such we can not consider it of any weight." *Albright v. Corley*, 40 Tex. 105.

3. Striking from Record.

Grounds.—As to striking out a statement of facts for noncompliance with the statutes and rules as to manner of setting out evidence, see ante. "Necessity for Compliance with Statutes and Rules of Court," III, C, 2, b.

As to striking out statement where not made or filed in time, see ante. "Effect of Noncompliance with Provisions as to Time," III, D, 3, c.

As to alteration after certificate as ground to strike, see ante. "Effect of Alteration after Certification by Judge," III, D, 5, c.

Appellee Not Estopped by Agreement to Statement.—Appellee is not estopped from moving to strike out a statement of facts, which shows a violation of the rule requiring its condensation, because he agreed to the statement, as the rule was made for the benefit of appellate courts. *Caswell v. Hopson* (Civ. App.), 43 S. W. 547.

Time of Motion to Strike.—A motion to strike out statement of facts because not in accordance with the rules, is not waived because filed too late, since it is the duty of the appellate court to enforce the rules without motion. *Heidenheimer v. Tannenbaum*, 23 Tex. Civ. App. 567, 568, 56 S. W. 776, affirmed in 94 Tex. 700, no op.

The fact that appellee failed to file his motion to strike a statement of facts within 48 hours before 10 o'clock on the day set for the hearing of the appeal, as required by the court of civil appeals (rule 8, 31 S. W. vi), did not constitute such a waiver of appellee's right as to preclude the court from disregarding such statement, which the court had power to do of its own motion. *Heidenheimer v. Tannenbaum*, 56 S. W. 776, 23 Tex. Civ. App. 567.

Under court of appeals rule 8 (94 Tex. 656, 67 S. W. xiv), providing that all motions relating to informalities in the manner of bringing a case into court shall be filed and entered by the clerk on the motion docket at least 48 hours before 10 o'clock a. m. of the day on which the case is set for hearing, otherwise the objection shall be deemed waived, if it can be waived by the party, etc., a motion to strike appellant's statement of facts, not filed until the day before the submission of the cause, was too late. *Brown v. Orange County*, 48 Tex. Civ. App. 470, 107 S. W. 607, affirmed, no op.

On appeal a motion to strike out the statement of facts on the ground that it was not filed during the term

at which the cause was tried will be denied, inasmuch as it is for the district court, and not an appellate tribunal, to correct the records of the district court. *Wilson v. Tyler Coffin Co.* (Civ. App.), 79 S. W. 327.

Effect of Erroneously Striking Out Statement.—Where court of civil appeals erroneously struck out statement of facts, cause will be remanded for consideration of such statement. *Oriental, etc., Co. v. Barclay*, 93 Tex. 425, 430, 55 S. W. 1111.

F. CONSTRUCTION OF STATEMENT.

Construction in Connection with Bill of Exceptions.—See ante, "Construction of Bill," II, F.

Rule Where Bill and Statement Conflict.—See the title APPEAL AND ERROR, vol. 1, p. 690.

Rule Where Statement Contains Statements at Variance with Formal Entries of Record.—It seems that if the statement of facts should contain statements at variance with formal entries of record, the latter would be regarded, on appeal, as the true exponents of the action of the court below. *Parr v. Johnston*, 15 Tex. 294.

"It may be said that matters may frequently be inadvertently omitted or inserted in the statement of facts which may evade the scrutiny of the counsel and of the judge. This is doubtless true, but such insertions or omissions are doubtless of frequent occurrence in the entry of judgments. Where the record presents contradictions or seeming repugnancies, they must be reconciled, if possible, and the positive agreed statement of a fact must be regarded as authentic evidence of its existence, when not rebutted by an entry in the proceedings to the contrary." *Parr v. Johnston*, 15 Tex. 294.

G. AMENDMENT OR CORRECTION OF STATEMENT.

A statement of facts certified to by the trial judge is not the subject of

amendment in the appellate court. *Atascosa County v. Alderman* (Civ. App.), 91 S. W. 846 (see 101 Tex. 628, no op.).

Under Rev. Stat. 1895, art. 998, providing that the appellate courts shall have power upon affidavit to ascertain such matters of fact as may be necessary to a proper exercise of their jurisdiction, the appellate court can not, on affidavits, correct a purported statement of facts so as to have the statement precede the signatures of the parties and the judge instead of following them. *Walker v. Allen*, 42 Tex. Civ. App. 630, 95 S. W. 585.

"If the law had been properly complied with in the preparation of the statement of facts, but through inadvertence or mistake the agreement of counsel and approval of the judge to same was attached to the beginning instead of the end thereof, so as not to apply or relate to the statement embracing the testimony of the witnesses, the proper place for the correction of same would have been in the court below before the transcript of the record in the cause was sent to this court." *Walker v. Allen*, 42 Tex. Civ. App. 630, 95 S. W. 585.

The trial court, in the absence of fraud or other improper conduct, has no power to amend or supersede a statement of facts certified and filed within the time required, after the time allowed in which to prepare and file a statement of facts has expired. *Dorsey v. Sternberg & Co.*, 42 Tex. Civ. App. 568, 94 S. W. 413.

IV. Agreed Case.

Statutory Provisions.—Article 1414 of the Rev. Stat. of 1895, provides for an agreed case, in which the original proceeding need not be carried at length into the transcript. It provides that "the parties may, without the necessity of setting out all the proceedings at length, agree upon such brief

statement of the case and of the facts proven, with or without copies of any part of the proceedings, as shall, in their opinion, enable the appellate court to determine whether there has been any error in the judgment; and if the judge shall approve and sign such statement, the same shall be filed among the papers of the cause and shall constitute a part of the record, and on appeal or writ of error shall be copied into the transcript in lieu of such proceedings themselves." *Whitaker v. Gee*, 61 Tex. 217.

Article 1413 of the Rev. Stat. of 1895 is intended to give parties a method by which they may exclude from the transcript everything not really essential to the proper description of the cause; it however, does not provide a method in which matters material shall be presented. *Whitaker v. Gee*, 61 Tex. 217.

Article 1516, of Pas. Dig. under the title "Agreed Case," reads as follows: "After the trial of any cause, when either party intends to remove the same into the supreme court for revision, the parties may, with the consent and approval of the judge who tried the cause, and without the necessity of copying the entire proceedings, agree upon such a statement of the case, and the facts proven, if any, as in their opinion will be necessary to show whether there has been any error in the proceedings, and such statement shall be signed by the attorneys of the parties, and certified by the judge, and filed as a part of the record of the cause; and a copy of such statement and of the judgment in the case, and the assignment of errors, certified by the clerk of the court, shall be a sufficient transcript of the proceedings to be taken to the supreme court, and to entitle the parties to a trial therein upon the points presented for revision." "In all cases proposed to be removed to the supreme court where such agreed statement is not

made, approved and filed as in this section provided, the clerk shall make out and send up the full transcript of the proceedings as is now provided by law." *Fisher v. Leisweitz*, 1 Posey 330. See, also, *Cross v. Crosby*, 42 Tex. 114.

Form, Contents and Sufficiency of Agreed Case.—In an agreed case, the evidence, both documentary and other must be agreed on as actually introduced or rejected, and the rulings when questioned, must be shown and the whole approved and signed by the judge. *Whitaker v. Gee*, 61 Tex. 217.

Under Rev. Stat., 1895, art. 1414, if evidence relied on by the parties was introduced on the trial, the agreed statement of facts should so state. *Missouri, etc., R. Co. v. Fisher* (Civ. App.), 47 S. W. 284.

When, on appeal, the transcript contains an agreement signed by counsel for the parties, of facts which they consented might be offered in evidence, but which does not purport to be a statement of facts signed by counsel and approved by the judge, and there is nothing to show that it was ever in fact offered in evidence, it will be disregarded. When, on such appeal, there appears no statement of the conclusions of law and fact found by the judge, and there is nothing to show that it was an agreed case under art. 1414, Rev. Stat., there being no statement of facts, the presumption is that the judgment below was proper. *Taylor v. Campbell*, 59 Tex. 315.

On appeal submitted on an agreed statement under Rev. Stat., 1895, art. 1414, a question not raised or embraced in the agreed case will not be considered. (Civ. App.), *Eastland v. Williams' Estate*, 45 S. W. 412, reversed in *Same v. Williams*, 46 S. W. 32, 92 Tex. 113.

An agreement of facts incorporated in the record on appeal, signed by counsel but not signed or approved by the judge, and not showing whether other facts were introduced in evidence, can not be regarded as a statement of facts, nor as an agreed case under art. 1414, Rev. Stat. *Stone v. McClellan*, 36 Tex. Civ. App. 364, 81 S. W. 751.

A statement which fails to state the nature and character of the suit, the plaintiff's claim, and defendant's defense, and which does not appear to have been filed, is insufficient as an agreed case, under Rev. St. art. 1516, providing that the parties may agree upon a statement of facts proven, which, certified and signed by the judge, shall be filed as a part of the record, etc. *Fisher v. Leisweitz*, 1 Posey 330.

A statement of facts, agreed upon before trial, upon which the court might render judgment according to the law arising upon the facts as agreed upon, is not an agreed case, within the meaning of Rev. St. art. 1516, providing that after the trial of a cause the parties may agree upon the facts proven, etc. *Fisher v. Leisweitz*, 1 Posey 330.

A transcript containing the statement of the case and the facts proved, under art. 1516, Pas. Dig., and which is signed by the attorneys of the parties as an agreed case, but lacks the certificate of the district judge before whom the case was tried, is fatally defective. *Cross v. Crosby*, 42 Tex. 114.

Effect of Unnecessarily Including Judge's Charge.—The judge's charge, though not included in the agreed case prepared under Pasch. Dig. art. 1516, will not be stricken from the record on appeal, if necessary to a proper understanding of the cause. *Price v. Cole*, 35 Tex. 461.

Exception to Pleading.

See the title DEMURRERS, vol. 6, p. 270.

Excess.

In quantity of land conveyed, see the title **VENDOR AND PURCHASER**.

Excess Baggage.

See the title **CARRIERS OF PASSENGERS**, vol. 3, p. 1052, et seq.

Excessive Damages.

See the titles **DAMAGES**, vol. 5, p. 903, et seq.; **EXEMPLARY DAMAGES**. See, also, the titles **NEW TRIALS**; **REMITTITUR**; **VERDICT**, and the titles treating of the various actions. As to argument of counsel swelling damages, see the title **ARGUMENT OF COUNSEL**, vol. 2, p. 60.

Excessive Fees.

See the title **ATTORNEY AND CLIENT**, vol. 2, p. 596, et seq.

Excessive Fines and Penalties.

See the title **PENALTIES AND FORFEITURES**. See, also, the title **CONSTITUTIONAL LAW**, vol. 4, p. 479.

Excessive Homestead.

See the title **HOMESTEAD EXEMPTIONS**.

Excessive Levy.

See the titles **ATTACHMENT**, vol. 2, p. 380, et seq.; **EXECUTIONS**.

Excessive Taxation.

See the title **TAXATION**.

Excessive Verdict.

See the titles **NEW TRIALS**; **REMITTITUR**; **VERDICT**. See, also, the title **DAMAGES**, vol. 5, p. 903, and the titles treating of the various actions.

Exchange and Re-Exchange.

See the titles **INTEREST**; **USURY**. As to negotiability of instrument calling for "exchange," see the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 858.

Exchange, Bill of.

See the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 839.

Exchange Brokers.

See the title **BROKERS**, vol. 3, p. 225.

Exchange of Judges.

See the title **JUDGES**.

EXCHANGE OF PROPERTY.

BY CHAS. W. FOURL.

I. Exchange of Interest in Land, 218.

- A. Transactions Constituting Exchange, 218.
- B. Construction of Contract, 219.
- C. Exchange of Lands Belonging to Infants, 220.
- D. Warranty and Re-Entry, 220.
- E. Remedies, 221.
 - 1. In General, 221.
 - 2. Specific Performance, 221.
 - 3. Rescission, 221.
 - a. In General, 221.
 - b. For Failure of Title, 221.
 - c. Where Induced by Misrepresentation and Fraud, 222.
 - d. For Refusal to Perform, 223.
 - 4. Lien, 224.
 - 5. Measure of Damages, 225.
 - 6. Pleading and Proof, 225.

II. Exchange of Goods, 226.

III. Exchange of Goods for Land, 226.

CROSS REFERENCES.

See the titles **DEEDS**, vol. 6, p. 148; **DOWER**, vol. 6, p. 750; **ESCROW**, vol. 6, p. 979; **ESTOPPEL**, vol. 6, p. 992; **FRAUDS, STATUTE OF; FRAUD AND DECEIT; JUDGMENTS AND DECREES; PENALTIES AND FORFEITURES; RECORDING ACTS; RESCISSION, CANCELLATION AND REFORMATION; SALES; SET-OFF, RECOUPMENT, RECONVENTION AND COUNTERCLAIM; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER; VENDOR'S LIEN; VERDICT; WARRANTY.**

I. Exchange of Interest in Land.

A. TRANSACTIONS CONSTITUTING EXCHANGE.

Exchange and Sale Distinguished.—

If there is a fixed price for the transfer of lands, the transaction is a sale; but if there is not, the transaction is an exchange. *Thornton v. Moody* (Civ. App.), 24 S. W. 331, affirmed in

93 Tex. 722, no op.; *Ullmann v. Land*, 37 Tex. Civ. App. 422, 424, 84 S. W. 294, writ of error dismissed, affirmed in 101 Tex. 664, no op.

A transaction by which certain pieces of property are given for others, a definite price being put on each, and the difference paid in cash, is a sale, and not an exchange. *Thornton v. Moody* (Civ. App.), 24 S. W. 331.

Appellant bought of B., now deceased, a tract of land for \$60,000, deeding in payment a place in Houston at \$18,000, and executing vendor's lien notes for balance. After receiving the warranty deed conveying to him the Houston property, B. discovered that it was burdened with a mortgage for \$3,250, which, to protect his title, he was compelled to pay off with interest. He sued the appellant on her warranty, which suit, by agreement, was consolidated with appellant's suit, and the two were tried together. Judgment on this suit on the warranty was for appellant. Held, error. This transaction was not an exchange of lands, each tract standing surety for the other, but the Houston property was conveyed by warranty as a first payment on appellant's purchase, and the incumbrance described constituted a breach of warranty. *Foster v. Ross*, 33 Tex. Civ. App. 615, 77 S. W. 990, affirmed in 98 Tex. 616, no op.

Payment of Lease Money as Affecting Character of Transaction.—A contract between plaintiff and defendant provided first for the use and possession by each party of lands of the other for a term of years from the date thereof. Held, that a subsequent provision, requiring the payment of lease money at the end of each year by one or the other, according as there was an excess of land in his favor, must be held to have grown out of the fact that the exact number of acres each was supplying was uncertain when the contract was executed, and did not re-

fer, as was contended, to a probable loss of control of the lands conveyed, and hence the contract must be regarded as an agreement for an exchange of lands, and not a lease by one to the other. *Singleton v. Houston*, 35 Tex. Civ. App. 10, 79 S. W. 98, affirmed in 98 Tex. 632, no op.

B. CONSTRUCTION OF CONTRACT.

A contract for an exchange of lands between L. and M. provided that L. should give M. a good title to his land, the same to be a deed from himself in his own right, and also a deed as guardian of his minor son, and that M. should deed his land to L. as soon as L. should execute such deeds. Held, that L. was not entitled to a deed from M. until he executed both deeds. *Ellis v. Light* (Civ. App.), 73 S. W. 551.

Effect of Levy on Both Tracts for Debt of One Party.—An insolvent debtor trading a tract for another tract, obtained a deed for the latter, the party trading with the debtor entered into possession, and execution against the debtor was levied upon both tracts. Held that such levy does not affect the equitable right of the party trading with the debtor, to the land he traded for, and possession of which he held at the time of levy though the legal title was in the debtor at the levy. *Wylie v. Posey*, 71 Tex. 34, 9 S. W. 87.

Contract Failing to Show Assumption of Incumbrance.—A. and B. proposed to exchange their respective homesteads. But on B.'s homestead there was an incumbrance which he was unable to discharge. To obviate this difficulty and consummate the exchange, it was agreed between A. and B. that A. should raise by mortgage on his homestead an amount equal to the incumbrance on B.'s. Accordingly, A. borrowed the amount from C., and executed to him his note with a deed of trust upon his homestead to secure

its payment. A. and B. then interchanged conveyances and possession. In the conveyance from A. to B., the condition was stipulated that B. should pay off the note and deed of trust executed by A. to C.; but B. gave no written assumpsit of the debt. Held, that, under these circumstances, B. acquired only the equity of redemption of the property conveyed to him by A.; that the debt to C. was, in truth, a part of the purchase money of the property, and constituted a right in the property prior and superior to the homestead privilege of B., which could not attach in his favor until the debt was discharged. Held, further, that B. and his representatives could not invoke the statute of frauds to defeat the enforcement of the trust against the property; nor even, it seems, to resist a personal recovery against him. *Monroe & Bro. v. Buchanan*, 27 Tex. 241.

C. EXCHANGE OF LANDS BELONGING TO INFANTS.

Necessity for Offer of Reconveyance.—Where devisee, after reaching majority, sues to recover lands of testatrix, her mother, unlawfully exchanged by her father, and she disclaims ownership of the lands thus conveyed to her mother, she need not offer to reconvey the lands thus acquired. *Cardwell v. Rogers*, 76 Tex. 37, 46, 12 S. W. 1006.

Decree Need Not Provide for Reconveyance Where No Obligation Made.—Where, in a suit to recover certain land conveyed to defendant without authority in exchange for certain other land, defendant made no demand for affirmative relief, he could not object on a judgment being rendered against him that the court did not require a reconveyance to place the parties in statu quo. *Cardwell v. Rogers*, 76 Tex. 37, 12 S. W. 1006.

Residence with Father as Approval of Exchange.—Fact of residence of plaintiff during minority with her

father as part of his family on land received from an invalid exchange of her mother's land which she inherited by devise, did not charge her with an approval of the exchange. *Cardwell v. Rogers*, 76 Tex. 37, 46, 12 S. W. 1006.

Repudiation within Reasonable Time.—Where devisee, seven months after reaching her majority, sued to recover land devised to her by her mother's will but unlawfully conveyed to another by her father in exchange for other lands conveyed to her mother, her repudiation is within reasonable time after majority. *Cardwell v. Rogers*, 76 Tex. 37, 46, 12 S. W. 1006.

Election after Majority Binding.—Though an attempted conveyance of land to testatrix in exchange of her separate lands was invalid, yet if minor devisee with full knowledge of the facts elected to hold the lands so conveyed after majority, she is bound by such election. *Cardwell v. Rogers*, 76 Tex. 37, 46, 12 S. W. 1006.

D. WARRANTY AND RE-ENTRY.

Although reciprocal conveyances expressing money considerations and containing general warranties of title may be in effect, an exchange of lands between the parties, yet such a transaction is not a technical exchange; and consequently if one of the parties be evicted from the land conveyed to him, he can not re-enter upon the land he had given in exchange, as he might do if the transaction was a technical exchange. In such a case, the remedy of the party evicted is upon the covenant of warranty in his deed. *Walker v. Renfro*, 26 Tex. 142.

On an exchange of lands each deed, besides a general warranty, contained a stipulation that if the grantee was ousted the deed should be of no effect, and he should have the right to re-enter, possess, and own the land given in exchange. Held, that the party ousted had his election to re-

enter or rely on his warranty. *Pugh v. Mays*, 60 Tex. 191.

When Re-Entry Runs against Subsequent Vendee.—Where on interchange of land, each deed provided for re-entry in case of ouster, in addition to general warranty, the re-entry runs against subsequent vendee with notice. *Pugh v. Mays*, 60 Tex. 191, 194.

Ousted Party May Recover Land.—Where on exchange of land, each deed in addition to general warranty provided for re-entry in case of ouster, the party ousted is not estopped from recovering the land conveyed by him on account of his warranty. *Pugh v. Mays*, 60 Tex. 191, 194.

E. REMEDIES.

1. In General.

That the contract provided the mode of relief and the measure of damages to vendee in case of failure of title, in case of rescission does not prevent the vendee from recovering upon her covenant of warranty for partial breach thereof where the contract was fully performed. *Larkin v. Trammel*, 47 Tex. Civ. App. 548, 105 S. W. 552.

Remedy for Failure to Pay Incumbrance Assumed.—A vendor reserved a lien upon land conveyed by him to secure the amount of an incumbrance on land given by the vendee in exchange, and which such vendee assumed to pay. The deed having been delivered to the vendee, the vendor could not recover back the land, either by reason of the vendee's failure to discharge such incumbrance or to furnish an abstract of title as agreed, and the latter could offset against the vendor's claim for such incumbrance damages for fraudulent representations made by his vendor in the sale. *Herring v. Mason*, 17 Tex. Civ. App. 559, 43 S. W. 797, affirmed in 93 Tex. 686, 70 op.

2. Specific Performance.

See the title SPECIFIC PERFORMANCE.

Where the parties contracted to exchange lands, and thereupon executed, each to the other, his bond for title, the defendant went into the possession of the land of the plaintiff, and afterwards received a conveyance from the plaintiff, and sold the land, and he and his vendees continued in the undisturbed possession, and have an undisputed and indisputable title; and the defendant did not convey to the plaintiff, and sold the land, and heveyed by him, but refused to do so, and persisted, by every means in his power, in resisting the plaintiff's right, held the facts are amply sufficient to entitle the plaintiff to have a conveyance decreed him. *Graham v. Stephen*, 15 Tex. 88, 96.

3. Rescission.

a. In General.

See the title RESCISSION, CANCELLATION AND REFORMATION.

In an equitable suit to rescind a contract involving a sale and exchange of both realty and personality, it is sufficient for plaintiff to offer, by his pleadings, to do equity, without specifically tendering back the property or part of the purchase price he has received. *Wells v. Houston*, 23 Tex. Civ. App. 629, 57 S. W. 584.

Where a plaintiff asks for a rescission of a trade of land, and to be reinstated to the lands conveyed by him, he must restore defendant to his original possession. *Paul v. Chenault* (Civ. App.), 44 S. W. 682.

Conditional Exchange.—Where a contract for the conditional exchange of lands is not executed in a reasonable time, the party not in default may rescind and recover back the property so contracted to be exchanged. *Joplin v. Fleming*, 38 Tex. 527.

b. For Failure of Title.

In order to justify a rescission of an exchange of property for failure of title, there must be not only a failure

of title in whole or in part, but danger of eviction. *Milby v. Hester* (Civ. App.), 94 S. W. 178.

An exchange of property could not be rescinded for failure of title, where the title conveyed rested on an adverse, uninterrupted possession, under color of title sufficient to bar all other claims, and there was no reasonable probability that plaintiff would not have the means in his possession of establishing such title if attacked in the future by a third person. *Milby v. Hester* (Civ. App.), 94 S. W. 178.

Void Lease as Evidence of Title.—

In an action to rescind a contract for an exchange of estates in lands for a certain period on the ground of defendant's misrepresentation as to his title, a lease to defendant of the lands in question, referring to a prior lease from the land department to his lessor, which it seems was void, should have been admitted in evidence, as conveying whatever title was then owned by the lessor. *Singleton v. Houston*, 35 Tex. Civ. App. 10, 79 S. W. 98, affirmed in 98 Tex. 632, no op.

c. Where Induced by Misrepresentation and Fraud.

See the title FRAUD AND DECEIT.

Where the execution of an agreement for an exchange of estates in lands for a certain period is obtained by the misrepresentation of one of the parties as to his title, it entitles the other to a rescission of the contract, not on the ground of a partial failure of consideration, but because the misrepresentation, even though innocently made, amounts to legal, if not actual, fraud. *Singleton v. Houston*, 35 Tex. Civ. App. 10, 79 S. W. 98, affirmed in 98 Tex. 632, no op.

Plaintiffs sued to cancel a deed given in exchange for land in a distant town, which they had not seen, on the ground of false representations as to the value of the property, the population of the town, the amount of business done, the natural advantages, and

improvements under way. Held, that a charge to find for plaintiffs if defendants made false and fraudulent representations, as charged, as to the kind, condition, and quality of the property, and they were material and relied on, and within a reasonable time after discovery plaintiffs offered to restore the property, and cancel the trade; and a charge that a material representation relates to the kind, condition, and quality of the property, believed and relied on by the persons to whom it is made, and inducing them to act as they would not otherwise have acted; and that a representation, to be material, must be in respect to an ascertainable fact, as distinguished from mere matter of opinion, probability, or expectation, and, if vague, or merely a loose, conjectural, or exaggerated statement, it is not a material representation,—clearly and correctly stated the law of the case. *Putnam v. Bromwell*, 73 Tex. 465, 11 S. W. 491.

Assumption of Debts—Other Debts than Those Stated.—

Where plaintiff, on making an exchange, assumed debts on the property received, that afterwards there prove to be other liens than those stated to him is not ground for rescission, where there was no evidence of fraud by the other party, who settled most, if not all, of them. *McGregor v. Johnston* (Civ. App.), 34 S. W. 407.

Misrepresentation as to Title.—

Where an exchange of lands was accomplished by fraudulent representations of one party as to the title of the land he conveyed, the other could have rescission of his deed. *Corbett v. McGregor* (Civ. App.), 84 S. W. 278.

Where the execution of an agreement for an exchange of estates in lands for a certain period is obtained by the misrepresentation of one of the parties as to his title, it entitles the other to a rescission of the contract, not on the ground of a partial failure of consideration, but because the mis-

representation, even though innocently made, amounts to legal, if not actual, fraud. *Singleton v. Houston*, 79 S. W. 98, 35 Tex. Civ. App. 10.

Misrepresentation as to Notes.—

A contract for an exchange of lands provided that plaintiff should assume a lien on certain of the lands conveyed to him, which was held by B. and P. as a part of the exchange. Defendant's ancestor transferred certain notes to plaintiff which he represented were deposited in a bank, which would be delivered to plaintiff on demand. The notes contained a vendor's lien on other land adjoining that conveyed to plaintiff; the purpose of transferring the notes being to enable plaintiff to get possession of such land by surrendering the notes to the vendor, or foreclosing the lien. It was thereafter discovered that the notes, instead of being deposited in the bank, had been pledged to B. and P. for the debt plaintiff had assumed. Held, that such misrepresentation was not ground for rescinding the exchange, as plaintiff, being bound to pay the B. and P. debt, on performing such obligation, could obtain possession of the notes. *Milby v. Hester* (Civ. App.), 94 S. W. 178.

Inducing Plaintiff to Forego Examination of Title.—Where there was nothing to raise even a suspicion that defendant's ancestor's representation that he had a perfect title to land conveyed to plaintiff in an exchange were intended or did in fact induce plaintiff to forego a more particular examination of the title, or that plaintiff in fact relied on such statement at all, the fact that such representation was untrue was not ground for a rescission of the exchange. *Milby v. Hester* (Civ. App.), 94 S. W. 178.

Failure of Agent to Notify Other Party as to Indorsement of Note.—

Failure of B., agent for plaintiff in exchange of land with M., wherein plaintiff assumed mortgage on M.'s land securing note indorsed by B., to in-

form plaintiff that he was indorser on note, while evidence of fraud, in connection with other matters, does not, as matter of law, establish it. *Beatty v. Bulger*, 28 Tex. Civ. App. 117, 66 S. W. 893.

Referring to Attorney Interested in Affecting Exchange.—Where, on an exchange of lands between plaintiff and defendant, defendant represented to plaintiff that defendant's title was good, and, not having an abstract, offered to furnish the opinion of an attorney, and selected one who was interested in effecting the exchange, who corroborated defendant's statement, when in fact the title was in litigation, plaintiff was entitled to a rescission of his deed to defendant. *Corbett v. McGregor* (Civ. App.), 84 S. W. 278.

Release—Evidence of Good Faith.—

A. exchanged land with B., who conveyed to C. A. represented to C. that the deed from A. to B. did not convey a good title, and thereupon C. released to A. In a suit to set aside that release as obtained by false and fraudulent representations, A. was allowed to show the judgment against him in a suit brought by B. to set aside a certain settlement on the ground that the title conveyed from A. to B. was invalid. Held that, even if the judgment did not go to show the invalidity of the title, it went to show A.'s good faith in representing the title to be invalid, and was therefore admissible. *Loftin v. Nally*, 24 Tex. 565.

d. For Refusal to Perform.

Where one party to executory contract for exchange of lands, refuses to perform, the other is entitled to rescission; the court can not compel acceptance of substitute offer. *Galbraith v. Reeves*, 82 Tex. 357, 360, 18 S. W. 696.

See decree approved canceling a contract for exchange of land, on account of the failure of the plaintiff to deliver possession of the land he had contracted to convey, or to surrender the lease notes for it, for the term it

had been leased, or to pay the money on such notes. The defendant had made a payment. This was secured in the decree by lien upon the land of the plaintiff upon which the payment had been made. *Galbraith v. Reeves*, 82 Tex. 357, 18 S. W. 696.

Where a vendee under a contract to exchange land refused to carry out the contract, his vendor could elect to rescind the contract and recover back the land conveyed or sue for its value and have the same enforced as a lien against the land. *Wright v. Bearrow*, 13 Tex. Civ. App. 146, 35 S. W. 190.

Reconveyance of Legal Title.—

Where deed and bond for title are executed contemporaneously for purpose of exchanging lands, the legal effect, as between the parties, is to entitle grantor in the deed to enforce reconveyance of legal title in case of default of grantee to comply with his obligation to convey. *Gibbons v. Ewer*, 2 Posey 250, 253; *Ross v. Armstrong*, 25 Tex. Supp. 355, 369.

Temporary Refusal to Give or Accept Conveyance.—A party is not released from his obligation to perform his contract by the fact that after making the contract, the plaintiff became apprehensive, that the defendant could not make him a good title, and thereupon refused, for a time, to perform his part of the contract, declining either to make a conveyance or to accept one from the defendant; and sought anxiously to be released from his bargain, and to obtain a rescission of the contract, where the plaintiff ultimately failing in this, performed his part of the contract, by making a conveyance which the defendant accepted without objection, nor could his refusal to accept a conveyance at that time, release the defendant from the obligation of his contract, or from the duty to make a conveyance when afterwards required, after he had accepted of the plaintiff's conveyance. His having tendered a deed at one

time, which was refused, did not release him from the obligation to deliver it when afterwards requested. While holding the plaintiff to the performance of his contract, the defendant was bound, at all times, to be ready to perform on his part. *Graham v. Stephen*, 15 Tex. 88, 97.

4. Lien.

See the title **VENDOR'S LIEN**.

A., holding title to certain lands charged with a lien to secure his debt to B., exchanged them with E. for the rights of E. in a homestead pre-emption claim not occupied for the time necessary to secure patent, and made such claim his homestead. Held, that A. acquired it subject to an equitable lien in favor of B. to secure the debt charged on the land exchanged for it. *Rose v. Taylor*, 17 Tex. Civ. App. 535, 43 S. W. 285, 44 S. W. 326.

It has been held in this state that in the exchange of lands under general warranties of title, if the title to one tract or any part of it fails, the grantee may sue the grantor on his covenant of warranty, and that he has a lien in the nature of a vendor's lien on the land he conveyed to his grantor to satisfy his damages. *Letcher v. Reese*, 24 Tex. Civ. App. 537, 539, 60 S. W. 256.

It has also been held that in cases of fraud entitling the grantee to a rescission of the sale or exchange, that equity will, in addition to restoring him to the possession of his lands, give him a lien on the land he received to cover any cash payments made or damages sustained. *Letcher v. Reese*, 24 Tex. Civ. App. 537, 539, 60 S. W. 256.

In the exchange of lands under warranty of title, one party has no vendor's lien on the land conveyed by him to satisfy a judgment based on unliquidated damages growing out of fraudulent representations concerning the lands conveyed to him. *Letcher v.*

Reese, 60 S. W. 256, 24 Tex. Civ. App. 537.

Where the title to land received by plaintiff in exchange for other land has failed, and he brings suit on the covenant of warranty for the agreed value of the land, and asks the enforcement of a vendor's lien against the tract conveyed by him, no question as to the creation of the lien by verbal contract is involved. *Parish v. White*, 5 Tex. Civ. App. 71, 24 S. W. 572.

Where land, exchanged for other land, has been conveyed by deed with general warranty, and title has failed, and suit is brought on such warranty, plaintiff, where rights of third persons have not intervened, is entitled to a lien on land, exchanged for such worthless title, for amount due him. *White v. Street*, 67 Tex. 177, 181, 2 S. W. 529.

5. Measure of Damages.

See the title DAMAGES, vol. 5, p. 824.

Eviction.—Party in possession under verbal contract for exchange of lands is entitled upon eviction to recover the value of the land less the unpaid purchase price, and whatever damages he sustained by reason of the loss of possession and title. *Johnson v. Hamilton*, 36 Tex. 270, 272.

Title to One Portion Failing.—When lands are exchanged, and title to one tract conveyed by deed with general warranty, fails, the true measure of damages is the value, as agreed on between the parties at the time of such exchange, and interest, or, if not agreed upon, the ascertained value, with interest. *White v. Street*, 67 Tex. 177, 181, 2 S. W. 529.

Contract Providing Measure—Evidence.—Where a contract to exchange property provides the mode of relief on rescission thereof and the measure of damages to defendant in case of failure of title to the property exchanged, evidence outside of the con-

tract, of the value of the land lost by failure of title is admissible where the contract has been fully executed and carried out by the parties. *Larkin v. Trammel*, 47 Tex. Civ. App. 548, 105 S. W. 552.

Estoppel to Complain of Error.—In an action for damages for breach of a contract of exchange of real estate the court charged at the special request of plaintiff that the measure of damage was the market values of the two tracts. Held, plaintiff can not complain that it was erroneous. *Roberts v. Zirkel* (Civ. App.), 54 S. W. 618, 619. See the title APPEAL AND ERROR, vol. 1, p. 313.

Interest on Agreed Value as Damages.—On an exchange of property, the measure of damages for false representations to the effect that there was a well on the land, was not the difference in value between the value of the land with a well and without it, but the difference between the value of the consideration given for the conveyance and the value of the land. *George v. Hesse*, 100 Tex. 44, 93 S. W. 107.

For property received by him in exchange, a party was to deliver other property within a reasonable time or pay its agreed value. Having afterwards sold the property, thus placing it out of his power to deliver it, he was, it seems, chargeable with interest on its agreed value from the date of such sale. *First Nat. Bank v. Lynch*, 6 Tex. Civ. App. 590, 25 S. W. 1042.

6. Pleading and Proof.

Where one party to an exchange of lands sued to rescind his deed because the exchange was accomplished by fraudulent misrepresentations of the other as to the title to the land conveyed by him, it was sufficient to allege the specific misrepresentation, without setting out the facts affecting the title. *Corbett v. McGregor* (Civ. App.), 84 S. W. 278.

Allegation, in a suit to rescind an exchange of land, that the land conveyed to plaintiff was worthless, is supported by evidence that there was no such land in existence as that described in the deed. *Paul v. Chenault* (Civ. App.), 44 S. W. 682.

II. Exchange of Goods.

Loss of Property as Excuse for Default.—Where there was a contract to give mules in exchange for other chattels, and the plaintiff complied, defendant can not refuse because his mules were lost. *Herrington v. Holman*, 25 Tex. Supp. 256.

Verbal Exchange with Delivery Sufficient.—Verbal exchange of personal property between husband and wife accompanied by delivery is valid. *Kendrick v. Taylor*, 27 Tex. 695, 699.

Contract Providing Measure of Damages.—A stipulation in a contract for the exchange of property that in case the exchange is not carried out by one of the parties the party in default shall pay to the other the value of the property to be received by him is not a contract to pay liquidated damages but is analogous to a contract of sale. *First Nat. Bank of Arlington v. Lynch*, 6 Tex. Civ. App. 590, 25 S. W. 1042.

Remedy of Party Deceived as to Number of Sheep.—Where, in an exchange of properties, one of the parties represents that there are 5,000 sheep on the ranch he wishes to exchange, and the other party believes and relies on this representation, but it turns out that there are in fact 600 less, the deceived party can recover for the deficiency. *Dargan v. Ellis*, 81 Tex. 194, 16 S. W. 789.

III. Exchange of Goods for Land.

Where consideration for sale of land is cotton, liability of purchaser is the same as if money had been advanced instead of cotton. *Brasher v. Davidson*, 31 Tex. 190, 192, 193.

Misrepresentation as to Value of Land.—A representation that land is

worth \$8,000, and on which party relies in making exchange, is one of fact, and not opinion. *Newton v. Ganss & Co.*, 7 Tex. Civ. App. 90, 93, 26 S. W. 81. See the title FRAUD AND DECEIT.

Subsequent acquirement by wife of title to slave, exchanged by her for land inures to the benefit of vendee of slave and makes both titles valid. *Clai-borne v. Tanner*, 18 Tex. 68, 77.

Party of Weak Intellect—Gross Inadequacy of Price.—Where there is gross inadequacy of price in making exchanges of property, a court of equity or an impartial jury will closely scrutinize facts and give weight to slight evidence of imposition and circumvention, where one party is of weak intellect. *McFaddin v. Vincent*, 21 Tex. 47, 57.

Misrepresentation—Refusal to Exchange.—If a person about to exchange land for personal property makes a statement that such land is worth \$8,000, when it is worth but \$4,000, and the value of such land is an important and material inducement to such contract of exchange, he can not recover if the other party refuses to trade. *Newton v. Ganss & Co.*, 7 Tex. Civ. App. 90, 92, 93, 26 S. W. 81.

Fraudulent Misrepresentation as to Number of Cattle.—In suit to rescind trade and recover land it appeared plaintiff, defendant and a third party had made agreement whereby the third party, upon consideration paid by plaintiff conveyed to defendant certain land, and defendant in consideration therefor conveyed to plaintiff a stock of cattle on the range. held, that plaintiff could rescind the trade, and recover the land conveyed to defendant by third party upon proof of fraudulent representations by defendant as to number of cattle sold. *Cabaness v. Holland*, 19 Tex. Civ. App. 383, 386, 47 S. W. 379, affirmed in 93 Tex. 680, no op.

Evidence Sustaining Finding of Fraud.—In a suit to set aside a sale of a shooting gallery, for which plaintiff and his wife transferred to defendant certain real estate and paid a cash consideration, evidence held to sustain a finding that the transaction was void for fraud. *Parker v. Anderson* (Civ. App.), 85 S. W. 856.

Unmarketable Nature of Articles as

Evidence.—When the petition charges fraud, and raises the question of adequacy of consideration, evidence showing the unmarketable nature of articles for which land was exchanged, and the unreasonable burdens assumed by one of the grantors, is admissible to prove the attitude of defendant in relation to the transaction. *Davis v. Van Wie* (Civ. App.), 30 S. W. 492.

Excise.

See the titles INTOXICATING LIQUORS; LICENSES; REVENUE LAWS.

Exclamations.

See the title RES GESTÆ.

Exclusion.

Of aliens, see the title ALIENS, vol. 1, p. 174. Of witnesses by rule, see the title WITNESSES. Of ballots, see the title ELECTIONS, vol. 6, p. 816. Of passengers by carrier, see the title CARRIERS OF PASSENGERS, vol. 3, pp. 803, 966, et seq. See, also, the titles BENEFICIAL AND BENEVOLENT ASSOCIATIONS, vol. 2, p. 756; CORPORATIONS, vol. 4, p. 682; RELIGIOUS SOCIETIES; WAR. As to exclusion from possession, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

Exclusive Jurisdiction.

See the title COURTS, vol. 5, p. 334, et seq.

Exclusive Possession.

See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

Exclusive Privileges.

See the titles FERRIES; FRANCHISES; MONOPOLIES AND CORPORATE TRUSTS. See, also, the titles CORPORATIONS, vol. 4, p. 836, et seq.; IMPAIRMENT OF OBLIGATION OF CONTRACTS; MUNICIPAL CORPORATIONS; TURNPIKES AND TOLLROADS. As to privilege to manufacture gas, see the title GAS. As to water privileges, see the title WATER COMPANIES AND WATERWORKS.

Exclusive Rights.

As to minerals, see the title MINES AND MINERALS. As to patents, see the title PATENTS AND TRADEMARKS.

Excommunication.

See the title RELIGIOUS SOCIETIES.

Excursion Tickets and Excursions.

See the title CARRIERS OF PASSENGERS, vol. 3, p. 830.

Excuse.

For nonperformance or delay, see the title CONTRACTS, vol. 4, p. 622, et seq. As to excuse for nondelivery or damage by carrier, see the title CARRIERS OF GOODS, vol. 3, p. 528, et seq. As to excuse for nonperformance of master's duty, see the title MASTER AND SERVANT. As to excuse for want of presentment, demand or notice, see the title BILLS, NOTES AND CHECKS, vol. 2, pp. 995, et seq., 1000, et seq., 1006, et seq. As to excuse for laches and delay, see the titles LACHES; LIMITATION OF ACTIONS AND ADVERSE POSSESSION; SPECIFIC PERFORMANCE. As to excuse for trespass, see the title TRESPASS. As to excuse for default, see the title JUDGMENTS AND DECREES. As to excuse from jury service, see the title JURY. As to excuse for delay or nondelivery of telegram, see the title TELEGRAPHS AND TELEPHONES.

Executed and Executory Consideration.

See the title CONTRACTS, vol. 4, p. 589.

Executed Contract.

See the title CONTRACTS, vol. 4, p. 558.

Executed Trust.

See the title TRUSTS AND TRUSTEES.

EXECUTION AGAINST THE BODY AND ARREST IN CIVIL CASES.

CROSS REFERENCES.

See the titles FALSE IMPRISONMENT; IMPRISONMENT FOR DEBT.

Sheriff's return of *capias ad respondendum* "executed personally" is prima facie evidence of personal jurisdiction of a court of sister state. Reid v. Boyd, 13 Tex. 246.

Execution and Proof of Documents.

See the title DOCUMENTARY EVIDENCE, vol. 6, p. 531, and references made. See, also, the titles BEST AND SECONDARY EVIDENCE, vol. 2, p. 796; LOST INSTRUMENTS AND RECORDS; WILLS.

Execution of Powers.

See the title POWERS.

EXECUTIONS.

BY T. B. BENSON.

I. Definition, 239.

II. Different Writs of Execution, 240.

III. Property Subject to Execution, 240.

- A. Power of Legislature, 240.
- B. Statutory Provision, 240.
- C. Property or Interests of Debtor, 240.
- D. By Consent of Debtor, 240.
- E. Property Subject to Attachment, 241.
- F. Personal Property, 241.
 - 1. Money, 241.
 - 2. Crops, 241.
 - 3. Improvements, 241.
 - 4. Chattels Real, 241.
 - 5. Franchises, 242.
 - 6. Corporate Stocks, 242.
 - 7. Choses in Action, 242.
 - 8. Proceeds of Another Execution, 243.
- G. Real Property, 243.
 - 1. In General, 243.
 - 2. School Lands, 244.
 - 3. Certificate Lands, 244.
- H. Particular Estates and Interests, 244.
 - 1. Contingent Interests, 244.
 - 2. Life Estates, 244.
- I. Equitable Estates and Interests, 244.
 - 1. At Common Law, 244.
 - 2. Under English Statute, 244.
 - 3. Under Texas Statute, 244.
- J. Property in Custody of Law, 246.
- K. Property Subject to Lien, 246.
- L. Property Mortgaged, 246.
 - 1. Interests of Mortgagor, 246.
 - 2. Interests of Mortgagee, 248.
- M. Property Conveyed, 248.
 - 1. Interests of Vendor, 248.
 - 2. Interests of Purchaser, 251.

- N. Property Assigned, 252.
- O. Property Exchanged, 252.
- P. Property Hired, 252.
- Q. Property Loaned, 253.
- R. Property in Possession of Particular Persons, 253.
 - 1. Agents and Attorneys, 253.
 - 2. Third Persons, 253.
- S. Property Owned by Particular Persons, 254.
 - 1. Partners, 254.
 - 2. Cotenants, 254.
 - 3. Private Corporations, 254.
 - 4. Municipal Corporations, 254.
 - 5. Husband and Wife, 254.
 - 6. Landlord and Tenant, 254.
 - 7. Decedents, 254.
 - 8. Devisees and Legatees, 254.
- T. Determining Whether Property Subject to Execution, 254.
 - 1. As of What Time, 254.
 - 2. Who May Raise Question, 254.

IV. Property Exempt from Execution, 254.

V. Form and Requisites of Writ, 254.

- A. In General, 254.
- B. Statutory Provision, 254.
- C. Conformity to Judgment, 255.
- D. Description of Judgment, 256.
- E. Reference to Judgment, 257.
- F. Description of Parties, 257.
 - 1. Plaintiffs, 257.
 - 2. Defendants, 258.
- G. Description of Amount, 259.
- H. Description of Property, 259.
- I. Recital of Death of Party, 259.
 - 1. In General, 259.
 - 2. Source of Information, 259.
- J. Recital of Affidavit to Obtain Writ, 259.
- K. Recital of Issuance of Prior Execution, 259.
- L. Caption or Title, 260.
- M. Indorsement, 260.
- N. Teste and Seal, 260.
- O. Of Execution Issued after Remand, 260.
- P. Irregularities, 261.
 - 1. Effect, 261.
 - 2. Objections, 261.

VI. Amendment of Writ, 261.

- A. In General, 261.
- B. Time of Amendment, 261.

VII. Construction of Writ, 262.

VIII. Validity of Writ, 262.

IX. Issuance of Writ, 262.

- A. Statutory Provision, 262.

- B. What Amounts to Issuance, 262.
- C. Necessity for Issuance, 262.
- D. Compelling Issuance, 262.
- E. Power to Issue Writ, 263.
 - 1. Of Courts, 263.
 - a. In General, 263.
 - b. Court of Equity, 263.
 - c. Mayor's Court, 263.
 - d. Justice of the Peace, 263.
 - e. On Remand, 263.
 - 2. Of Clerks of Court, 263.
- F. Parties to Issuance, 263.
 - 1. In Whose Favor Writ Issued, 263.
 - 2. Against Whom Writ Issued, 263.
- G. Prerequisites to Issuance, 265.
- H. To What County Writ Issued, 265.
 - 1. County Where Judgment Rendered, 265.
 - 2. County Other than One Where Judgment Rendered, 265.
 - a. In General, 265.
 - b. Necessity for Issuance to County Where Judgment Rendered, 265.
 - c. Form and Requisites of Writ, 266.
 - 3. To New County Formed from One Where Judgment Rendered, 267.
 - 4. To New County Where Abstract of Judgment Filed, 267.
 - 5. Simultaneous Issuance to Different Counties, 267.
- I. Issuance on Judgment, 267.
 - 1. Necessity for Judgment, 267.
 - 2. Proof of Judgment, 267.
 - 3. Nature of Judgment, 268.
 - a. In General, 268.
 - b. Finality, 268.
 - c. Direction for Issuance, 268.
 - d. Designation of Property for Levy, 269.
 - e. Pecuniary Judgment, 269.
 - f. Certainty, 269.
 - g. Recording and Indexing, 269.
 - h. Lost Judgment, 269.
 - i. Satisfied Judgment, 270.
 - j. Vacated Judgment, 270.
 - k. Void Judgment, 271.
 - l. Erroneous Judgment, 272.
 - m. Judgment by Default, 272.
 - n. Judgment on Confession, 272.
 - o. Judgment Stayed, 272.
 - p. Judgment Enjoined, 272.
 - q. Judgment Rendered on Notice by Publication, 272.
 - r. Judgment Rendered on Foreign Judgment, 273.
 - s. Judgment Rendered in Violation of Stipulation, 273.
 - t. Judgment of Revival, 273.
 - u. Judgment of Foreclosure, 273.

- v. Judgment for Cost, 273.
- w. Judgment in Action for Trial of Right to Property, 273.
- x. Judgments of Particular Courts, 273.
- y. Judgments against Particular Persons, 273.
 - (1) Receivers, 273.
 - (2) Executors and Administrators, 273.
 - (3) Person Not Party, 273.
- z. Judgment Where Appeal Taken, 273.
 - (1) Judgment of Lower Court, 273.
 - (a) Without Supersedeas Bond, 273.
 - (b) With Supersedeas Bond, 274.
 - (c) Where Appeal Abandoned, 274.
 - (2) Judgment of Appellate Court, 274.
 - (a) In General, 274.
 - (b) On Affirmance, 275.
 - (c) On Reversal, 275.
- 4. On Several Judgments, 275.
- J. Issuance on Decree, 275.
- K. Issuance on Order for New Trial, 275.
- L. Issuance on Bond, 275.
- M. Time of Issuance, 276.
 - 1. Issuance Instantly, 276.
 - 2. After Adjournment of Term, 276.
 - 3. Within Twenty Days, 276.
 - 4. After Twelve Months, 276.
 - 5. After Death of Party, 279.
 - a. Plaintiff, 279.
 - b. Defendant, 279.
 - (1) In General, 279.
 - (2) Where Judgment Revived by Scire Facias, 279.
 - (3) Where There Are Several Defendants, 279.
 - 6. After Receipt of Mandate, 279.
 - 7. While Suit for Injunction Pending, 279.
 - 8. Effect of Premature Issuance, 279.
- N. Forged Issuance, 279.
- O. Irregular Issuance, 279.
- P. Of Alias and Pluries Writs, 280.
- Q. Presumptions, 280.
- R. Effect of Issuance, 280.
- X. Receipt of Writ by Officer, 281.**
- XI. Abandonment and Withdrawal of Writ, 281.**
- XII. Enjoining Execution, 281.**
 - A. In General, 281.
 - B. Jurisdiction and Venue, 281.
 - 1. Court Where Judgment Rendered, 281.
 - 2. Other Courts, 282.
 - 3. Retention of Jurisdiction, 283.
 - C. Parties, 283.
 - 1. Plaintiffs, 283.

- a. Owner, 283.
- b. Holder of Record Title, 284.
- c. Trustee, 284.
- d. Cestui Que Trust, 284.
- e. Vendor, 284.
- f. Purchaser, 284.
- g. Mortgagee, 285.
- h. Attaching Creditor, 285.
- i. Garnishee, 285.
- j. Husband and Wife, 285.
- k. Surety, 286.
 - l. Stranger to Judgment, 286.
- 2. Defendants, 286.
- D. Grounds for Relief, 287.
 - 1. In General, 287.
 - 2. As Determined by Existence of Other Remedy, 287.
 - a. In General, 287.
 - b. Action for Damages, 287.
 - c. Trespass to Try Title, 287.
 - d. Trial of Right of Property, 288.
 - e. Motion for New Trial, 289.
 - f. Appeal, 289.
 - g. Certiorari, 289.
 - h. Supersedeas, 289.
 - i. Legal Defenses, 289.
 - 3. As Determined by Injury to Plaintiff, 290.
 - a. In General, 290.
 - b. Cloud on Title, 290.
 - 4. As Determined by Nature of Execution, 292.
 - a. Void Execution, 292.
 - b. Voidable Execution, 292.
 - c. Excessive Execution, 293.
 - 5. As Determined by Existence of Judgment, 293.
 - 6. As Determined by Nature of Judgment, 293.
 - a. Valid Judgment, 293.
 - b. Void Judgment, 293.
 - c. Voidable Judgment, 293.
 - d. Dormant Judgment, 293.
 - e. Lost Judgment, 293.
 - f. Satisfied Judgment, 293.
 - (1) In General, 293.
 - (2) By Prior Levy, 294.
 - (3) By Delivery of Property, 294.
 - (4) By Discharge in Bankruptcy, 294.
 - 7. As Determined by Time of Issuance, 294.
 - a. After Twelve Months, 294.
 - b. After Death of Party, 294.
 - 8. As Determined by Ownership of Property, 295.
 - 9. As Determined by Liability of Property to Execution, 296.
 - 10. As Determined by Manner of Levy, 296.
 - 11. As Determined by Release of Levy, 296.
 - 12. As Determined by Manner of Sale, 297.

13. As Determined by Right to Contribution between Defendants, 297.
- E. Prerequisites to Bringing Suit, 297.
- F. Multifariousness, 297.
- G. Petition, 297.
 1. Nature, 297.
 2. Verification, 297.
 3. Sufficiency of Allegations, 298.
 4. Alleging Particular Facts, 298.
 - a. Want of Other Remedy, 298.
 - b. Pursuit of Other Remedy, 298.
 - c. Injury to Petitioner, 298.
 - (1) In General, 298.
 - (2) Cloud on Title, 298.
 - d. Interest of Petitioner, 299.
 - e. Value of Property, 299.
 - f. Invalidity of Judgment, 299.
 - g. Satisfaction of Judgment, 299.
 - h. Issuance of Prior Executions, 299.
 5. Construction of Allegations, 300.
- H. Plea or Answer, 300.
- I. Burden of Proof, 300.
- J. Instructions, 300.
- K. Verdict, 300.
- L. Time of Issuance, 300.
 1. Within Six Months, 300.
 2. Within Twelve Months, 300.
 3. During Pendency of Appeal, 301.
- M. Judgment, 301.
 1. Requisites and Validity, 301.
 2. Perpetuating Injunction, 302.
 3. Dissolving Injunction, 302.
 4. Reviving Original Judgment, 303.
 5. Substituting Destroyed Judgment, 303.
 6. Enjoining Writ of Possession, 303.
- N. Return of Writ of Injunction, 303.
- O. Appeal, 303.
- P. Effect of Injunction, 303.
 1. On Levy and Lien, 303.
 2. On Sale, 303.
 3. On Recovery on Injunction Bond, 304.
- Q. Costs of Injunction, 304.
- R. Damages for Wrongful Injunction, 304.

XIII. Staying, Quashing and Superseding, 305.

- A. Staying Execution, 305.
 1. Grounds for Stay, 305.
 2. Contract for Stay, 305.
 3. Effect of Stay, 306.
 - a. On Judgment Lien, 306.
 - b. On Issuance of Other Executions, 306.
 - c. As Release of Surety, 306.
- B. Quashing Execution, 306.

1. Time of Quashing, 306.
 2. Grounds for Quashing, 306.
 - a. Where Execution Void, 306.
 - b. Where Defects of Record, 306.
 - c. In Trial of Right of Property, 306.
 3. Proceedings for Quashing, 306.
 - a. Nature of, 306.
 - b. Notice, 306.
 - c. Hearing, 307.
 4. Appeal, 307.
- C. Superseding Execution, 307.

XIV. Abatement of Writ, 307.

XV. Withdrawal of Writ, 307.

XVI. Levy of Writ, 307.

- A. In General, 307.
- B. Necessity for, 307.
 1. To Preserve Judgment Lien, 307.
 2. To Bind Surety, 307.
 3. Where Property Described in Order of Sale, 307.
- C. Propriety of Levy, 307.
- D. Prerequisites to Levy, 307.
- E. Time of Making Levy, 307.
 1. After Twelve Months, 307.
 2. After Death, 308.
 3. After Return Day, 308.
 4. After Making Return, 308.
- F. By Whom Levy Made, 308.
 1. In General, 308.
 2. Sheriff, 308.
 3. Deputy Sheriff, 308.
 4. Constable, 308.
 5. Marshal, 308.
 6. Disqualification of Officer, 309.
 7. Duty and Liability of Officer, 309.
 - a. Duty, 309.
 - b. Liability, 309.
 - c. Under Indemnity Bond, 309.
- G. Who May Have Levy Made, 309.
- H. On What Property Levy Made, 309.
 1. Designated by Law, 309.
 2. Designated by Execution, 310.
 3. Designated by Parties, 310.
 - a. In General, 310.
 - b. By Defendant, 310.
 - (1) In General, 310.
 - (2) Where Property All of Same Class, 311.
 - (3) Where Right Denied, 311.
 - (a) No Request to Defendant, 311.
 - (b) Effect on Sale, 311.
 - (4) Where Right Afforded, 312.

- (5) Where Defendant Not Found after Search, 312.
- (6) Where Defendant Has No Other Property, 313.
- (7) Mode and Sufficiency of Pointing Out, 313.
- (8) Property That May Be Pointed Out, 314.
 - (a) Property Exempt, 314.
 - (b) Property of Surety, 315.
 - (c) Property of Third Person, 315.
- (9) Substituting Property, 315.
- c. By Plaintiff, 315.
- d. By Surety, 316.
- e. By Mortgagee, 316.
- f. By Claimant of Property, 316.
- I. On How Much Property Levied, 316.
- J. Manner of Making Levy, 317.
 - 1. In General, 317.
 - 2. Conformity to Statute, 318.
 - 3. Conformity to Direction of Plaintiff, 318.
 - 4. By Use of Force, 318.
 - 5. Of Execution from Another County, 318.
 - 6. Of Execution from Justice's Court, 318.
 - 7. On Land, 318.
 - 8. On Personality, 319.
 - a. In General, 319.
 - b. Statutory Provision, 319.
 - c. On Stock of Goods, 319.
 - d. On Cattle, 320.
 - e. On Crops, 321.
 - f. On Corporate Stocks, 322.
 - g. On Slaves, 322.
 - h. Dependent on Possession, 322.
 - 9. On Property of Particular Persons, 322.
 - a. Of Codefendants, 322.
 - b. Of Partners, 322.
 - c. Of Husband and Wife, 323.
 - d. Of Pledgee, 323.
- K. Sufficiency of Levy, 323.
 - 1. On Land, 323.
 - a. Description of Property, 323.
 - (1) In General, 323.
 - (2) Presumptions, 326.
 - (3) Construction, 327.
 - (4) Aided by Deed, 327.
 - (5) Effect of Insufficient Description, 327.
 - b. Description of Owner, 327.
 - 2. On Personality, 327.
 - 3. Irregular Levy, 328.
 - a. Presumptions, 328.
 - b. Effect on Purchaser, 328.
 - c. Objections, 328.
 - d. Waiver, 328.
- L. Indorsement of Levy, 328.
- M. Signing of Levy, 329.

- N. Amendment of Levy, 329.
- O. Custody of Property, 329.
- P. Consent of Owner to Levy, 330.
- Q. Proof of Levy, 330.
- R. Quashing and Setting Aside Levy, 330.
- S. Effect of Levy, 330.
 - 1. On Title and Possession, 330.
 - 2. As Satisfaction of Judgment, 331.
 - 3. As Creation of Lien, 332.
 - 4. As Estoppel, 332.
 - 5. As Trespass, 332.
- T. Second Levy, 332.

XVII. Return of Writ, 332.

- A. Statutory Provision, 332.
- B. Necessity for, 332.
- C. Time of Making—Return Day, 333.
- D. Manner of Making, 333.
- E. Form and Requisites, 334.
- F. Contents, 334.
 - 1. Description of Property, 334.
 - 2. Value of Property, 334.
 - 2. Lien of Prior Executions, 334.
 - 4. Alleging Levy, 334.
 - 5. Alleging Sale, 335.
- G. Duty and Liability of Officer, 335.
- H. Amendment, 335.
- I. Quashing and Setting Aside, 336.
- J. Proof of Return, 336.
- K. Effect of Return, 336.
 - 1. Conclusiveness, 336.
 - 2. On Purchaser, 339.
 - 3. As Evidence, 339.
 - 4. As Constructive Notice, 339.
 - 5. Of Return without Sale, 339.

XVIII. Entry of Levy and Return, 339.

- A. On Writ, 339.
- B. On Docket, 340.

XIX. Lien and Priorities, 340.

- A. Liens, 340.
 - 1. Commencement, 340.
 - a. From Date of Issuance, 340.
 - b. From Date of Levy, 341.
 - c. From Date of Indorsement, 341.
 - 2. Termination, 341.
 - a. At Return Day, 341.
 - b. By Death of Party, 341.
 - c. By Return without Sale, 341.
 - d. By Replevin, 341.
 - e. By Delivery Bond, 341.

- f. By Act of Defendant, 341.
 - g. By Removal of Property, 341.
 - h. By Postponement of Levy, 341.
 - i. By Reversal of Judgment, 342.
 - j. By Existence of War, 342.
- B. Priorities, 342.
 - 1. Between Different Executions, 342.
 - 2. Between Executions and Other Liens, 343.
 - a. Execution and Conveyance, 343.
 - b. Execution and Mortgage, 346.
 - c. Execution and Contract to Convey, 347.
 - d. Execution and Contract to Reconvey, 347.
 - e. Execution and Purchase Money Note, 347.
 - f. Execution and Distress Warrant, 347.
 - g. Execution and Equitable Lien, 348.
 - h. Execution and Landlord's Lien, 348.

XX. Satisfaction and Discharge, 349.

- A. What Amounts to Satisfaction, 349.
 - 1. Payment, 349.
 - a. In General, 349.
 - b. In Money, 349.
 - c. In Draft, 349.
 - d. To Attorney, 349.
 - e. After Return Day, 349.
 - 2. Receipt of Creditor, 349.
 - 3. Levy, 350.
 - 4. Replevin, 350.
 - 5. Sale, 350.
 - 6. Payment on Judgment, 350.
- B. To Whom Made, 350.
- C. Entry of Satisfaction, 350.
- D. Proof of Satisfaction, 350.
- E. Setting Aside Satisfaction, 351.

XXI. Supplementary Proceedings, 351.

XXII. Sale, 351.

XXIII. Claims of Third Persons, 351.

- A. Who May Assert, 351.
- B. Procedure, 351.

XXIV. Wrongful Execution, 352.

- A. Rights and Liabilities, 352.
 - 1. Rights, 352.
 - 2. Liabilities, 352.
- B. Grounds of Action, 353.
 - 1. In General, 353.
 - 2. Necessity for Levy, 353.
 - 3. Levy on Land, 353.
 - 4. Levy on Property of Third Person, 353.
 - 5. Levy on Interests of Partnership, 353.

6. Levy on Property of Decedent, 354.
7. Levy on Property in Custody of Law, 354.
8. Levy on Exempt Property, 354.
9. Dependent upon Who Receives Proceeds, 354.
- C. Damages, 354.
 1. Elements, 354.
 - a. Injury to Business, 354.
 - b. Loss of Credit, 354.
 - c. Interest, 354.
 - d. Attorney's Fees, 354.
 - e. Mental Suffering, 355.
 - f. Consequential Damages, 355.
 2. Measure of, 355.
 - a. In General, 355.
 - b. Value of Property, 355.
 - c. Where Levy on Exempt Property, 356.
 3. Exemplary, 356.
 4. Mitigation, 358.
- D. Procedure, 358.
 1. Prerequisites to Action, 358.
 2. Election of Remedies, 358.
 3. Joinder of Causes of Action, 358.
 4. Parties, 358.
 5. Jurisdiction, 359.
 6. Venue, 359.
 7. Complaint, 359.
 8. General Denial, 359.
 9. Special Plea, 360.
 10. Burden of Proof, 360.
 11. Evidence, 360.
 12. Instructions, 361.
 13. Submission to Jury, 362.
 14. Verdict, 362.

CROSS REFERENCES.

See the titles ATTACHMENT, vol. 2, p. 296; EXECUTION AGAINST THE BODY AND ARREST IN CIVIL CASES, ante, p. 228; EXEMPTIONS FROM EXECUTION AND ATTACHMENT; GARNISHMENT; HOME-STEAD EXEMPTIONS; JUDICIAL SALES; SHERIFFS' SALES.

I. Definition.

"Execution is defined to be the act of carrying into effect the final judgment of a court. The writ which authorizes the officer so to carry into effect such judgment is also called an execution." Lockridge v. Baldwin, 20 Tex. 303, 306; Borden v. Tillman, 39 Tex. 262, 273.

"A writ of execution is the embodied power of the court, in the

shape of a command to a ministerial officer, respecting the rights of the parties to the judgment; and imposing upon the officer certain duties and liabilities prescribed by law." Lockridge v. Baldwin, 20 Tex. 303, 308; Morris v. Morgan, 92 Tex. 92, 45 S. W. 1002; Henry v. Moore, 1 App. Civ. Cases, §§ 880, 882.

Process to Carry Judgment into Effect.—"The term, execution, applies to all processes issued to carry into effect

the final judgment of a court. Any writ, which authorizes the officer to carry into effect such judgment, is an execution." *Pierson v. Hammond*, 22 Tex. 585, 587.

Process under Which Property May Be Sold.—Any process issuing from a district court under which property may be sold after final judgment is an execution. *Pierson v. Hammond*, 22 Tex. 585, 587; *Borden v. McRae*, 46 Tex. 396; *Smithwick v. Kelly*, 79 Tex. 564, 576, 15 S. W. 486.

The word "execution" as used in art. 3772, Pas. Dig., when considered in reference to a judgment for money meant such process as authorizes the seizure and sale of the judgment debtors' property to satisfy the judgment. *Gruner v. Westin*, 66 Tex. 216, 219, 18 S. W. 512.

Order of Sale.—Any writ which authorizes the officer to carry into effect the final judgment of a court, is an execution; and the claimant of property seized by virtue of an order of sale is entitled to the same remedies in asserting the claim, as exist under the levy of any other form of execution. *Pierson v. Hammond*, 22 Tex. 585.

II. Different Writs of Execution.

Writ of Capias Ad Satisfaciendum.—See the titles EXECUTION AGAINST THE BODY AND ARREST IN CIVIL CASES, ante, p. 228; IMPRISONMENT FOR DEBT.

Writ of Venditioni Exponas.—See the title VENDITIONI EXPONAS.

Writ of Possession.—See the title POSSESSION, WRIT OF.

III. Property Subject to Execution.

A. POWER OF LEGISLATURE.

The legislature has power to subject to execution property previously exempt. *Portis v. Parker*, 22 Tex. 699, 707.

B. STATUTORY PROVISION.

To satisfy pecuniary judgments, under the execution act of 1842, personal property, uncultivated lands, slaves, and improved lands and homestead were subject to execution in the order named. *Price v. Brady*, 21 Tex. 614, 617.

C. PROPERTY OR INTERESTS OF DEBTOR.

In order for property to be subject to levy and sale under an execution, it must be owned by the execution debtor at the time of levy and sale. *Forbes, etc., Co. v. Hill*, Dallam 486, 487; *McCargo v. Smith*, 23 Tex. Civ. App. 714, 58 S. W. 188; *Pinkard v. Willis & Bro.*, 24 Tex. Civ. App. 69, 72, 57 S. W. 891, affirmed in 94 Tex. 692, no op.; *Lewis v. Davidson* (Civ. App.), 29 S. W. 403, 404; *Perryman v. Rayburn* (Civ. App.), 30 S. W. 915; *Barnes v. Krause* (Civ. App.), 53 S. W. 92, affirmed in 93 Tex. 724, no op.; *Massie v. McKee* (Civ. App.), 56 S. W. 119.

If the execution debtor has at the time of levy no right in law to take property levied on, or to sustain a suit for it, it is not subject to the execution, because the execution can not go beyond the right of the defendant in the property. *Vickery v. Ward*, 2 Tex. 212, 216.

No property or interest in property is subject to sale under execution or like process, unless the debtor, if sui juris, has power to pass title to such property or interest in the property by his own act. *Moser & Son v. Tucker*, 87 Tex. 94, 26 S. W. 1044.

D. BY CONSENT OF DEBTOR.

Where property was attempted to be sold on execution sale and an agreement was obtained from the person who was the real owner of the property providing "I hereby agree that the above property may be made use of for the purpose of the above advertisement" such agreement can not be taken as a power authorizing the sale of the land, as it uses no words of

bargain, sale or conveyance and is without consideration and without a seal. *Leland v. Wilson*, 34 Tex. 79.

E. PROPERTY SUBJECT TO ATTACHMENT.

See the title *ATTACHMENT*, vol. 2, p. 331.

F. PERSONAL PROPERTY.

1. Money.

Money may be taken in execution the same as any other property. *Hamilton v. Ward*, 4 Tex. 356, 357.

2. Crops.

Growing crops are subject to sale under execution. *Willis v. Moore*, 59 Tex. 628.

Crops fit for harvesting may be levied on as personal chattels. *Horne v. Gambrell*, 1 White & W. Civ. Cas. Ct. App. § 997; *Willis v. Moore*, 59 Tex. 628, 631.

Crops, whether growing or standing in the field ready to be harvested, are, when produced by annual cultivation, no part of the realty; they are liable to voluntary transfer as chattels, and may be seized and sold under execution. *Willis v. Moore*, 59 Tex. 628.

Where land is leased on condition that a third of the crop shall be given to the owner in payment of rents, the owner acquires no title to the part of the crop reserved for rent until it is set apart to him by the tenant; hence a creditor of the tenant may levy an execution thereon subject to the landlord's lien, and the latter is not entitled to the possession of such property, but may claim payment of his claim out of the proceeds. *Pace v. Sparks*, 1 Posey Unrep. Cas. 402.

3. Improvements.

A mere claim for compensation for improvements made on the land is not such an interest as is subject to execution. *Mooring v. McBride*, 62 Tex. 309.

An interest in land only to extent of a right to recover for improvements is

not subject to forced sale, under a writ of execution. *Hendricks v. Snediker*, 30 Tex. 296, 308.

In 1846, one B. avowed his wish to purchase the town lot in controversy for his two sons, and having then purchased it, he said, on several occasions in 1847 and 1848, that he had given it to his son Francis, who, in the spring of 1847, went into possession of it, improved it, and subsequently occupied and claimed it as his own. No consideration of any kind passed, and B. died in 1850, without making any conveyance or other disposition of the property. H., the plaintiff in this action of trespass to try title, recovered a money judgment against Francis in 1856, levied on the lot as his property and bought it at the sheriff's sale, in March, 1857. Held, that Francis, as a donee or purchaser from his father, acquired no title or right which could be protected or enforced by the courts in his favor, or in favor of any one claiming under him; that his improvements, being made without his father's consent, and for his own benefit, with full knowledge of the condition of the title, raised no equity which the courts could enforce; and that if he had any right to compensation for his improvements, it was an uncertain right, ascertainable only by decree, and was not subject to execution, so as to vest in the plaintiff by virtue of his purchase at the sheriff's sale. *Curlin v. Hendricks*, 35 Tex. 225.

4. Chattels Real.

Lessee of real estate for fixed term has ordinarily an estate therein subject to execution. *Moser & Son v. Tucker & Co.*, 87 Tex. 94, 97, 26 S. W. 1044.

Estates of tenants at will or at sufferance are not subject to execution. *Moser & Son v. Tucker Co.*, 87 Tex. 94, 97, 26 S. W. 1044.

Where Right to Sublet Restricted by Agreement.—A leasehold interest under a lease making the lessee's right

to sublet conditional upon the lessor's permission, or giving him permission to sublet to a responsible party, thus reposing a personal trust in him, is not subject to execution against the lessor, and a levy thereon can not be upheld by virtue of the lessor's consent to have the leasehold subjected to the debt. *Boone v. First Nat. Bank*, 17 Tex. Civ. App. 365, 43 S. W. 594.

Where Right to Sublet Restricted by Statute.—Under Sayles' Civ. St. art. 3122, providing that persons leasing lands or tenements shall not rent or lease them during the term of the lease to any other person without first obtaining the landlord's consent, a lessee's interest can not be subjected to the payment of his debts in the absence of an agreement which permits assignment or subletting at the will of the lessee. *Moser v. Tucker*, 87 Tex. 94, 26 S. W. 1044; *Moses v. Tucker*, (Civ. App.), 26 S. W. 1105.

A transfer by a lessee of the leased premises without the landlord's consent could only make the assignee a tenant at will or at sufferance, dependent upon the will of the landlord. Such estate, even if the transfer were fraudulent, would not be subject to seizure for the debts of the lessee making such transfer. *Moser & Son v. Tucker & Co.*, 87 Tex. 94, 26 S. W. 1044.

It seems that even if by the terms of the lease the lessee be allowed to sublet, that such power could not be exercised by a levy and sheriff sale of the term under execution against the lessee. *Moser & Son v. Tucker & Co.*, 87 Tex. 94, 26 S. W. 1044.

5. Franchises.

If the corporate franchises of a corporation can only be exercised on a particular lot in a city, then such lot would be an incident to the corporation, and could not be sold under execution. *Palestine v. Barnes*, 50 Tex. 538.

Under the act of December 19, 1857,

the railroad track franchise and chartered powers and privileges of a railroad company were made subject to execution. *Central, etc., R. Co. v. Henning*, 52 Tex. 466.

6. Corporate Stocks.

If by any proper means the officer who levies the execution can ascertain the number of shares owned by the debtor, there is no doubt of his authority to levy an execution upon so many of them as may be proper to satisfy it, as in other cases; but when he neither possesses nor can acquire such knowledge he can not make a lawful levy and sale. By art. 199, Rev. Stat., in garnishment proceedings the creditor is entitled to ascertain by the answer of the corporation what number of shares, if any, the debtor owns in such corporation. These shares so ascertained shall be ordered to be sold, or so much thereof as may be necessary. Rev. Stat., art. 208. *Keating v. Stone, etc., Live Stock Co.*, 83 Tex. 467, 18 S. W. 797.

Under arts. 2294, 2297, Rev. Stat., shares levied upon by notice to an officer of the corporation may be sold under execution. *Keating v. Stone, etc., Live Stock Co.*, 83 Tex. 467, 471, 18 S. W. 797.

At common law corporate shares not subject to levy and sale upon execution. *Keating v. Stone, etc., Live Stock Co.*, 83 Tex. 467, 471, 18 S. W. 797.

Shares in railroad corporations are personal property, and subject to execution. *Baker v. Wasson*, 53 Tex. 150, 156. See Rev. Stat., arts. 208, 209, 210, 2397 and 4138.

7. Choses in Action.

Quære, whether, as a general rule, choses in action can be levied upon and sold. *Menard v. Shaw*, 5 Tex. 334.

Choses in action not being assignable are not subject to sale under a scire facias at common law. *Price v. Brady*, 21 Tex. 614, 617.

Notes and accounts are not subject to be levied on and sold under process of execution. *Taylor v. Gillean*, 23 Tex. 508.

Under Execution Act of 1842.—"Personal or movable property might, in some connections, include choses in action, but I apprehend that such extension has never been given to the terms in statutes subjecting property to execution. Such expressions are merely the equivalents of the terms, goods and chattels; and under these choses in actions have not been included as the subjects of a *feri facias*. There is, then, no express authority under the statute for levying upon and selling choses in action in satisfaction of a judgment." *Price v. Brady*, 21 Tex. 614, 617.

Where certain certificates of the funded debt of the republic, concerning which the law provided that "they shall be transferable only on the books of the stock commissioner by the holder himself, his attorney or legal representative," were sold by virtue of an execution, and the stock commissioner refused to allow the sheriff to make the transfer on his books. Held, that the court would not compel him to do so. *Menard v. Shaw*, 5 Tex. 334.

§. Proceeds of Another Execution.

Where the sheriff has one execution in favor of and another against the same person, he may apply the money collected upon one to the satisfaction of the other. *Hamilton v. Ward*, 4 Tex. 356; *Walton v. Compton*, 28 Tex. 569, 575; *McClane v. Rogers*, 42 Tex. 214, 218; *Mann v. Kelsey*, 71 Tex. 609, 614, 12 S. W. 43; *Deware v. Wichita*, etc., Elevator Co., 17 Tex. Civ. App. 394, 398, 43 S. W. 1047.

It matters not that in the one case the party is the sole plaintiff, and in the other codefendant with another. *Hamilton v. Ward*, 4 Tex. 356.

Money in the hands of the sheriff, collected under an order of sale is-

sued upon a judgment foreclosing a vendor's lien upon the judgment creditor's homestead which has been voluntarily sold, is subject to a valid execution in the sheriff's hands. *Mann v. Kelsey*, 71 Tex. 609, 613, 12 S. W. 43.

Section 6, of act of Jan. 27, 1842, Pas. Dig. art. 3777, is simply declaratory of the antecedent law as to a sheriff's duty to satisfy an execution out of any money of the defendant coming into his hands. *Walton v. Compton*, 28 Tex. 569, 575.

Realized from Exempt Property.—Money in the hands of a sheriff realized by a judgment for damages, resulting from the seizure and conversion of exempt property, can not be applied in satisfaction of an execution held by such officer against the plaintiff. *Howard v. Tandy*, 79 Tex. 450, 452, 15 S. W. 578; *Cone v. Lewis*, 64 Tex. 331, 332.

Agreement between Creditor and Sheriff.—In anticipation of money coming into the hands of the sheriff under an execution which he holds in favor of the debtor against another party, no arrangement or understanding can be made between the creditor and the sheriff in advance of the receipt of the money arising from such execution by which the money is to be applied to the satisfaction of the execution in favor of the creditor, or any preference be given the creditor. *McClane v. Rogers*, 42 Tex. 214, 218.

G. REAL PROPERTY.

1. In General.

"The remedy given by statute to the judgment creditor against the real estate of the debtor is by process of execution, as against personal property, and not, as by the English law, a sequestration of the profits of the land by writ of *levari facias*, or the possession of a moiety, or the whole of the lands, by process of *elegit* and extent." *Young v. Smith*, 23 Tex. 598, 599; *Lockridge v. Baldwin*, 20 Tex.

303, 307. See Hart. Dig., arts. 1271-1287.

2. School Lands.

Sayles' Civ. St. art. 4218f, provided that, if the occupant of school lands has resided on his home section for three years, additional lands purchased by him from the commissioner may be patented at any time. Article 4218ff provides that, in case of the sale of such purchased tracts after the completion of the three years residence by the vendor, the vendee need not reside on or occupy such purchased tract. Held, that land, purchased from the commissioner, though unpatented, was subject to sale under execution against the purchaser after he had resided three years on his home section. *Martin v. Bryson*, 71 S. W. 615, 31 Tex. Civ. App. 98.

3. Certificate Lands.

Land located by virtue of a valid headright certificate is subject to levy and sale under an execution. *Morton v. Welborn*, 21 Tex. 772; *Barker v. Swenson*, 66 Tex. 407, 1 S. W. 117; *West v. Loeb*, 16 Tex. Civ. App. 399, 42 S. W. 612.

H. PARTICULAR ESTATES AND INTERESTS.

1. Contingent Interests.

Uncertain or contingent vested estates or rights in property may ordinarily be subjected to the payment of debts through execution. *Moser & Son v. Tucker & Co.*, 87 Tex. 94, 96, 26 S. W. 1044.

2. Life Estates.

A life estate in personal property is subject to execution. *Allen v. Russell*, 19 Tex. 87, 90. See the title RIGHT OF PROPERTY, TRIAL OF.

I. EQUITABLE ESTATES AND INTERESTS.

1. At Common Law.

Equitable interests were not subject to execution at common law. *Chase v. York County Sav. Bank*, 89 Tex.

316, 36 S. W. 406; *Edwards v. Norton*, 55 Tex. 405.

2. Under English Statute.

Trust estates were made subject to execution by Statute of 29 Charles II, § 3, but this act did not subject all equitable interests to sale. Under the decisions where that statute prevails trust estates are not liable to execution against the beneficiaries, except in case of a clear and simple trust for the benefit of the debtor; and the result of our decisions is to recognize a similar rule as to equitable estates in land under our statute. *Chase v. York County Sav. Bank*, 89 Tex. 316, 36 S. W. 406.

3. Under Texas Statute.

See post, "Supplementary Proceedings," XXI.

It could not be contended that our statute (Hart. Dig., art. 1345) in the article cited went further than the statute, 29 Charles II, in subjecting the equitable and trust estates to execution, and perhaps its terms would go so far. *Daugherty v. Cox*, 13 Tex. 209, 213.

"It may be that an equitable claim to title, or a resulting trust, may sometimes be subject to sale by execution, and yet every equity not subject to sale." *Daugherty v. Cox*, 13 Tex. 209, 212.

The sale of equities must depend upon the peculiar circumstances of each particular case. *Daugherty v. Cox*, 13 Tex. 209, 214; *Hendricks v. Snediker*, 30 Tex. 296.

When after the donation of lots by a railroad to a Catholic bishop, it executed a mortgage on all its property which mortgage was foreclosed, it was held that a reconveyance by the bishop to the purchaser at a foreclosure sale because the lots had not been used for church purposes, vested a legal title in the purchaser and the equitable interest in the railroad, so that a judgment creditor of the latter could subject the property to his claim. *Gabert*

v. Olcott (Civ. App.), 22 S. W. 286, reversed in 86 Tex. 121.

An uncertain equitable interest in land is not subject to sale under execution. Such a sale would involve ruinous sacrifice to the debtor, without effecting the purpose of the law in satisfying the claims of creditors. *Edwards v. Norton*, 55 Tex. 405; *Hendricks v. Snediker*, 30 Tex. 296.

An equitable interest in land is not subject to execution, except where it is a clear and simple trust for the benefit of the debtor alone. *Chase v. York County Sav. Bank*, 89 Tex. 316, 322, 36 S. W. 406.

Trusts for Accounting.—A mere equitable right to demand an accounting from a trustee is not such an interest in land as is subject to execution. *Chase v. York County Sav. Bank*, 89 Tex. 316, 323, 36 S. W. 406.

Eleven parties having contributed in various proportions funds used to purchase nine tracts of land, which they caused to be conveyed to one of their number as trustee, united in executing an instrument releasing their interest and title to such trustee and declaring the nature of the trust to be that such person had the absolute title and right to convey, but was trustee only for the purpose of accounting to them for the proceeds of the land when sold, in proportion to the amounts respectively contributed. Held, that this instrument placed the entire title to the land, legal and equitable, in the trustee, and left no interest in any of the beneficiaries which could be taken by levy on and sale of the land under execution against them. The interest of the beneficiaries was not such an interest in the land as was subject to levy, and it could be reached only by an equitable proceeding for that purpose. *Chase v. York County Sav. Bank*, 89 Tex. 316, 36 S. W. 406.

Spendthrift Trust.—Land, the legal title to which is in a trustee, whose duty it is to apply its income for the

use and benefit of the cestui que trust, the terms of the trust expressly declaring that the trust estate should not be subject to the debts of the latter, can not be attached on execution against him. *Wallace v. Campbell*, 53 Tex. 229, citing *Gamble v. Dabney*, 20 Tex. 69, 76.

Property in the possession of a cestui que trust under a testamentary direction permitting its use by him, is not subject to his debts, although it has been used by him for two years prior to the levy of an execution. *Herring v. Patten*, 18 Tex. Civ. App. 147, 44 S. W. 50.

Resulting Trust.—The interest of a beneficiary under a resulting trust is subject to title acquired under an execution sale of such interest. *Hirshfeld v. Howard* (Civ. App.), 60 S. W. 806, denying rehearing, 59 S. W. 55.

A certain equitable claim in a resulting trust may sometimes be subject to execution sale. *Daugherty v. Cox*, 13 Tex. 209, 213.

Where land sold under execution as the property of defendants' father was subject to a resulting trust in defendants' favor, the validity and effect of a deed executed by the father and his wife to defendants, intending to convey the property to them, was immaterial as against the purchaser at the sale. *Hicks v. Pogue*, 76 S. W. 786, 33 Tex. Civ. App. 333.

Trust for Maintenance.—A trust was for maintenance, with a power to the trustees of disposal of the property, except as to a certain part, which was limited over. Held, that that part could not be taken on execution against the cestui que trust. *Gamble v. Dabney*, 20 Tex. 69.

Where Sale Would Defeat Purposes of Trust.—The interest of one cestui que trust can not be sold on execution, where it is of so varying and determinate a character that the transfer would greatly interfere with the pur-

poses of the trust. *Gamble v. Dabney*, 20 Tex. 69.

J. PROPERTY IN CUSTODY OF LAW.

Property in custody of the law is not subject to execution. *Loeb v. Blum*, 2 Posey 445.

Property in the hands of a receiver, pending litigation, is not subject to levy and sale until after a final decree is rendered in the cause. *Edwards v. Norton*, 55 Tex. 405; *Texas Trunk R. Co. v. Lewis*, 81 Tex. 1, 16 S. W. 647.

Property of defendant in execution is not prohibited from levy and sale as being in custodia legis by being taken into the hands of a receiver as the property of a third party. *Farmers, etc., Nat. Bank v. Scott*, 19 Tex. Civ. App. 22, 45 S. W. 26.

Held under Bond for Trial of Right of Property.—Property which has been levied on under process and delivered to a claimant, who has executed a bond therefor under the statute providing for the trial of the right of property, is in custodia legis, and not subject to a subsequent levy of process against defendant in the first process. *Bailey v. Miers*, 1 White & W. Civ. Cas. Ct. App. § 84.

Where a stock of goods was assigned by the owners, and attachments were levied thereon in possession of the assignee, upon the assignee's obtaining a release of the attachment and regaining possession of the property upon giving bond as required by the statute for the trial of the right of property, the goods are in custodia legis, and are not subject to an execution issued against the assignor. *Le Gierse v. Pierce*, 2 Willson, Civ. Cas. Ct. App. § 89.

In Custody of Office under Writ of Sequestration.—While property remained in the hands of an officer under a writ of sequestration, issued out in an action to foreclose a chattel mortgage, it would be regarded as in

custodia legis, and not subject to seizure on execution, and that custody ceased after the property was replevied and taken from the custody of the officer, and while it was then subject to seizure by execution, the rights of plaintiff in the foreclosure suit were not impaired. *Krall v. Printing Press Co.*, 79 Tex. 556, 15 S. W. 565.

Levied on under Attachment.

Horses levied on under attachment as "they run on the range" in the country where the levy is made, are constructively in custodia legis. *Rice v. Miller*, 70 Tex. 613, 8 S. W. 317.

Property of Decedent.—See the title EXECUTORS AND ADMINISTRATORS.

K. PROPERTY SUBJECT TO LIEN.

Property upon which a factor has a lien for advances may be levied on subject to such advances. *Joost v. Scott*, 19 Tex. 473.

The existence of prior liens upon the property of the defendant furnishes the sheriff no justification for his failure to levy execution thereon. *Smothers v. Field, etc., Co.*, 65 Tex. 435, 439.

If defendant has an interest in the property subject to execution, it may be levied on and sold notwithstanding a third party may hold a lien with which it will be incumbered in the hands of the purchaser at the sale. *Garrity v. Thompson*, 64 Tex. 597.

L. PROPERTY MORTGAGED.

1. Interests of Mortgagor.

Mortgaged property, both real and personal, may be levied on and sold under an execution against the mortgagor. *Wright v. Henderson*, 12 Tex. 43; *Gillian v. Henderson*, 12 Tex. 47, 48; *Ballard v. Anderson*, 18 Tex. 377, 385; *Wootton v. Wheeler*, 22 Tex. 338, 339; *Baker v. Clepper*, 26 Tex. 629, 634; *Belt v. Raguet*, 27 Tex. 471, 472; *Raysor v. Reid*, 55 Tex. 266, 271; *Stiles v. Hill, etc., Co.*, 62 Tex. 429; *De La Vega v. League*, 64 Tex. 205.

213; *Garrity v. Thompson*, 64 Tex. 597; *Bracenridge v. Cobb*, 85 Tex. 448; 21 S. W. 1034, affirming 2 Tex. Civ. App. 161, 21 S. W. 614; *Mensing v. Axer*, 2 Posey 268; *Parker & Co. v. Benner, etc., Co.*, 1 App. Civ. Cases, § 64; *Blum v. Conrad*, 1 App. Civ. Cases, § 1217; *Gammage v. Silliman*, 2 App. Civ. Cases, § 14; *Wilkins v. Bryarly* (Civ. App.), 46 S. W. 266.

Where one holds the land of another as security for a debt, the ultimate right of property is with him who thus encumbers the land and this right may be levied on and sold under execution. *De La Vega v. League*, 64 Tex. 205.

W. held towards L. a position similar to that which a mortgagor holds towards a mortgagee. L. held the land as security for W.'s debt; the ultimate right of property remained with W., and this could not be divested except by sale in manner pointed out by the instrument. Our courts have well settled the principle that such an interest may be levied on and sold under execution. *De La Vega v. League*, 64 Tex. 205, 213.

If one who has encumbered his land again mortgages it and afterwards and before foreclosure of the lien his interest is sold on execution, the purchaser succeeds to all the rights of the mortgagor. *De La Vega v. League*, 64 Tex. 205.

Subject to Rights of Mortgagee.—

The interest of the mortgagor may be taken in execution subject to the rights of the mortgagee. The rights of the mortgagee to enforce his lien against the property was unaffected by an execution against the interests of the mortgagor. *Gillian v. Henderson*, 12 Tex. 47; *Raysor v. Reid*, 55 Tex. 268, 270; *Garrity v. Thompson*, 64 Tex. 597; *Wynne v. State Nat. Bank*, 82 Tex. 378, 17 S. W. 918; *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848; *Bracenridge v. Cobb*, 85 Tex. 448, 21 S. W. 1034, affirming 2 Tex. Civ. App. 161,

21 S. W. 614; *Mensing v. Axer*, 2 Posey 268; *Parker & Co. v. Benner, etc., Co.*, 1 App. Civ. Cases, § 64; *Gammage v. Silliman*, 2 App. Civ. Cases, § 14.

Upon the sale of incumbered property the purchaser only obtains the equity of redemption—the right to pay the prior lien and hold the property. *Brooks v. Lewis*, 83 Tex. 335, 18 S. W. 614.

Execution sale of mortgaged lands under judgment against the mortgagor passes to the purchaser title and right of possession, subject merely to lien of mortgage, which must be foreclosed to give title. *Wilkins v. Bryarly* (Civ. App.), 46 S. W. 266.

Under Purchase Money Mortgage.

—Where a mortgage to secure the purchase money of land is executed simultaneously to the deed of the vendee, the interest of the mortgagor may be levied and sold, even though the legal title still remains with the vendor. *Baker v. Clepper*, 26 Tex. 629.

The opinion in the case of *Ballard v. Anderson*, 18 Tex. 377, had suggested a doubt whether the purchaser of real estate who gives a mortgage for the whole of the purchase money, has such interest in the land as can be taken in execution. See, also, *Gillian v. Henderson*, 12 Tex. 47; *Wright v. Henderson*, 12 Tex. 43, 46.

T. purchased land entirely on a credit, taking deed therefor which was not recorded. The funds to pay his purchase money notes were advanced by one B., under an agreement that when the payment was completed T. would return his deed to the vendor, who would then execute a deed to B., and the latter would hold the title until T. repaid the money so advanced. Held, that the superior title remained in the vendor, and that a purchaser under an execution sale against T. acquired only his equity, but could not acquire the title without payment to B. of the purchase money advanced

by him. *Cobb v. Trammell*, 9 Tex. Civ. App. 527, 30 S. W. 482, affirmed in 93 Tex. 727, no op.

Where Mortgage Contains Power of Sale.—Mortgaged property is liable to be sold under an execution against the mortgagor although it contain a power authorizing the sale of the property, by a trustee, upon default of payment by the mortgagor. *Wootton v. Wheeler*, 22 Tex. 338; *Blum v. Conrad*, 1 App. Civ. Cases, §§ 1217, 1218.

Under Deed of Trust.—The interest of the grantor in a deed of trust to secure a debt before the trust is executed subject to be levied on and sold. *Wright v. Henderson*, 12 Tex. 43; *Ballard v. Anderson*, 18 Tex. 377, 385; *Wynne v. State Nat. Bank*, 82 Tex. 378, 381, 17 S. W. 918; *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848.

Personal property held by a trustee as security may be levied upon and sold, levy being by notice to trustee, and the purchaser is entitled to possession upon satisfying the debt. *Gunter v. Cobb*, 82 Tex. 598, 607, 17 S. W. 848.

A grantor's interest in property conveyed by a trust deed is subject to execution where neither the trustee nor the beneficiary are in possession or entitled to it at the time of levy and sale. *Raysor v. Reid*, 55 Tex. 266, 270.

Property held as a pledge or by virtue of a mortgage is liable to levy and sale, subject to the pledge or mortgage. *Mensing v. Axer*, 2 Posey 268, 270.

Equity of Redemption.—An equity of redemption in mortgaged property may be subject to levy and sale at the suit of other creditors. *Simmons Hardware Co. v. Kaufman & Runge*, 77 Tex. 131, 8 S. W. 283; *Raysor v. Reid*, 55 Tex. 266; *Smothers v. Field*, etc., Co., 65 Tex. 435, 438, 439; *Blum v. Conrad*, 1 App. Civ. Cases, §§ 1217, 1218.

2. Interests of Mortgagee.

It seems that the interests of the mortgagee in the property mortgaged is not subject to execution. *Vickery v. Ward*, 2 Tex. 212, 216; *Gillian v. Henderson*, 12 Tex. 47; *Parker & Co. v. Benner*, etc., Co., 1 App. Civ. Cases, § 64; *Blum v. Conrad*, 1 App. Civ. Cases, §§ 1217, 1218.

M. PROPERTY CONVEYED.

1. Interests of Vendor.

A warranty deed with stipulation that at the death of the grantee the property or proceeds thereof remaining in her should revert to the bodily heirs of the grantor, leaves no interest in the grantor subject to execution for his debts. *O'Neal v. Clymer* (Civ. App.), 61 S. W. 545 (see 94 Tex. 710, no op.), citing *Chase v. York County Sav. Bank*, 89 Tex. 316, 36 S. W. 406.

Under Conditional Sale.—A slave belonging to the execution debtor was levied on, who was, and had been for more than a year, in possession of a third person. The day before the levy the agent of the execution debtor sold the slave to such person, taking his note in payment, on condition that, if the note was not paid, such person should return the slave. Held that, as the execution debtor's right to the slave would only accrue on the purchaser's failure to pay the note, the slave was not subject to a levy under an execution against the execution debtor. *Vickery v. Ward*, 2 Tex. 212.

If the election was left with the execution debtor to take back the property which he had sold if he should choose to do so, in preference to taking the purchase money, the ownership would not have been changed. *Vickery v. Ward*, 2 Tex. 212, 215.

If the execution debtor had at the time no right in law to take the property, or to sustain a suit for it, it was not subject to the execution, because the execution could not go beyond the right of the defendant in it. *Vickery v. Ward*, 2 Tex. 212, 216.

If the time of payment of the purchase price of personal property conveyed had passed at the date of the levy of execution, such property would be subject to execution. *Vickery v. Ward*, 2 Tex. 212, 216.

Under Contract of Sale.—Where a contract for the sale of land is not recorded, a creditor without notice may acquire a lien by levy, and the purchaser at the sale is protected, though he had notice of the contract at the time of the sale. *Linn v. Le Compte*, 47 Tex. 440.

Under Unrecorded Deed.—Defendant, by a deed absolute in form, conveyed land to one R. to secure a loan. After the loan was paid, R. executed a reconveyance of the land to defendant, but it was not filed for record until several years later, and after plaintiff had obtained and docketed a judgment against R., and had issued execution thereon. Held, that plaintiff could not subject such land to his judgment against R. *Michael v. Knapp*, 4 Tex. Civ. App. 464, 23 S. W. 280. See post, "Execution and Conveyances," XIX, B, 2, a.

Under Conveyance to Prefer Creditors.—An execution creditor can not subject to his execution the personal property of an insolvent corporation debtor not fraudulently transferred by it, in preference, to another creditor, unless he shows the preferred creditor received more property than was sufficient to satisfy his debt at a fair valuation. *Lang v. Dougherty*, 74 Tex. 226, 232, 12 S. W. 29.

Under Conveyance to Defraud Creditors.—See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

A judgment creditor has the right to levy on the property of the debtor which is held by another to protect it from execution by virtue of a fraudulent transfer. *Lynn v. Le Gierse & Co.*, 48 Tex. 138; *Gaines v. National Exchange Bank*, 64 Tex. 18; *Schmitt v. Jacques*, 26 Tex. Civ. App. 125, 62 S.

W. 956, affirmed in 94 Tex. 707, no op.; *Loan, etc., Co. v. Campbell*, 27 Tex. Civ. App. 52, 53, 65 S. W. 65; *Clark v. Bell*, 40 Tex. Civ. App. 38, 39, 89 S. W. 38.

Evidence that a judgment debtor, under whom the plaintiff claimed certain cattle by an execution sale had given the cattle to his sons when he owed nothing, that he had controlled the cattle and had made sales of certain of them, turning the proceeds over to his sons, is insufficient to show title in the plaintiff. *Rutledge v. Mayfield* (Civ. App.), 26 S. W. 910.

In an action for conversion of horses sold under an execution against the father of a minor plaintiff, it being shown that the father had the stock several years previously and the minor's brand was not seen on any of the stock until 1889, though his parents swore it was recorded in 1882, and that the stock was branded with the plaintiff's brand in 1882; that the father exercised full control over the stock, traded, sold and gave away some, and in 1887, transferred them to X. to avoid a surety debt, and at an execution sale claimed they belonged to his wife, a verdict for the defendant was sustained by the evidence. *Lewis v. Davidson* (Civ. App.), 29 S. W. 403, 404.

Same—Transfer before Judgment.—Property is subject to execution although transferred before judgment was obtained. *Schmitt v. Jacques*, 26 Tex. Civ. App. 125, 62 S. W. 956, affirmed in 94 Tex. 707, no op.; *Loan, etc., Co. v. Campbell*, 27 Tex. Civ. App. 52, 53, 65 S. W. 65.

That an abstract of a judgment was not recorded until after the judgment debtor had transferred certain land was of no avail to the transferee, as against a purchaser at a sale under the judgment, in the absence of any showing that the transfer was in good faith. *Weinert v. Simmang*, 68 S. W. 1011, 29 Tex. Civ. App. 435.

An execution sale of property which

had previously been conveyed by the debtor for the fraudulent purpose of placing it beyond the reach of his creditors will not be set aside at the instance of the fraudulent grantee on the ground of inadequacy of price. *Clark v. Bell*, 89 S. W. 38, 40 Tex. Civ. App. 39.

Same—Transfer after Judgment.—

Where defendant in a suit by the vendee of property sold by a judgment debtor after judgment, but before execution, pleaded the general issue, an abstract of the judgment was admissible to show plaintiff's want of good faith in making the purchase. *Loan & Deposit Co. of America v. Campbell*, 65 S. W. 65, 27 Tex. Civ. App. 52.

Under Vendor's Lien.—"The beneficial title subject to sale under execution was in the vendees and not in the vendor with a lien reserved." *Brotherton v. Anderson*, 27 Tex. Civ. App. 587, 589, 66 S. W. 682, affirmed in 95 Tex. 674, no op.; *Willis & Bro. v. Sommerville*, 3 Tex. Civ. App. 509, 22 S. W. 781, affirmed in 93 Tex. 670, 677, no op.; *Catlin v. Bennett*, 47 Tex. 165; *McCamly v. Waterhouse*, 80 Tex. 340, 16 S. W. 19; *Stephens v. Motl*, 82 Tex. 81, 18 S. W. 99.

A vendor's equitable lien does not pass by sale under execution of the land on which the lien exists. *Davis v. Wheeler* (Civ. App.), 23 S. W. 435.

A purchaser of land at execution sale acquires no priority over a vendor's equitable lien, of which he had notice at the time of the sale. *Davis v. Wheeler* (Civ. App.), 23 S. W. 435.

Where a vendor conveys land, and reserves in the deed a lien for the purchase price, he retains no interest in the land subject to sale under execution. *P. J. Willis & Bro. v. Sommerville*, 3 Tex. Civ. App. 509, 22 S. W. 781.

The vendor's lien to secure the purchase money is but an executory con-

tract, and the superior title remaining in the vendor is subject to execution. *Willis & Bro. v. Sommerville*, 3 Tex. Civ. App. 509, 513, 22 S. W. 781, affirmed in 93 Tex. 670, 677, no op.

Under Purchase Money Notes.—

Vendors of land under a general warranty holding purchase money notes had such a claim on or interest in the lands, which would be affected by a sale thereof under execution as would permit them to question such sale, whether or not the conveyance by them was in fraud of creditors. *Weaver v. Nugent*, 72 Tex. 272, 10 S. W. 458.

Same—Where Notes Assigned.—

Vendor of land, who has executed bond for title, placed purchaser in possession and transferred or collected purchase notes, retains legal title as trustee and has no interest subject to execution. *Catlin v. Bennett*, 47 Tex. 165, 170; *Brotherton v. Anderson*, 27 Tex. Civ. App. 587, 66 S. W. 682, affirmed in 95 Tex. 674, no op.; *Jemison v. Halbert*, 47 Tex. 180, 189.

Where one who has conveyed land by deed reserving a vendor's lien on its face, and consequently the superior legal title, transfers the purchase money notes taken by him for the land to a third person, and afterwards, as additional security for the notes, conveys the legal title itself to such third person, this will not operate as a rescission of the original sale and conveyance, and since such latter deed does not convey an interest subject to execution, a sale of the land under execution against such third person, made to one having notice, would not affect the title of parties who had acquired the lien notes in good faith. *Puster & Co. v. Anderson*, 27 Tex. Civ. App. 626, 66 S. W. 684, affirmed in 95 Tex. 684, no op.

H. conveyed land to P., retaining vendor's lien to secure the four notes given in payment. H. assigned three of the notes to L., and then gave L. a

deed of the land, which was not recorded, and which was intended only to preserve the security. L. transferred the three notes as collateral, the transferee having no knowledge of the deed from H. to L.; and, under such transfer, defendants obtained title to such notes. After such transfer by L. without any sale being really made, but as additional security for payment of said three notes, P. and L. made a contract reciting sale of the land by L. to P., and retention of lien to secure payment of purchase money. Thereafter plaintiffs had judgment against L., and recorded abstract thereof. After this, in consideration of the four notes, defendants having obtained the fourth one from H.; the land was conveyed by P. to defendants. Subsequently plaintiffs issued execution on said judgment, levied on the land, and bought it at the execution sale. Held, that L. having no title in the land subject to execution, and plaintiffs having notice of the lien of the notes before record of the abstract of judgment, they acquired no title as against defendants. *Puster & Co. v. Anderson*, 66 S. W. 684, 27 Tex. Civ. App. 626.

Where Purchaser in Possession.—

Actual, open, and notorious possession of land is sufficient notice of title in the occupant to render void a levy and an execution sale of the same as property of the occupant's grantor. *Markham v. Parker* (Civ. App.), 31 S. W. 82.

2. Interests of Purchaser.

Under Quitclaim Deed.—Since a judgment debtor who has only a quitclaim deed to land can have no title thereto as against a prior unrecorded conveyance of his vendor, an execution sale of the property under such judgment will not pass any title to the purchaser. *Shepard v. Hunsacker*, 1 Posey Unrep. Cas. 578.

Under Title Bond.—The interest conveyed to the vendee by a bond for

title, is subject to forced sale. *Downs v. Porter*, 54 Tex. 59, 61.

An execution against a vendee holding title bond attaches only to his equitable right to demand title on payment. *Jemison v. Halbert*, 47 Tex. 180, 189.

"If, for instance, a purchaser had paid for the land and taken a bond for title, the land would be subject to execution against the purchaser, because there would be nothing uncertain; nothing to be done on the part of the purchaser nor on the part of the vendor, but to make the title." *Daugherty v. Cox*, 13 Tex. 209, 213.

"If, however, other things were to be done by the parties, as in this case, a selection was to be made out of a particular but large tract, until these things were done, there would be no such equity to any particular land as would make it subject to the levy of an execution against the holder of such equity." *Daugherty v. Cox*, 13 Tex. 209, 213.

Under Hart. Dig. art. 1345, providing that, when a sale has been made under execution, the purchaser shall receive conveyance of "all the right, title, interest, and claim" of the defendant, such conveyance did not embrace the defendant's interest in a bond for title, which did not identify the particular land or determine the quantity with certainty, and which depended on certain things to be done by the debtor before the conveyance. *Daugherty v. Cox*, 13 Tex. 209.

Under Vendor's Lien.—The interest of a purchaser in land subject to a vendor's lien may be sold under execution. *Dibrell v. Smith*, 49 Tex. 474, 480.

In the absence of notice to the plaintiff in execution, or the purchaser at a sale thereunder, that part of the land purchased was covered by an unrecorded title bond, the levy and sale pass title to the land, the legal title thereto being in the execution defend-

ant. *Wright v. Lassiter*, 71 Tex. 640, 10 S. W. 295.

Under Contract of Sale.—The interest in land of one to whom another by an oral agreement has agreed to convey it, on performance of certain services, is not subject to sale under an execution. *Le Gierse v. Getzen-daner*, 2 Posey Unrep. Cas. 380.

Where a deed and the purchase money notes evidence an executory contract to sell the land, and there is a provision for a rescission of the contract in case of nonpayment of the price, a purchaser at a sale on execution of the interest of the vendee becomes merely a tenant of the vendor. *McKelvain v. Allen*, 58 Tex. 383.

Where Purchase Price Paid.—One paying a part of the purchase money for property has an interest therein, subject to sale under execution. *Moor-ing v. McBride*, 62 Tex. 309, 312.

If a purchaser pay for land and take a bond for title, the land is subject to execution against him. *Daugherty v. Cox*, 13 Tex. 209, 213.

The interest of purchasers, cultivating land having paid a part of the purchase price, under an agreement for a deed on full payment, held liable to execution. *Matula v. Lane* (Civ. App.), 56 S. W. 112.

But one, who subsequent to the purchase of certain land pays a part of the purchase price to the vendee and takes possession with him under an oral agreement, has not such an interest therein as is subject to execution. *Merchants' Nat. Bank v. Eustis*, 8 Tex. Civ. App. 350, 355, 28 S. W. 227.

Where Sale Made under Fraudulent Attachment.—Execution levied on property sold under a fraudulent attachment against the judgment debtor, creates no lien. *Murphy v. Nash* (Civ. App.), 45 S. W. 944; *Same v. Harlock*, Id.; *Same v. Deaderick*, Id.

Right to Compel Conveyance.—The

right to compel a conveyance on payment of a certain sum may be sold on execution. *De La Vega v. League*, 64 Tex. 205, 213.

Where Purchase Money Paid by Third Person.—Where A loans B money to buy property, and the purchase is made for B, though title is taken in A's name for purpose of protecting the property from B's creditors, the property belongs to B, and is subject to execution for payment of his debts. *Jones v. Meyer Bros. Drug Co.*, 25 Tex. Civ. App. 234, 61 S. W. 553, affirmed in 94 Tex. 710, no op.

One purchasing land paid for with the separate means of the wife but title to which was taken in the name of the husband, under execution against the husband in ignorance of the right of the wife and for a valuable consideration, acquires a right superior to that of the wife. *Hooper v. Caruthers*, 78 Tex. 432, 15 S. W. 98.

N. PROPERTY ASSIGNED.

It seems that property assigned for the benefit of creditors is subject to execution against the assignor. *Loeb v. Blum*, 2 Posey 445; *Still v. Focke*, 66 Tex. 715, 2 S. W. 59. See ante, "Interests of Vendor," III, M, 1; post, "Wrongful Execution," XXIV. And see the title RIGHT OF PROPERTY, TRIAL OF.

O. PROPERTY EXCHANGED.

Where an insolvent debtor traded one tract of land for another and received a deed for the latter, but the other party, although he entered into possession of the first tract, had not yet received a deed, execution against the debtor, levied on both tracts, does not affect the equitable right of said other party. *Wylie v. Posey*, 71 Tex. 34, 41, 9 S. W. 87.

P. PROPERTY HIRED.

It seems, that a slave that is hired out, can not be taken in execution for a debt of the owner, where the lien

has not attached before the transfer of the possession by hiring. *McGee v. Currie*, 4 Tex. 217.

Q. PROPERTY LOANED.

A loan of certain slaves to husband and wife for the purpose of raising and supporting their children, and to have the labor and use of such slaves during their natural lives, gives an interest to the husband which is liable to execution. *Allen v. Russell*, 19 Tex. 87.

Testatrix directed her executor, either by himself or agent, to control her property, so that her brother should have the right to occupy the homestead, together with such personal property as should be necessary to the brother's convenience; that the net proceeds of the estate should be paid to the brother during his life, and after his death the estate should be disposed of as provided in the will. Plaintiff, after qualifying as executor, delivered possession of the estate to the brother as his agent, who held it for two years, when it was leased to a third party, who held it until levied upon and sold by defendant. Held, that Rev. St. art. 2547, making personal property held for two years under pretended loan liable for the debts of the holder, had no application to the holding of the estate by testator's brother as agent of the executor under the express provision of the will, since the statute expressly excepts from its operation property held under a will declaring the purpose of its use. *Cox v. Patten* (Civ. App.), 66 S. W. 64.

The statute could not be construed to divest a principal of the title to property held by an agent, at the suit of the agent's creditors. *Cox v. Patten* (Civ. App.), 66 S. W. 64.

Defendants, father and son, had conducted a dairy farm for years; and the father, after ten years' management, turned it over to the care of the son. The father visited the farm about once a month, and paid the taxes; the son

never paying any regular rental, but paying small sums to his father from time to time. Some of the cows turned over to the son had died, and others had been sold, and new ones purchased to replace the same. Plaintiff was an execution purchaser of an undivided half of the cows on a levy against the son, claiming that the son, having had possession of the cows for over two years, had acquired title under Rev. St. art. 2547, providing that, where any loan of chattels shall be made to any person with possession for two years without demand, the absolute property, as to creditors, is with the possession. Held, that the evidence was sufficient to require the submission of such issue to the jury. *Hunstock v. Roberts* (Civ. App.), 65 S. W. 675.

R. PROPERTY IN POSSESSION OF PARTICULAR PERSONS.

1. Agents and Attorneys.

Money paid into the hands of an agent for the purpose of paying a judgment, is not subject to execution. *Carey v. Tinsley*, 22 Tex. 383, 388.

A person holding property as agent may assert the owner's rights to prevent a levy on such property upon an execution against himself. *Walmsley v. Hubbard*, 24 Tex. 612, 614.

Money received by the agent of the plaintiff's attorney, who had an assignment of the judgment in his hands, is in the possession of the attorney, and can not be taken in execution for the plaintiff's debts. *Carey v. Tinsley*, 22 Tex. 383.

2. Third Persons.

The fact that F. resided on certain property in 1842, when an execution was levied on it as F.'s property, does not show that it was not in fact W.'s and therefore not subject to levy, nor that it was not W.'s property in 1840. *Fuller v. East Texas, etc., Co.* (Civ. App.), 23 S. W. 571, 573, affirmed in 93 Tex. 639, no op.

Where Owner Estopped.—On the issue whether the owner of goods, seized under execution against a third person, was estopped as against the creditor of the third person from claiming the goods, an instruction that if the third person held himself out before the levy as the owner of the goods and the owner permitted him so to do, the law will hold the third person to be the owner, etc., is insufficient because it fails to bring out the necessity that the owner after full knowledge that the third person claimed the goods as his own, stood by and enabled him to deceive others and entice them into dealing with him as the true owner. *Blum v. Merchant*, 58 Tex. 400.

If A.'s goods are seized on execution against B., who has asserted himself their owner, and A. neither joined in B.'s representations nor failed to deny them, so that A.'s conduct did not deceive the creditor, A. is not estopped, in a suit against the creditor, from denying the truth of B.'s representations. *Blum v. Merchant*, 58 Tex. 400.

S. PROPERTY OWNED BY PARTICULAR PERSONS.

1. Partners.

See the title PARTNERSHIP.

2. Cotenants.

See the title JOINT TENANTS AND TENANTS IN COMMON.

3. Private Corporations.

See the title CORPORATIONS, vol. 4, p. 682.

4. Municipal Corporations.

See the title MUNICIPAL CORPORATIONS.

5. Husband and Wife.

See the title HUSBAND AND WIFE.

6. Landlord and Tenant.

See the title LANDLORD AND TENANT.

7. Decedents.

See the title EXECUTORS AND ADMINISTRATORS.

8. Devisees and Legatees.

See the title WILLS.

T. DETERMINING WHETHER PROPERTY SUBJECT TO EXECUTION.

1. As of What Time.

The liability of property to execution depends upon its actual condition at the time the levy is made. *Vickery v. Ward*, 2 Tex. 212.

2. Who May Raise Question.

A defendant, in execution levied on property held by him in trust, has the right and is in duty bound to assert title on behalf of beneficiaries. *Parker v. Portis*, 14 Tex. 166, 170.

IV. Property Exempt from Execution.

See the titles EXEMPTIONS FROM EXECUTION AND ATTACHMENT; HOMESTEAD EXEMPTIONS.

The execution of a replevin bond does not cut off the right of defendant and the sureties upon the bond to show that the property seized is not subject to seizure and sale for the payment of plaintiff's demand. *Hall v. Miller*, 21 Tex. Civ. App. 336, 51 S. W. 36.

V. Form and Requisites of Writ.

A. IN GENERAL.

An execution which shows in the body thereof the court, the date, the amount of the judgment and the party against whom rendered, and which shows in an indorsement thereto the number of the cause and the name of the parties, one of whom is the judgment debtor, sufficiently recites a judgment against the debtor and in favor of the other party to save it from being regarded as void, and protects an officer acting thereunder. *Collins v. Hines*, 100 Tex. 304, 99 S. W. 400.

B. STATUTORY PROVISION.

The general execution law of 1839

gave the form of the writ corresponding to the common-law writ of fieri facias. Hart. Dig., arts. 1271-1287. This act was repealed by the act of 1840 in which the form of the writ was omitted. Hart. Dig., arts. 1288-1310. *Lockridge v. Baldwin*, 20 Tex. 303, 307.

Rev. Stat. 1895, art. 1665, provides that an execution shall correctly describe the judgment, state the court wherein and the time when rendered, the names of the parties, etc. *Collins v. Hines* (Civ. App.), 100 S. W. 339.

C. CONFORMITY TO JUDGMENT.

An execution should conform to the judgment on which it is issued. *Criswell v. Ragsdale*, 18 Tex. 443; *Battle v. Guedry*, 58 Tex. 111; *Cleveland v. Simpson*, 77 Tex. 96, 97, 13 S. W. 851; Rev. Stat., art. 2281.

Ordinarily, if there be no objection to the form of the writ by motion to quash or vacate it, it will in many cases, where there is a variance between the writ and the judgment which is produced to support it, be treated as valid. *Battle v. Guedry*, 58 Tex. 111.

Where execution is issued on a void judgment and subsequently the judgment is validated by an amendment, the execution shows a different judgment from the one upon which it was issued and is a nullity on that account. *Underwood v. Brown*, 29 Tex. Civ. App. 163, 68 S. W. 206.

The levy of an execution will not be enjoined on the ground of variance between the writ and judgment where such variance is a mere irregularity. *Dunson v. Spradley* (Civ. App.), 40 S. W. 327.

Presumption of Conformity.—An execution is presumed to conform to the judgment on which issued. *Turner v. Crane*, 19 Tex. Civ. App. 369, 47 S. W. 822, affirmed in 93 Tex. 652, no op.

Variance as to Amount.—A judgment was rendered in 1868. An execution

issued in 1872 was for a larger amount than the original amount of the judgment. Held not to show variance, the judgment bearing interest. *Taylor v. Doom*, 43 Tex. Civ. App. 59, 95 S. W. 4.

"The execution correctly described the court before which the judgment was rendered, the date of its rendition, and the names of the parties to the suit, but misdescribed the amount of the judgment by reciting it as being for 'thirteen dollars and thirty-seven cents debt due and interest,' when the judgment was for twelve dollars and fifty cents principal and six cents interest. We do not think that this was such a material variance as should, on a collateral attack, avoid a purchase made by a third party at the execution sale." *Williams v. Ball*, 52 Tex. 603, 610, distinguished in *Battle v. Guedry*, 58 Tex. 111, 115.

An execution is not void because issued for too large an amount, and, on the establishing of a credit on the judgment on which it is based, it should be vacated only to the extent of such credit, and a sale should be ordered on a levy made thereunder for the remainder due. *Jackson v. Finlay* (Civ. App.), 40 S. W. 427, 1032.

Where an execution refers to a judgment bearing interest at ten per centum, but the judgment bore no interest, it was held that the irregularity in the execution was not sufficient to render it void on attack in a collateral proceeding. *Fitch v. Boyer*, 51 Tex. 336.

Variance as to Parties.—An execution will be held invalid, although not attacked by motion to quash or vacate, where it describes a different defendant from the one mentioned in the judgment produced to support it. *Battle v. Guedry*, 58 Tex. 111.

A sheriff's deed should not be excluded merely because there is a variance in the parties as stated in the judgment and in the execution, where, during the pendency of the action, it

was sometimes docketed as it appeared in the judgment and sometimes as it appeared in the execution. *Haskins v. Wallet*, 63 Tex. 213.

A judgment was against Ben and Ann H. The execution was against Ben and Anna H. Held that the variance was an irregularity not sufficient to render the execution void when sought to be impeached in a collateral proceeding. *Fitch v. Boyer*, 51 Tex. 336.

An execution against P. B. Clements is not supported by a judgment against J. P. Clements, in the absence of suitable evidence showing that the same man is described in both; and therefore a sale under such an execution will not pass the title to the property of J. P. Clements. *Battle v. Guedry*, 58 Tex. 111, cited in *Morris v. Balkham*, 75 Tex. 111, 113, 12 S. W. 970.

An execution issued on a judgment against one Hunnings was lost. The entry on the docket did not show against whom the writ was issued. The sheriff's deed recited that the execution was issued on a judgment against one Hemmings, commanding a levy on his property, and in the habendum recited that he would hold the same to the purchaser as fully as could the "said Hunnings, above mentioned." Held, that as the deed was evidence of the execution, and consistent with the conclusion that it was issued either against Hemmings or Hunnings, it would be presumed that the execution followed the judgment, and was correctly issued. *Turner v. Crane*, 47 S. W. 822, 19 Tex. Civ. App. 369.

Under Rev. St. art. 2281, providing that executions shall correctly describe the judgment, stating the names of the parties, an execution issued in the names of C. alone, on a judgment rendered in favor of C. and L. as partners, is not authorized by the judgment, and a sale of lands thereunder is invalid. *Cleveland v. Simpson*, 77 Tex.

96, 13 S. W. 851, distinguished in *Collins v. Hines*, 100 Tex. 304, 99 S. W. 400.

Under 1 Sayles' Early Laws, art. 1178, though there be a variance in the names of the parties in the judgment and execution, the judgment is sufficiently identified as one on which the execution was issued, where the bills of costs are almost identical, and there was only one judgment entered at that term in which the judgment debtor was party. *Harris v. Dunn* (Civ. App.), 45 S. W. 731, affirmed in 93 Tex. 685, no op.

Variance as to Time.—"In *Alexander v. Miller*, 18 Tex. 893, 894, objection was made to an execution because it recited a judgment as rendered on the 9th, while the judgment, when produced, appeared to have been rendered on the 6th. It was shown, however, that no judgment had in fact been rendered on the 9th, but that the court had adjourned on that day, and these facts were held sufficient to account for the mistake." *Battle v. Guedry*, 58 Tex. 111, 115.

An execution recited that the judgment was rendered July 15, 1895, but the judgment showed that it was rendered July 15, 1891. The execution otherwise properly described the judgment, and on the back was indorsed. "July Term, 1891. Judgment July 15, 1891;" and the sheriff's return showed that it was received June 21, 1894. Held, that it was plain that the date of 1895, instead of 1891, was a mere clerical error, and was not such an irregularity as would avoid the execution and sale thereunder. *Barnes v. Nix* (Civ. App.), 56 S. W. 202.

D. DESCRIPTION OF JUDGMENT.

An execution should correctly describe the judgment on which it is issued. *Martin v. Rice*, 16 Tex. 157, 162; *Alexander v. Miller*, 18 Tex. 893; *Williams v. Ball*, 52 Tex. 603, 610; *Battle v. Guedry*, 58 Tex. 111, 112, 114; *Has-*

kins v. Wallet, 63 Tex. 213, 219; Collins v. Hines, 100 Tex. 304, 99 S. W. 400.

It is so provided by Rev. Stat., art. 2281. *Cleveland v. Simpson*, 77 Tex. 96, 13 S. W. 851.

The levy of an execution will not be enjoined because the writ misdescribes the judgment on which issued, such misdescription being a mere irregularity. *Dunson v. Spradley* (Civ. App.), 40 S. W. 327.

Revived Judgment.—Where a judgment has been revived, the execution should show its authority from both the original judgment and the judgment of revivor, though, if the execution is issued on the judgment of revivor only, it is an irregularity not sufficient to affect the title of the purchaser thereunder. *Taylor v. Doom*, 43 Tex. Civ. App. 59, 95 S. W. 4.

An execution issued on a judgment reviving a former judgment, which recites the recovery of the former judgment, its date, amount, the amount of costs, and its revival by the last judgment, giving the date of revival, and which then proceeds in the usual form, sufficiently describes the original and reviving judgments. *Bludworth v. Poole*, 53 S. W. 717, 21 Tex. Civ. App. 551.

Judgment on Appeal.—Where an execution should have been issued upon the judgment of the supreme court, rendered on appeal, but purports instead to have been issued on the original judgment, names only one plaintiff, although there are in fact several plaintiffs, names the appellant as the only defendant, and misstates the date on which it is issued, in violation of Rev. St. art. 2281, which requires the execution to "correctly describe the judgment, stating the court wherein rendered, the names of the parties," etc., a sale under such execution of land worth from \$14,000 to \$21,000 for \$2,280 will, on account of such defects, coupled with the inadequacy of

the price, be set aside at the suit of the judgment debtor. *Irvin v. Ferguson*, 83 Tex. 491, 18 S. W. 820.

E. REFERENCE TO JUDGMENT.

A judgment does not support an execution which omits to refer to it as authority for the issuance of such writ. *Hart v. McDade*, 61 Tex. 208, 212.

An execution issued on a judgment against B., and running against C., "executor of the will of B., deceased," without referring to the judgment as authority, is not supported by the judgment, since, if B. was dead and the judgment had been revived, the execution should so show, as B.'s property could not be levied on under a command to levy on that of his executor. *Hart v. McDade*, 61 Tex. 208.

F. DESCRIPTION OF PARTIES.

1. Plaintiffs.

An execution which fails to state the names of the plaintiffs does not correctly describe the judgment as required by Rev. Stat., art. 2281. *Irvin v. Ferguson*, 83 Tex. 491, 494, 18 S. W. 820; *Woodhouse v. Cocke* (Civ. App.), 39 S. W. 948.

"It may be assumed that it is essential to the validity of an execution that it show the party or parties in whose favor the authority is to be exercised; but this requirement is not, like that as to the mandate of the writ, that the name of the party plaintiff must appear at any particular place or in any particular order." *Collins v. Hines*, 100 Tex. 304, 308, 99 S. W. 400.

An execution from a justice's court which leaves blank the name of the plaintiff in the body of the instrument, but the clerk's indorsement shows the name of the plaintiff and of the defendant, is not void but merely irregular. *Collins v. Hines*, 100 Tex. 304, 99 S. W. 400.

As Executors and Administrators.—The defendants named in the writ were H. and D., and the additional description of them as an executrix and

executor did not supply the place of a direction in the writ to levy upon the property of the estate, and sale of property of the estate thereunder is invalid. *Horton v. Garrison*, 1 Tex. Civ. App. 31, 20 S. W. 773, following *Hart v. McDade*, 61 Tex. 208, 212. See the title EXECUTORS AND ADMINISTRATORS.

As Assignee.—The unauthorized insertion in an execution of words showing that it is for the use of an assignee of the judgment should be rejected as surplusage, and disregarded, on a trial of the right of property levied on, and the assignee should be permitted to have the case docketed in the name of the plaintiff in the writ for his use, and, on proof of his purchase of the judgment, he should be recognized as the proper plaintiff in the case. *Owens v. Clark*, 78 Tex. 547, 15 S. W. 101.

2. Defendants.

The failure of a writ of execution to name the judgment debtor is fatal. *Capps v. Leachman*, 90 Tex. 499, 502, 39 S. W. 917; *Day v. Johnson*, 32 Tex. Civ. App. 107, 72 S. W. 426 (see 97 Tex. 630, no op.).

"Without the command to take the property of a named person the officer has no authority to take that of any one. Without this command there is no writ; and without the name of the person whose property is to be taken there is no command." *Collins v. Hines*, 100 Tex. 304, 308, 99 S. W. 400.

An execution on a money judgment which fails to name the person whose property is to be subjected to its satisfaction is void, under Rev. St. 1895, art. 2338, which prescribes as one of the requisites that, "if the judgment be for money simply, it shall require the officer to satisfy the judgment out of the property of the debtor, subject to execution." *Capps v. Leachman*, 39 S. W. 917, 90 Tex. 499, distinguished in *Collins v. Hines*, 100 Tex. 304, 99 S. W. 400.

Where an execution issued against Wm. V. on a judgment against H. W. V. was levied on the property of H. W. V. but whose christian name was not William, the sale of W. V.'s interest in the property did not convey the title therein of H. W. V. *Morris v. Balkham*, 75 Tex. 111, 12 S. W. 970.

As Executors and Administrators.—

A sale under execution of the property of an estate on a judgment rendered four years before the sale, describing the judgment defendants by name, with the addition of the words "executor" and "executrix," will not be set aside as illegal and void more than twenty-five years thereafter, on the ground that the judgment was rendered against the executor and executrix individually, unless it is clearly shown that the execution was issued without authority of law. *Croom v. Winston*, 18 Tex. Civ. App. 1, 43 S. W. 1072, affirmed in 93 Tex. 638, no op.

The execution under which defendants claimed recited a judgment against testator's executors who were named as defendants in the writ, and commanded the sheriff, "that of the goods and chattels, lands and tenements of the said H. and D., executors of H., deceased," he make the moneys, and in all other respects the writ correctly followed the judgment. The return indorsed on the writ showed a levy on and sale of lands of the testator as the property of "the defendants." Held, that there was nothing in the writ to authorize a levy on the property of testator, and a sale thereof thereunder was void. *Horton v. Garrison*, 1 Tex. Civ. App. 31, 20 S. W. 773.

Where There Are Several Defendants.—An execution against a firm is not void because it does not state the names of the individual members thereof. *Perryman v. Rayburn* (Civ. App.), 30 S. W. 915, 918.

As Sureties on Supersedeas Bond.—An execution was issued in which one

of the sureties on a supersedeas bond against whom judgment had been rendered on appeal was described as a surety against whom the judgment in the district court had been rendered. Held, that such recitation does not prevent the facts being proved to sustain a sale under said execution of the land of the defendant about whom the mistake was made. *Holloway v. McIlhenny Co.*, 77 Tex. 657, 14 S. W. 240.

G. DESCRIPTION OF AMOUNT.

Where there are several defendants in an execution, and they are not equally liable, the execution should specify the amount to be collected of each. *Martin v. Rice*, 16 Tex. 157.

H. DESCRIPTION OF PROPERTY.

A writ of execution which does not describe with certainty where and what land is to be levied on is ambiguous and void. *Pfeiffer & Co. v. Lindsay*, 66 Tex. 123, 125, 1 S. W. 264. See *Woodhouse v. Cocke* (Civ. App.), 39 S. W. 948. And see the title POSSESSION, WRIT OF.

Where the statutes provide, both by writs of garnishment and by execution, for reaching a debtor's shares of stock in a corporation, a creditor can not sell such stock on execution without stating the number of shares, since the creditor may reach the stock by garnishment, and thereby get a sufficient description, and then sell on execution. *Keating v. J. Stone & Sons' Live Stock Co.*, 83 Tex. 467, 18 S. W. 797.

Cure of Defective Description by Sheriff's Deed.—See the title SHERIFFS' SALES.

I. RECITAL OF DEATH OF PARTY.

1. In General.

An execution under which land was sold, which was formal in other respects, recited that the plaintiff in whose favor the judgment was ren-

dered was dead, and gave the name of one who it stated had administered on his estate. In a collateral attack upon the title acquired by a purchaser at a sale under the execution, held, the writ was sufficient. *Scott v. Lyons, etc., Co.*, 59 Tex. 593.

2. Source of Information.

An execution under which land was sold, which was formal in other respects, recited that the plaintiff in whose favor the judgment was rendered was dead, and gave the name of one who it stated had administered on his estate. In a collateral attack upon the title acquired by a purchaser at a sale under the execution, held, there is no statutory requirement that the clerk shall recite in the writ the source of his information on the subject. *Scott v. Lyons, etc., Co.*, 59 Tex. 593.

Where an execution recites the fact of the death of the plaintiff in the suit, and gives the name of the administrator, it will be presumed that the clerk who issued the execution became apprised of the facts thus recited in the manner prescribed by statute; there being no statutory requirement that he recite the source of his information. *Scott v. Lyons*, 59 Tex. 593.

J. RECITAL OF AFFIDAVIT TO OBTAIN WRIT.

The fact that an affidavit has been filed to obtain an execution instanter need not appear in or upon the execution. *Lebreton v. Lemaire* (Civ. App.), 43 S. W. 31.

K. RECITAL OF ISSUANCE OF PRIOR EXECUTION.

An execution should show, on its face, whether it is original, alias or pluries. *Scott v. Allen*, 1 Tex. 508, 519.

An alias execution should show on its face that it is an alias. *Snow v. Nash*, 50 Tex. 216.

Execution is not void for its failure to state the number of executions pre-

viously issued. *Corder v. Steiner* (Civ. App.), 54 S. W. 277.

The neglect of a clerk to put on executions rightly issued the form alias, pluries, etc., is not important. *Graves v. Hall*, 13 Tex. 379.

Art. 2281, Rev. Stat., requires that when an alias or pluries execution is issued a recital of the number of previous executions shall appear on the face of the writ. *Driscoll v. Morris*, 2 Tex. Civ. App. 603, 21 S. W. 629; *Scott v. Allen*, 1 Tex. 508, 514.

An endorsement of "al. execution" on the back of a writ of execution, and a mention in the bill of costs attached to such writ of the items of costs for the issuance of previous executions, is not a compliance with the requirement of the statute. *Driscoll v. Morris*, 2 Tex. Civ. App. 603, 21 S. W. 629.

L. CAPTION OR TITLE.

"No caption, no venue, in fact, is necessary. The addition of the name of the county may be rejected as surplusage, and 'The State of Texas' would then stand alone and give character and style to the process." *Portis v. Parker*, 8 Tex. 23, 28. See *Collins v. Hines*, 100 Tex. 304, 99 S. W. 400.

Where an execution commenced "The State of Texas, County of Austin," and it was objected to as not styled according to law, it was held that, had the objection been taken in limine, the execution might have been quashed or amended, but that, as it came after the execution had performed its functions, it could not be sustained. *Portis v. Parker*, 8 Tex. 23.

The failure of execution to be directed to an officer of any county (name of county being omitted), renders it void; so that a recovery for seizure thereunder can not be had against sureties on the bond of the officer acting under the writ. *Jones v. Hess* (Civ. App.), 48 S. W. 46.

M. INDORSEMENT.

"The law requires the clerk to in-

dorse upon the execution whether the sale shall be made with or without appraisalment. He can be informed of the facts necessary to enable him to make the appropriate indorsement only by the record." *Robinson v. Perry*, 4 Tex. 273, 275. See the title SHERIFFS' SALES.

As Changing Return Day.—The return day of a writ of execution as fixed by law can not be changed by the indorsement of the clerk. *Cain v. Woodward*, 84 Tex. 549, 553, 12 S. W. 319.

As Supplying Omissions in Writ.—Where the name of the plaintiff in the judgment is omitted in the body of the writ, the indorsement of the clerk may be looked to to ascertain the name. *Collins v. Hines*, 100 Tex. 304, 99 S. W. 400.

N. TESTE AND SEAL.

Where the claimant of property taken in execution in 1845 objected to a certified copy of the execution, when offered in evidence, that the execution was not authenticated by the seal of the court, it was held the objection was properly overruled. *Earle v. Thomas*, 14 Tex. 583.

The objection to an execution purporting to have been issued by a justice of the peace, and directed to the sheriff or any constable of another county, that it was not accompanied by a certificate under seal of the clerk of the county court that the officer issuing the same was a justice of the peace, can not be made available when presented for the first time in the supreme court. *Hodde v. Susan*, 58 Tex. 389.

Cure of Irregularities.—The attestation by the clerk can not cure an irregularity, shown by the date noted by the clerk, in issuing an execution more than one year after the rendition of the judgment. *Irvin v. Ferguson*, 83 Tex. 491, 494, 18 S. W. 820.

O. OF EXECUTION ISSUED AFTER REMAND.

The execution upon return of man-

date affirming a money judgment should recite the fact of the rendition of the judgment, the appeal therefrom, and the rendition of the judgment of affirmance. *Irvin v. Ferguson*, 83 Tex. 491, 18 S. W. 820. See *Martin v. Rice*, 16 Tex. 157; *Cook v. Sparks*, 47 Tex. 28; Rev. Stats., art. 1057.

P. IRREGULARITIES.

1. Effect.

An execution is not void because of mere formal mistakes and irregularities. *Graves v. Hall*, 13 Tex. 379, 382; *Alexander v. Miller*, 18 Tex. 893; *Collins v. Hines*, 100 Tex. 304, 99 S. W. 400; *Barnes v. Nix* (Civ. App.), 56 S. W. 202.

It is the duty of an officer who receives a merely irregular execution to serve it. *Earle v. Thomas*, 14 Tex. 583, 591.

An execution from another county, irregularly issued, is voidable only, and the sheriff must execute it. *Earle v. Thomas*, 14 Tex. 583, 591.

Where proceedings on an execution sale are defective only as to matter of form, such defect may be disregarded or supplied in any suit in which the question may become involved. *McKay v. Paris Exchange Bank*, 75 Tex. 181, 184, 12 S. W. 529.

2. Objections.

Irregularity of an execution can only be avoided by a party to it. *Earle v. Thomas*, 14 Tex. 583, 591.

No defendant in an execution can object to an error therein, if it be not to his prejudice. *Martin v. Rice*, 16 Tex. 157.

The levy of an execution can not be enjoined because of mere irregularities. *Dunson v. Spradley* (Civ. App.), 40 S. W. 327.

VI. Amendment of Writ.

A. IN GENERAL.

The courts have gone very far in allowing amendments of executions.

Morris v. Balkham, 75 Tex. 111, 113, 12 S. W. 970.

B. TIME OF AMENDMENT.

A substantial defect in the judgment or execution could not be cured by amendment after the sale so as to validate the sale. *McKay v. Paris Exchange Bank*, 75 Tex. 181, 12 S. W. 529; *Morris v. Balkham*, 75 Tex. 111, 113, 12 S. W. 970.

Where an execution issued against William V. on a judgment rendered against H. W. V., which was levied on the property of H. W. V., but whose Christian name was not William, the execution could not be cured by a motion to amend it, made after the sale. *Morris v. Balkham*, 75 Tex. 111, 12 S. W. 970.

The probable effect of selling property under execution under a defective judgment being to deter bidders and sacrifice the property, it would be inequitable to remove and cure difficulties existing and process under it after the sale at the instance of the purchaser, and the proceedings should be amended before the sale. *McKay v. Paris Exchange Bank*, 75 Tex. 181, 12 S. W. 529.

The motion concludes with a prayer "for an order amending said revived judgment and the said two executions so as to make them conform to what they should have been." The court granted the relief prayed for, ordering that the revived judgment be amended so as to read: "That execution issue upon said judgment against the estate of B. H. Epperson, in the hands of J. P. Russell v. R. B. Epperson, his executors," etc.; and that both of said executions be so amended "as to run against the estate of B. H. Epperson in the hands of his executors," etc. The court said that the exceptions to the motion should have been sustained and the proceeding dismissed. If judgments or executions are defective in particulars that may affect the title to property sold

under them, it is too late after sales have been made to amend either so as to have the effect of affecting such sales. *McKay v. Paris Exchange Bank*, 75 Tex. 181, 184, 12 S. W. 529.

VII. Construction of Writ.

If the terms used in an execution to describe certain property are sufficient to identify it, but are understood only by persons familiar with the property or with the section of country in which it is situated, parol evidence is admissible to inform the court as to the meaning of the terms used. *Pfeiffer & Co. v. Lindsay*, 66 Tex. 123, 1 S. W. 264.

VIII. Validity of Writ.

Where an execution is not void, but only voidable, a claimant of the property levied on has not the right to attack its validity. *Portis v. Parker*, 22 Tex. 699.

Who May Question.—"The claimant was not entitled to assert the invalidity of the execution (it being against another person) unless it was void." *Hancock v. Metz*, 15 Tex. 205; *Portis v. Parker*, 22 Tex. 699, 707; *Webb v. Mallard*, 27 Tex. 80; *Meador Co. v. Aringdale*, 58 Tex. 447, 450.

A claimant of property seized under execution against another will not be heard to assert the invalidity of the execution unless it be void. *Meador Co. v. Aringdale*, 58 Tex. 447.

How Questioned.—A third party desiring to attack the validity of an execution which is voidable only should do so by direct pleading, or exceptions filed in the nature of a demurrer to the sufficiency of evidence, in case the supposed defect renders it void, or by tendering an issue of fact under the direction of the court. *Meador Co. v. Aringdale*, 58 Tex. 447.

The objection to an execution purporting to have been issued by a jus-

tice of the peace, and directed to the sheriff or any constable of another county, that it was not accompanied by a certificate under seal of the clerk of the county court that the officer issuing the same was a justice of the peace, can not be made available when presented for the first time in the supreme court. *Hodde v. Susan*, 58 Tex. 389.

IX. Issuance of Writ.

A. STATUTORY PROVISION.

The purpose of art. 3772, Pas. Dig., was to establish a general rule to govern the issuance of executions, and to provide exceptions thereto. *Gruner v. Westin*, 66 Tex. 209, 215, 18 S. W. 512.

B. WHAT AMOUNTS TO ISSUANCE.

The term "issue," as applied to an execution, means more than the mere clerical preparation and attestation of the writ, and includes its delivery to an officer for enforcement. *Bourn v. Robinson*, 49 Tex. Civ. App. 157, 107 S. W. 873.

An execution showing that it was issued within a year from the rendition of the judgment, but not appearing from the officer's return or other evidence to have been placed in the hands of the sheriff, is not sufficient to preserve the judgment lien under the provisions of art. 3290, Rev. Stat. *Schneider v. Dorsey*, 96 Tex. 544, 74 S. W. 526, affirming 72 S. W. 1029.

C. NECESSITY FOR ISSUANCE.

As to necessity for issuance of executions to preserve judgment lien, see the title JUDGMENTS AND DECREES.

D. COMPELLING ISSUANCE.

See the titles CLERKS OF COURT, vol. 4, p. 174; MANDAMUS.

All the plaintiffs and intervenors in the original suit should be made parties to a motion to compel the clerk in the lower court to issue an execu-

tion. *Eppstein v. Holmes*, 64 Tex. 360.

E. POWER TO ISSUE WRIT.

1. Of Courts.

a. In General.

See the title COURTS, vol. 5, p. 161.

b. Court of Equity.

The power to issue writs of execution is not inherent in courts of chancery and the United States courts of chancery only issue them when the decree is for land, except when expressly authorized by statute. *Texas-Mexican R. Co. v. Cahill* (Civ. App.), 23 S. W. 232, 233, affirmed in 93 Tex. 721, no op.

c. Mayor's Court.

Rev. St. art. 418, provides that for a fine imposed by a mayor execution may issue, to be levied and executed in the same manner as executions from the district court; and that it shall be issued to the marshal, who, in levying on property and selling, shall have like power and authority as the sheriff in executions issued from the district court. Held, that the authority of the marshal to sell land under such execution is not limited to the town, but he may make the levy and sale anywhere in the county. *Dudley v. Jones*, 6 Tex. Civ. App. 466, 26 S. W. 445.

d. Justice of the Peace.

See the title JUSTICES OF THE PEACE.

e. On Remand.

Although a judgment was rendered upon affirmance by the appellate court, the district court to which the mandate of the appellate court had been addressed was the proper tribunal to issue an execution. *Cope v. Lindsey*, 17 Tex. Civ. App. 203, 204, 43 S. W. 29, affirmed in 91 Tex. 463.

2. Of Clerks of Court.

Sayles' Civ. Stat., art. 2267a, points out the manner in which the district clerk shall acquire the power to issue the execution. The recital in the ex-

ecution is not evidence of the authority. *Richards v. Belcher*, 6 Tex. Civ. App. 284, 286, 25 S. W. 740.

For Costs.—See the title COSTS, vol. 4, p. 971.

F. PARTIES TO ISSUANCE.

1. In Whose Favor Writ Issued.

Executors and Administrators.—See the title EXECUTORS AND ADMINISTRATORS.

On the death of a sole plaintiff, or of one of several plaintiffs, the clerk is authorized to issue an execution in the name of his representative, or of such representative and the survivor, provided the death of the plaintiff and the appointment of the administrator is proved by affidavit of the administrator, entered of record and filed with the clerk; and this proof is a prerequisite to the issuance of the execution. *Holman v. Chevallier's Adm'r*, 14 Tex. 337.

Minors.—Upon a judgment in favor of a minor, where the suit is prosecuted by a next friend, execution should run in the name of the minor. *Galveston, etc., R. Co. v. Hewitt*, 67 Tex. 473, 482, 3 S. W. 705.

One of Several Plaintiffs.—Judgment in favor of two plaintiffs for a gross sum, "one-half of said sum to each of said plaintiffs," is a separate judgment, on which executions may issue in favor of each plaintiff for half the amount recovered. *Stewart v. Morrison*, 81 Tex. 396, 17 S. W. 15.

In Execution for Costs.—An execution for costs is properly issued in the name of the party recovering costs. It should not be issued in name of the officers entitled to the costs. *Smith v. Perkins*, 81 Tex. 152, 16 S. W. 805.

Though the costs of the clerk of court are taxed on an execution between suitors he is not a party to such execution nor has he any right to control the same. *De La Garza v. Carolan*, 31 Tex. 387.

2. Against Whom Writ Issued.

Deceased Persons.—An execution

can not issue against the estate of a deceased defendant. *Kendrick v. Rice*, 16 Tex. 254, 259.

In the case of *Turner v. Smith*, 9 Tex. 626, the defendants in the original judgment not included in the execution having died, the question was whether they were properly omitted in issuing execution. It was held that they were, because execution could not issue against their estates. *Hendrick v. Rice*, 16 Tex. 254.

The objection that an execution was void because issued in part against an estate of a deceased person can only be raised by the administrator, guardian, or heirs or wards, but not by other execution defendants. The latter may look to the estate for contribution. *Stark v. Carroll*, 66 Tex. 393, 1 S. W. 188.

In rendering judgment against an executrix for a debt of her testator, it was error for the district court to award execution against the estate of the testator, when there were no allegations in the petition authorizing the same; and the supreme court, reversing and reforming the judgment in this respect, directs that it be certified to the proper court, to be paid in due course of administration. *Goff v. Hauser*, 33 Tex. 430.

Where a judgment was rendered by the district court in 1872, and affirmed by the supreme court in 1874, and the judgment debtor died in 1878, an execution thereon could not issue thereafter against the independent executrix of the deceased, she never having been a party to the suit. *Govan v. Bynum*, 43 S. W. 319, 17 Tex. Civ. App. 180.

An execution issuing before the death of one of the parties is not abated thereby but if returned not satisfied so that an alias is resorted to, the legal representative of the deceased must be made a party unless a lien was acquired by the first execution. *Bennett v. Gamble*, 1 Tex. 124.

It seems that where one of two judgment debtors dies, execution may run against the survivor, without a discontinuance as to the deceased. *Chandler v. Hudson*, 11 Tex. 32. See the title EXECUTORS AND ADMINISTRATORS.

Partners.—In action against the surviving partner on a firm debt, execution is properly awarded against the firm assets. *Dulaney v. Walshe & Co.*, 3 Tex. Civ. App. 174, 176, 22 S. W. 131. See the title PARTNER-SHIP.

Surety.—The rights of a purchaser at an execution sale are not affected by the fact that the defendant, whose property was sold, was a surety, and not the principal, on the note on which the judgment was rendered. *Weisiger v. Chisholm*, 28 Tex. 780.

Principal and Indorser.—When judgment is rendered against the principal in a note, and also against an indorser, on a petition which asks execution against the indorser only, in the alternative, it is error to render judgment directing execution against the property of both, jointly. *Lewis v. Dennis*, 54 Tex. 487.

Several Defendants.—On the affirmation of a judgment on an appeal taken by a part of several defendants, the execution may include all, stating the several liability of each. *Kendrick v. Rice*, 16 Tex. 254, 259.

Where an execution is issued against all defendants on an affirmed judgment for the amount of the original judgment and damages, less a credit exceeding the damages, the defendant who did not join in the appeal can not complain of the execution unless he himself paid the credits. *Kendrick v. Rice*, 16 Tex. 254, 260.

Where only a part of the defendants appeal and judgment is affirmed the costs on appeal are chargeable to defendants appealing and execution should direct a satisfaction of the original judgment out of all the de-

defendants. *Martin v. Rice*, 16 Tex. 157, 161.

Although Rev. Stat., §§ 1207, 1208, provides that the judgment rendered against the parties to a replevin bond should be joint and several, an execution could not issue against one of the sureties while the principal and the other sureties were prosecuting, under a supersedeas bond, a writ of error. *Wren v. Peel*, 64 Tex. 374.

G. PREREQUISITES TO ISSUANCE.

See ante, "In Whose Favor Writ Issued," IX, F, 1. As to issuance of the writ in action for trial of right to property, see the title RIGHT OF PROPERTY, TRIAL OF.

H. TO WHAT COUNTY WRIT ISSUED.

1. County Where Judgment Rendered.

The Revised Statutes of 1895, art. 2335, require that an execution shall issue in the first instance to the county in which the judgment on which issued was rendered. *Gulf, etc., R. Co. v. Morris*, 67 Tex. 692, 703, 4 S. W. 156; *Terry v. O'Neal*, 71 Tex. 592, 9 S. W. 763; *Schneider v. Dorsey*, 96 Tex. 544, 74 S. W. 526, affirming 72 S. W. 1029; *Cabell v. Orient Ins. Co.*, 22 Tex. Civ. App. 635, 55 S. W. 610.

2. County Other than One Where Judgment Rendered.

a. In General.

There are cases where an execution may go out of the county. *Earle v. Thomas*, 14 Tex. 583; *Castro v. Illies*, 22 Tex. 479, 502; *Borden v. McRae*, 46 Tex. 396.

Where a judgment debtor owns personal property in the county where the judgment was rendered, the issuance of an alias execution in another county to be levied on land there, is irregular, the judgment debtor not having been called on to point out the personal property. *Driscoll v. Morris*, 2 Tex. Civ. App. 603, 606, 21 S. W. 629.

b. Necessity for Issuance to County Where Judgment Rendered.

An execution issued in the first instance to a county other than the one in which the judgment was rendered is not void, but irregular only. *Earle v. Thomas*, 14 Tex. 583; *Hancock v. Metz*, 15 Tex. 205; *Cabell v. Orient Ins. Co.*, 22 Tex. Civ. App. 635, 636, 55 S. W. 610; *Norwood v. Orient Ins. Co.* (Civ. App.), 44 S. W. 188.

The issuance can be avoided only at the instance of a party to the writ. *Earle v. Thomas*, 14 Tex. 583.

A person having no interest in the property levied upon can not take advantage of such issuance. *Gulf, etc., R. Co. v. Morris*, 67 Tex. 692, 703, 4 S. W. 156.

A claimant of property levied on under it can not inquire into its irregularity. *Earle v. Thomas*, 14 Tex. 583.

"It may be avoided at the instance of the defendant in the judgment." *Cabell v. Orient Ins. Co.*, 22 Tex. Civ. App. 635, 636, 55 S. W. 610.

An officer is bound to execute such an execution and can justify under the same. *Sydnor v. Roberts*, 13 Tex. 598, 600; *Cabell v. Oriental Ins. Co.*, 22 Tex. Civ. App. 635, 55 S. W. 610.

"If such an execution is levied and property sold by virtue thereof to an innocent purchaser, he will acquire a good title." *Cabell v. Orient Ins. Co.*, 22 Tex. Civ. App. 635, 636, 55 S. W. 610; *Sydnor v. Roberts*, 13 Tex. 598, 600.

To Preserve Judgment Lien.—In the case of *Schneider v. Dorsey*, 96 Tex. 544, 74 S. W. 526, affirming 72 S. W. 1029, it was considered questionable whether the issuance of a writ to another county without a prior issuance from the county where the judgment was rendered is sufficient to preserve the judgment lien; but in the case of *Cabell v. Orient Ins. Co.*, 22 Tex. Civ. App. 635, 55 S. W. 610, it was held that a writ so issued prevented the judgment

from becoming dormant under art. 2326a, Rev. Stat.

A pluries execution enjoined because the first execution was issued to the wrong county prevents the judgment from becoming dormant if it was issued within a year from rendition of the judgment. *Cabell v. Orient Ins. Co.*, 22 Tex. Civ. App. 535, 636, 55 S. W. 610.

Necessity for Return of Nulla Bona.

—*Quære*, whether there should be a return of nulla bona, or no property, in the county where judgment is obtained, before sending execution to another county. Admitting that there should be such a return, it goes merely to the mode of exercising the power which the judgment confers of issuing execution; and if the execution be sent to another county without such previous return it is, at most, an irregularity, and not of a character to invalidate the title of a bona fide purchaser under such execution. *Sydnor v. Roberts*, 13 Tex. 598.

Where an execution is issued to the county in which the judgment was rendered, and returned on that day, and on the same day another execution is issued on such judgment to another county, in the absence of evidence to the contrary, it will be presumed that the execution to the county wherein the judgment was rendered was returned before the other execution was issued, and that it was received by the sheriff on the next day. *Brackenridge v. Cobb*, 85 Tex. 448, 21 S. W. 1034.

Presumption of Return.—Where an execution directed to another county shows on its face that it is an alias execution, it will be presumed that it was properly issued, and that a previous execution had been issued to the county where the judgment stood, and returned nulla bona. *Benson v. Cahill* (Civ. App.), 37 S. W. 1088.

Where Defendant Fails to Point Out Property in County.—Where an execution is issued to another county the

title of the purchaser under such execution is not affected by the fact that the defendant had ample property to satisfy the judgment in the county where the judgment was obtained, which he had failed to point out when called upon. *Sydnor v. Roberts*, 13 Tex. 598.

Where Property Situated in Several Counties.—In the levy and sale of cattle running at large in a range in several counties, the sheriff is not limited to cattle in his county at the time. *Gunter v. Cobb*, 82 Tex. 598, 606, 17 S. W. 848.

“Article 2279, Sayles’ Rev. Stat., provides that ‘where an execution, or any writ in the nature thereof, requires the sale or delivery of specific real or personal property, it may be issued to the county where the property or some part thereof is situated.’ Here a writ, viz, an order of sale, in the nature of an execution, required the sale of specific real property, a part of which was situated in Dallas county, to which the writ issued. The conditions of this article are literally fulfilled in this instance.” *Miller v. Edinburgh-American Land Mortg. Co.*, 14 Tex. Civ. App. 309, 311, 37 S. W. 181.

c. Form and Requisites of Writ.

The title of a purchaser under execution sent from another county is not affected by the fact that the execution was in the ordinary form of a pluries execution, and not in the form of a testatum. *Sydnor v. Roberts*, 13 Tex. 598.

An execution issued from a justice court of one county to another county, without a certificate of the county clerk as required by Rev. St. art. 1633, is voidable but not void. *Seligson v. Staples*, 1 White & W. Civ. Cas. Ct. App. § 1070.

The fact that the execution does not recite that the defendants had no property in the county where the judgment was rendered will not invalidate the

title of a bona fide purchaser. *Sydnor v. Roberts*, 13 Tex. 598.

Enjoining Levy of Writ Issued Out of County.—See post, "Enjoining Execution," XII.

3. To New County Formed from One Where Judgment Rendered.

See the titles COURTS, vol. 5, p. 161; SHERIFFS' SALES.

4. To New County Where Abstract of Judgment Filed.

Where, after rendition of a judgment, an abstract thereof was filed in F. county, an execution, which appeared to be the first execution issued on the judgment, issued to F. county instead of the county in which the judgment was rendered, was void. *Judgment (Civ. App.)*, 72 S. W. 1029, affirmed. *Schneider v. Dorsey*, 74 S. W. 526, 96 Tex. 544.

5. Simultaneous Issuance to Different Counties.

The simultaneous issuance of execution to different counties is no ground for setting aside a levy and sale under one of them, when it appears that the price of the property was not depreciated thereby. *Brackenridge v. Cobb*, 2 Tex. Civ. App. 161, 21 S. W. 614, affirmed in 85 Tex. 448.

Where several executions are issued on the same judgment, in consecutive order, on the same day, to different counties, and the first execution is first levied, such execution will be held to be valid, though those subsequently issued are not, unless all were issued to delay other creditors of defendants in execution. *Brackenridge v. Cobb*, 85 Tex. 448, 21 S. W. 1034.

I. ISSUANCE ON JUDGMENT.

1. Necessity for Judgment.

The foundation of an execution is the judgment of the court or some act or obligation which is in law equivalent thereto. *Wright v. Wright*, 6 Tex. 29, 31; *Criswell v. Ragsdale*, 18 Tex. 443, 445; *Cyrus v. Hicks*, 20 Tex. 483; *Walker v. Emerson*, 20 Tex. 706, 710;

Leland v. Wilson, 34 Tex. 79; *Gentry v. Lockett*, 37 Tex. 503, 510; *Simpson v. Trimble*, 44 Tex. 310, 312; *Smith v. Miller*, 66 Tex. 74, 78, 17 S. W. 399; *Allday v. Whitaker*, 66 Tex. 669, 1 S. W. 794; *Brown v. Reese*, 67 Tex. 318, 3 S. W. 292; *Miller v. Koertge*, 70 Tex. 162, 7 S. W. 691; *Tudor v. Hodges*, 71 Tex. 392, 9 S. W. 443; *Terry v. O'Neal*, 71 Tex. 592, 9 S. W. 763; *McKay v. Paris Exchange Bank*, 75 Tex. 181, 184, 12 S. W. 529; *Halsell v. McMurry*, 86 Tex. 100, 23 S. W. 647, affirming 21 S. W. 777; *Holt v. Maverick*, 5 Tex. Civ. App. 650, 23 S. W. 751; *Beckham v. Medlock*, 19 Tex. Civ. App. 61, 62, 46 S. W. 402, affirmed in 93 Tex. 725, no op.; *Glass v. Shapard*, 37 Tex. Civ. App. 365, 83 S. W. 880.

"It is well settled that a person who claims title through an execution sale must show a judgment on which the execution is founded." *Hart v. McDade*, 61 Tex. 208, 211. See the title COSTS, vol. 4, p. 971.

Validity of Execution without Judgment.—Without a judgment to support the execution it is absolutely null and void, and can confer no authority upon the officer to make the levy. *Bailey v. Knight*, 8 Tex. 58, 61; *Criswell v. Ragsdale*, 18 Tex. 443, 444; *Walker v. Emerson*, 20 Tex. 706, 710; *Allison v. Brookshire*, 38 Tex. 199, 202.

There is no error in enjoining an execution where there is no judgment to support it. *Trammell v. Watson*, 25 Tex. Supp. 210, 216.

2. Proof of Judgment.

It seems that it is necessary in the establishment of the title of a purchaser under an execution sale that in addition to the execution the judgment on which it is issued must be proven. *Allison v. Brookshire*, 38 Tex. 199, 202.

But the jury may infer the existence of a judgment of a justice's court from the fact of issuance of several executions on judgment sought to be established. *Walker v. Emerson*, 20 Tex. 706, 710.

3. Nature of Judgment.

a. In General.

The judgment need be framed in no particular language; for the right to the issuance of an execution arises from the obligation to pay and not from the judgment. *Ryan v. Raley*, 48 Tex. Civ. App. 187, 106 S. W. 750.

The writ may issue upon a judgment which declares the rights of the respective parties. *Smith v. Miller*, 66 Tex. 74, 78, 17 S. W. 399.

b. Finality.

Rev. St. 1895, art. 2324, requiring the clerk to issue execution in an action in which a judgment has been rendered for the enforcement of the judgment, etc., includes all final judgments, whether the issuance of an execution is provided for therein or not, and includes judgments of foreclosure of liens. *Ryan v. Raley*, 48 Tex. Civ. App. 187, 106 S. W. 750.

But the writ can not issue upon any judgment not final as to all parties. *Texas Co. v. Beddingfield* (Civ. App.), 114 S. W. 894.

c. Direction for Issuance.

It is not necessary that the judgment should in terms direct the issuance of an execution thereon. *Carson v. Taylor*, 19 Tex. Civ. App. 177, 47 S. W. 395, affirmed in 93 Tex. 637, 650, no op.; *Bludworth v. Poole*, 21 Tex. Civ. App. 551, 53 S. W. 717; *Loan, etc., Co. v. Campbell*, 27 Tex. Civ. App. 52, 65 S. W. 65; *Taylor v. Doom*, 43 Tex. Civ. App. 59, 93 S. W. 4; *Ryan v. Raley*, 48 Tex. Civ. App. 187, 106 S. W. 750.

But the execution must be authorized by the judgment. *Criswell v. Ragsdale*, 18 Tex. 443, 445.

An execution may issue under the authority of a judgment not in terms providing therefor; the right to the process arising from the obligation to pay, and not from the language of the judgment. *Ryan v. Raley*, 48 Tex. Civ. App. 187, 106 S. W. 750.

An execution sale, based on a judgment for recovery of money which does not order execution, is valid, as the right to enforce the judgment follows, as a matter of law, from the fact of judgment. *Bludworth v. Poole*, 53 S. W. 717, 21 Tex. Civ. App. 551.

Issuance of an execution follows, as a necessary consequence, from the rendition of a judgment for costs, though not expressly awarded. *Schmidt v. Huff*, 7 Tex. Civ. App. 593, 596, 28 S. W. 1053 (see 87 Tex. 385).

Judgment of Foreclosure.—Under Rev. St. 1895, art. 1340, providing that judgments for the foreclosure of liens shall be that plaintiff recover the debt, that an order of sale shall issue, and that if the property is insufficient other property shall be sold as in case of ordinary executions, an execution to satisfy a deficiency on the foreclosure of a vendor's lien is authorized, though the judgment contains no provision therefor. *Ryan v. Raley*, 48 Tex. Civ. App. 187, 106 S. W. 750.

A judgment against executors in their representative capacity need not direct that execution issue against the property of the estate of their testator; and Pas. Dig., art. 1371, making it the duty of the clerk to issue an execution against the estate when the judgment is against the executor, does not necessarily require that there be such recitation in the judgment. *Croom v. Winston*, 18 Tex. Civ. App. 1, 43 S. W. 1072, affirmed in 93 Tex. 638, no op.

A judgment against a husband and wife need not contain a special direction that execution issue against the separate property of the wife, in order to support an execution against her separate property, as the statute does not require this. Rev. Stat., art. 2971. *Carson v. Taylor*, 19 Tex. Civ. App. 177, 47 S. W. 395, affirmed in 93 Tex. 637, 650, no op.

Alias and Pluries Executions.—Under a judgment against a railroad

company for work performed, providing for a sale of all the property of the railroad company, all the property owned at the time of the judgment was sold. Held that, there being a balance due on the judgment, and the railroad company having acquired other property, an alias execution was properly issued, though the judgment did not specifically direct its issuance. *Weddington v. Carver*, 45 Tex. Civ. App. 68, 100 S. W. 786.

d. Designation of Property for Levy.

Where a judgment decreed that the plaintiff therein recover of testator's estate, and that execution be levied upon the "effects" of said estate, it included real estate, as well as personalty. *Horton v. Garrison*, 1 Tex. Civ. App. 31, 20 S. W. 773.

Though the word "effects" unaffected by context is generally held to include only personal property, yet, where a judgment directed execution upon the effects of defendant and on considering the facts it is apparent that no distinction could properly have been made by the court rendering the judgment between personal and real property of the estate as both were equally subject to the debt and that it was not necessary for the judgment to define what property should be levied on. Such judgment must be construed to authorize execution on either real or personal property of the defendant. *Horton v. Garrison*, 1 Tex. Civ. App. 31, 20 S. W. 773.

e. Pecuniary Judgment.

The execution act of 1842 provides for issuance of an execution on pecuniary judgments only. *Price v. Brady*, 21 Tex. 614, 617.

f. Certainty.

An execution can not issue on a judgment insufficient because uncertain. *Luter v. Rose*, 16 Tex. 52; *All-day v. Whitaker*, 66 Tex. 669, 1 S. W. 794. See the title JUDGMENTS AND DECREES.

g. Recording and Indexing.

An execution can not legally issue where there is no judgment of record upon which it can be found. *Cyrus v. Hicks*, 20 Tex. 483; *Miller v. Koertge*, 70 Tex. 162, 7 S. W. 691. See post, "Lost Judgment," IX, I, 3, h.

Error in Recording.—In the judgment entry in a suit against James L. Thompkins and Gilbert L. McMurphy, partners, the name Gabriel appeared instead of Gilbert. Held, that as from the entire record it clearly appeared that the name Gabriel was a clerical error, such error did not affect a sale under execution against the real defendants. *Halsell v. McMurphy*, 86 Tex. 100, 23 S. W. 647, affirming 21 S. W. 777.

On Certification from County Court.

—It is necessary that a copy of a judgment rendered in a county court, certified to by the county clerk, should have been recorded in the minutes of the district court before the district clerk was authorized to issue an execution upon such judgment. *Richards v. Belcher*, 6 Tex. Civ. App. 284, 286, 25 S. W. 740. See, also, *Miller v. Koertge*, 70 Tex. 162, 7 S. W. 691.

Indexing is necessary to perfect a judgment lien upon recording abstract of the judgment. *Miller v. Koertge*, 70 Tex. 162, 7 S. W. 691.

Proof that an abstract of the judgment, under which a party claims, was recorded, does not raise a presumption that such record was indexed as required by law; but the legal inference is that claimant would have proved the indexing had it in fact been made. *Miller v. Koertge*, 70 Tex. 162, 7 S. W. 691.

h. Lost Judgment.

The issuance of an execution upon a judgment destroyed by fire, before its substitution, was held an irregularity, and that an injunction would lie to enjoin it. This ruling is approved in *Brown v. Reese*, 67 Tex. 318, 3 S. W. 292; *Beckham v. Med-*

lock, 19 Tex. Civ. App. 61, 62, 46 S. W. 402, affirmed in 93 Tex. 725, no op. See, also, *Cyrus v. Hicks*, 20 Tex. 483.

A claimant of property levied on as that of another can not attack the execution on the ground that the record of the judgment on which it was issued is lost. *McCormick v. Nichols* (Civ. App.), 35 S. W. 526. See the title LOST INSTRUMENTS AND RECORDS.

i. Satisfied Judgment.

A satisfied judgment will not support an execution. *Huggins v. White*, 7 Tex. Civ. App. 563, 567, 27 S. W. 1066, affirmed in 93 Tex. 664, no op.; *Singer Mfg. Co. v. Herman, etc., Mfg. Co.*, 1 App. Civ. Cases, § 741.

By Tender.—A judgment for the recovery of a horse and costs of suit, the horse being adjudged worth less than the amount of costs, is not satisfied by the tender of the horse, so as to preclude an execution for costs. *Garvin v. Hall*, 83 Tex. 295, 300, 18 S. W. 731.

By Assignee for Benefit of Creditors.

—The execution was issued on a judgment which had been satisfied and released by part payment through an assignee for the benefit of creditors, and was void. There was much evidence as to the judgment and the debt on which it was founded. Held, that an instruction that if the goods were plaintiff's, though they became so under circumstances rendering their ownership fraudulent as to H. & Co., the execution was no justification for their seizure was correct, and applicable to the case, as from the evidence the jury might infer that the judgment was still in force, and the execution issued on it a good defense. *Willis v. Hudson*, 72 Tex. 598, 10 S. W. 713. See post, "Wrongful Execution," XXIV.

By Stranger.—After payment of a judgment by a stranger thereto so as to extinguish it, such judgment will not support an execution,—and a purchase at execution sale under such sat-

isfied judgment passes no title. *Terry v. O'Neal & Son*, 71 Tex. 592, 9 S. W. 673.

By One of Several Defendants.—

Where, after the death of the principal maker of a note, judgment is rendered against those who signed it as sureties, and the judgment is paid by one of defendants, he can not have execution afterwards issued on the judgment and levied on the property of his codefendants. *Ft. Worth Nat. Bank v. Daugherty*, 81 Tex. 301, 16 S. W. 1028.

Whether Execution Void or Voidable.—

"If the judgment had in fact been satisfied in full prior to the sale, there are cases of high authority which hold that the sale is absolutely void, and confers no title on the purchasers, although there was nothing of record to show the satisfaction, and the purchaser bought in perfect good faith." *Owen v. Navasota*, 44 Tex. 517, 521. So held in *Hardin v. Clark*, 1 Tex. Civ. App. 565, 21 S. W. 977.

But in the case of *Texas Land, etc., Co. v. Worsham*, 5 Tex. Civ. App. 245, 23 S. W. 938, it was held that a judgment which the plaintiff assigned and afterwards released the lien of record and the assignee had execution issued thereon, the judgment and execution being valid on their face and requiring parol evidence to show their invalidity, sale thereunder will cast a cloud upon the title of the owner, and such sale would be enjoined.

j. Vacated Judgment.

An execution can not legally issue for the enforcement of a judgment which has been vacated or annulled. *Wright v. Wright*, 6 Tex. 29.

Where New Trial Granted.—A judgment was rendered against several defendants, sued on a promissory note, and a new trial as to part of the defendants was granted, held, that the legal effect of such an order was to so far vacate the entire judgment as to render the issuance of execution

thereon invalid. *Long v. Garnett*, 45 Tex. 400.

k. Void Judgment.

An execution which shows upon its face that it is issued upon a void judgment is void. *Bowers v. Chaney*, 21 Tex. 363; *Perdew v. Davis*, 31 Tex. 488, 491; *Hollingsworth v. Bagley*, 35 Tex. 345; *Long v. Garnett*, 45 Tex. 400; *Stegall v. Huff*, 54 Tex. 193; *Northcraft v. Oliver*, 74 Tex. 162, 11 S. W. 1121; *Hooper v. Caruthers*, 78 Tex. 432, 15 S. W. 98; *Schneider v. Gray*, 7 Tex. Civ. App. 25, 27, 26 S. W. 640; *Underwood v. Brown*, 29 Tex. Civ. App. 163, 68 S. W. 206; *Carpenter v. Anderson*, 33 Tex. Civ. App. 484, 491, 77 S. W. 291, affirmed in 98 Tex. 611, no op.

Void for Want of Process.—See the titles SHERIFFS' SALES; SUMMONS AND PROCESS.

A purchaser at a sale under execution, issued on a judgment in a cause where service was attempted on the defendant in execution by publication, acquires no title, if the record affirmatively shows that publication was not made for the period required by law; and this may be shown in a collateral proceeding. *Collins v. Miller*, 64 Tex. 118.

For Want of Jurisdiction.—A purchaser at an execution sale under a judgment void on its face for want of jurisdiction acquires no title as against the original owner. *Collins v. Miller*, 64 Tex. 118.

Procured by Fraud.—See the title SHERIFFS' SALES.

Rendered for Person Not before Court.—A judgment rendered in favor of a party not before the court, upon a cause of action accruing to other parties, is void, and no execution can legally issue in favor of such party on such judgment. *Dunlap v. Southerlin*, 63 Tex. 38.

Duty of Officer to Levy Execution.—The sheriff, being required to show cause why he omitted to levy an exe-

cution, answered that the judgment on which the execution issued was void. Held, that the answer was sufficient. *Wilson v. Sparks*, 9 Tex. 621.

So far as it is consistent with principles of law, courts should protect officers enforcing process issued under void judgments. *Horan v. Wahrenberger*, 9 Tex. 313, 322.

Defendant had an execution levied upon a bale of cotton as the property of S. Plaintiff claimed the cotton, and gave bond for the trial of the right of property thereto. Upon the trial before the justice, plaintiff failed to establish his claim to the cotton, and the justice rendered judgment against him for the costs. At a subsequent day of the same term, the justice added to the judgment a judgment against plaintiff and the sureties upon his claim bond for the value of the cotton. Execution was issued upon this judgment as amended, and levied upon sheep belonging to plaintiff, which were sold, etc. Plaintiff brought this suit for damages for the sale of his sheep. Defendant attempted to justify with his judgment and execution thereon. The court below held that the judgment last rendered by the justice against the plaintiff and his sureties was void, and no justification, and rendered judgment in favor of plaintiff against the defendant for damages. Held that, when the court determined that the claimant had failed to establish his claim to the cotton, Rev. St. art. 4843, described the judgment which should follow as a sequence to that judgment, and the announcement by the court of this determination was notice to the claimant and his sureties that the law required the justice to render judgment against them on the bond for the value of the cotton, with interest, and the judgment was a good justification for the sale of the sheep by virtue of it. *Hinzie v. Ward*, 1 White & W. Civ. Cas. Ct. App. § 1314.

Enjoining Execution.—Where the

judgment is void, the defendant has the right to enjoin the plaintiffs from enforcing an execution. *Witt v. Kaufman*, 25 Tex. Supp. 384. See post, "Void Judgment," XII, D, 6, b.

l. Erroneous Judgment.

An execution issued upon an erroneous judgment is not void and can not be impeached collaterally. The purchaser of property under it acquires a good title. *Bowers v. Chaney*, 21 Tex. 363; *Smith v. Chenault*, 48 Tex. 455; *Day v. Johnson*, 32 Tex. Civ. App. 107, 72 S. W. 426 (see 97 Tex. 630, no op.). See the titles JUDGMENTS AND DECREES; SHERIFFS' SALES. And see post, "Voidable Judgment," XII, D, 6, c.

Liability of Officer Making Levy.—

A levy on an execution issued on a voidable judgment is not a trespass. *Mikesha v. Blum*, 63 Tex. 44, 48.

m. Judgment by Default.

See the titles JUDGMENTS AND DECREES; SHERIFFS' SALES.

An execution issued upon a judgment by default which is void on the face of the record is invalid and may be collaterally attacked. *Stegall v. Huff*, 54 Tex. 193; *Gulf, etc., R. Co. v. King*, 80 Tex. 681, 683, 16 S. W. 641.

n. Judgment on Confession.

Where the owner of land authorized her attorney to confess judgment for a given amount, and the attorney confessed judgment for a much larger amount, the authority of the attorney to confess being incorporated in the judgment, the landowner was not estopped from denying the validity of an execution sale under the judgment. *Cordray v. Neuhaus*, 61 S. W. 415, 25 Tex. Civ. App. 247.

o. Judgment Stayed.

A sale made by a deputy sheriff under an execution upon a judgment, which by agreement of parties had been stayed, and notice of stay given to the sheriff, but not communicated to the deputy making the

sale, and the purchaser being ignorant of the agreement, is not void. *Owen v. City of Navasota*, 44 Tex. 517.

p. Judgment Enjoined.

Where the enforcement of an order of sale on foreclosure of a trust deed has been enjoined, no execution could be properly issued on the judgment of foreclosure until after the return of the order of sale. *Ward v. Billups*, 76 Tex. 466, 13 S. W. 308.

When preliminary injunction against the collection of a judgment to which plaintiffs are strangers is dissolved, it is reversible error to render judgment against the sureties on the injunction bond for the amount of the judgment without first requiring plaintiff in the original judgment to execute a refunding bond, as required by Pasch. Dig. art. 9337, providing that on the dissolution of an injunction restraining the collection of money, if the petition be continued over for trial or hearing as an original suit, the court shall require the defendant to give bond and security in double the amount enjoined, conditioned that he will refund to complainants the amount of money, interest, and costs which may be collected in the suit enjoined, in the event such injunction is made perpetual on a final hearing. *Foster v. Shephard*, 33 Tex. 687.

q. Judgment Rendered on Notice by Publication.

An execution on a judgment rendered on service of publication only is prima facie valid; it not affirmatively appearing that defendants were non-residents of the state when the judgment was rendered. *Wrought-Iron Range Co. v. Brooker*, 2 Willson, Civ. Cas. Ct. App. § 225.

An execution on a judgment founded on another judgment rendered in another state on service by publication only is prima facie valid; it not affirmatively appearing that the courts of such other state had no jurisdiction to render a personal judgment on such

service. *Wrought-Iron Range Co. v. Brooker*, 2 Willson, Civ. Cas. Ct. App. § 225.

r. Judgment Rendered on Foreign Judgment.

See ante, "Judgment Rendered on Notice by Publication," IX, I, 3, q.

s. Judgment Rendered in Violation of Stipulation.

An execution will not be enjoined four years after judgment on the ground that the plaintiff had taken judgment without the defendants' knowledge contrary to a stipulation to dismiss, where it appeared that judgment was not taken till three years after the stipulation to dismiss. *Watrous v. Rodgers*, 16 Tex. 410, 412.

t. Judgment of Revival.

An execution may be issued under a judgment reviving an original judgment rendered dormant by failure to issue execution thereon within a year, though the judgment of revivor did not provide for execution. *Taylor v. Doom*, 43 Tex. Civ. App. 59, 95 S. W. 4.

u. Judgment of Foreclosure.

An execution may issue upon a judgment foreclosing a lien. *Ryan v. Raley*, 48 Tex. Civ. App. 187, 106 S. W. 750.

v. Judgment for Cost.

See the title COSTS, vol. 4, p. 971.

w. Judgment in Action for Trial of Right to Property.

In an action for the trial of the right of property, judgment was rendered against the claimant for the property and against his surety for damages. Under this judgment two executions were issued against the claimant and his surety,—one for the damages, and the other for the value of the property. Held, that the surety could maintain a bill for injunction to restrain the execution against him for the value of the property, on the ground that there was no judgment to sustain it. *Gentry v. Lockett*, 37 Tex. 303. See post, "Issuance on Bond," IX, L.

x. Judgments of Particular Courts.

See the titles COURTS, vol. 5, p. 161; JUSTICES OF THE PEACE.

y. Judgments against Particular Persons.

(1) Receivers.

A judgment against a receiver operates only as an established claim, and it is error to direct execution to issue execution. *Arnold v. Penn*, 11 Tex. Civ. App. 325, 32 S. W. 353.

(2) Executors and Administrators.

See the title EXECUTORS AND ADMINISTRATORS.

A judgment against an administrator, as such, does not authorize the issuance of an execution and sale thereunder of property of the estate represented. *Schmidt v. Huff*, 7 Tex. Civ. App. 593, 596, 28 S. W. 1053 (see 87 Tex. 385).

A judgment in a suit brought for the sole purpose of fixing the defendant's liability as an executor and legatee under a will does not authorize the issuance of an execution for the sale of any property other than that received by the defendant from the testator's estate. *Texas Ass'n v. Banker*, 26 Tex. Civ. App. 107, 61 S. W. 724, affirmed in 94 Tex. 701, no op.

(3) Person Not Party.

Where it is sought to sell plaintiff's land under an execution levied on a judgment rendered in a case to which he was not a party, he may properly seek to enjoin the sale in the court in whose jurisdiction the land lies, instead of in that in which the judgment was rendered. *Huggins v. White*, 7 Tex. Civ. App. 563, 27 S. W. 1066.

z. Judgment Where Appeal Taken.

(1) Judgment of Lower Court.

(a) Without Supersedeas Bond.

The judgment of a district court from which a writ of error is prosecuted without the giving of a supersedeas bond, authorizes the issuance of an execution for its enforcement. *Castro v. Illies*, 22 Tex. 479, 495.

Under the act of June 4, 1873, P. D.,

art. 3772, no bond except a supersedeas will operate to suspend the issuance of execution pending the appeal. Art. 1493, P. D., doubtless remained in force after the passage of that act; but it amounts to a declaration that such a bond as was required by art. 1493 shall not deprive one, who has recovered a judgment, of the right to execution as though no appeal had been perfected. *Gruner v. Westin*, 66 Tex. 209, 18 S. W. 512.

(b) With Supersedeas Bond.

The prosecution of an appeal under a supersedeas bond suspends the issuance of execution upon the judgment appealed from. *Shapard v. Bailleul*, 3 Tex. 26; *Smith v. Kale*, 32 Tex. 290; *Thulemeyer v. Jones*, 37 Tex. 560, 571; *Woodson v. Collins*, 56 Tex. 168; *Wren v. Peel*, 64 Tex. 374; *Gruner v. Westin*, 66 Tex. 209, 18 S. W. 512; *Texas Trunk R. Co. v. Jackson Bros.*, 85 Tex. 605, 607, 22 S. W. 1030; *Semple v. Eubanks*, 13 Tex. Civ. App. 418, 420, 35 S. W. 509, affirmed in 93 Tex. 720, no op.

Appeal by One Codefendant.—

Though the statute provided that the judgment rendered against the parties to a replevin bond should be joint and several, an execution could not issue against one of the sureties while the principal and the other sureties were prosecuting, under supersedeas bond, a writ of error. *Wren v. Peel*, 64 Tex. 374.

Where Service of Citation in Error Obstructed.—Where the plaintiff in error has prevented the issuance and service of the citation in error, it seems that the defendant in error may require the clerk to issue execution, notwithstanding the petition and bond for writ of error; and if the clerk should refuse to issue execution, the defendant in error might, perhaps, upon a proper representation to the supreme court, have a mandamus to enforce the duty, or the petition in error may be dismissed. *Chambers v. Shaw*, 16 Tex. 143.

Damages for Wrongful Levy.—See post, "Wrongful Execution," XXIV.

(c) Where Appeal Abandoned.

If the defendant in the judgment takes an appeal, and does not prosecute it at the next succeeding term of the supreme court, the supersedeas to the judgment is at an end, and the plaintiff may sue out his execution. *Aulanier v. Governor*, 1 Tex. 653; *Shapard v. Bailleul*, 3 Tex. 26; *Muller v. Boone*, 63 Tex. 91.

(2) Judgment of Appellate Court.

(a) In General.

When a judgment is recovered and finally rendered or reformed in a court of final resort, the judgment of that court would seem to be the proper one to be enforced by execution. *Lundy v. Pierson*, 67 Tex. 233, 237, 2 S. W. 737.

Where a money judgment is affirmed by the supreme court, which thereupon renders judgment against the appellant and the sureties on his supersedeas bond, execution should issue on the judgment of the supreme court, and not on the judgment appealed from. *Irvin v. Ferguson*, 83 Tex. 491, 18 S. W. 820.

Upon the filing the mandate of the supreme court affirming a judgment of a district court, no further order is required to authorize the clerk to issue an execution. *Lemmel v. Pauska*, 54 Tex. 505, 509.

"In the case of a living person it would be the duty of the clerk to issue execution upon the filing of the mandate, without further order of the district court. Art. 1057. Suppose, however, the defendant should be dead when the clerk came to issue an execution, although alive at the time of the rendition of the judgment; the clerk would then be without authority to issue an execution. Rev. Stat. 1879, art. 2275." *Govan v. Bynum*, 17 Tex. Civ. App. 180, 181, 43 S. W. 319.

Judgment for Costs.—See the title COSTS, vol. 4, p. 971.

(b) On Affirmance.

Execution may issue on the judgment of affirmance of the supreme court. *Irvin v. Ferguson*, 83 Tex. 491, 18 S. W. 820. See Rev. Stat., art. 1057. See ante, "In General," IX, I, 3, z, (2), (a).

On affirmance of a judgment the supreme court has power to enter a judgment against the sureties on the appeal bond, and under such a judgment execution would properly issue from the district court against all persons made liable by the judgment but this is by reason of the statutes. Rev. Stat., arts. 1049, 1419. *Blair v. Sanborn*, 82 Tex. 686, 18 S. W. 159.

Where, in rendering a judgment of affirmance, the clerk had omitted the name of one of the sureties, an execution was not warranted by the judgment of the supreme court, nor by the statutory effect of the appeal bond; and the execution against such surety was void, and it was properly perpetually enjoined. *Trammell v. Watson*, 25 Tex. Supp. 210.

(c) On Reversal.

See the titles APPEAL AND ERROR, vol. 1, p. 982; JUDGMENTS AND DECREES; SHERIFFS' SALES.

An execution issued on a judgment which has been reversed is void. *Stroud v. Casey*, 25 Tex. 740; *Cleveland v. Tufts*, 69 Tex. 580, 584, 7 S. W. 72; *Flanary v. Wade*, 102 Tex. 63, 113 S. W. 8, reversing (Civ. App.), 108 S. W. 306; *Cordray v. Neuhaus*, 25 Tex. Civ. App. 247, 61 S. W. 415, affirmed in 94 Tex. 690, no op.

On Appeal without Supersedeas.—

The judgment ordered the mortgaged lands to be sold, and also other lands in lieu of part of those mortgaged, to which the mortgagor's title had failed. After a writ of error without supersedeas, the plaintiff got execution, under which he purchased other lands not included in the mortgage. The judgment was reversed on the writ of er-

ror as to the lands not included in the mortgage, which, however, had not been sold under the judgment. Held, that this did not affect the plaintiff's title as to the lands purchased at the execution sales. *Castro v. Illes*, 22 Tex. 479.

Reversal Subject to Remittitur.—
See the title SHERIFFS' SALES.

4. On Several Judgments.

Where title is claimed by virtue of execution sales under two different judgments, the fact that one of the judgments is defective does not affect the purchaser's title under the other sale. *Crain v. Hogan* (Sup.), 16 S. W. 1019.

J. ISSUANCE ON DECREE.

An execution can not issue upon a decree which has been vacated or annulled. *Wright v. Wright*, 6 Tex. 29, 31.

K. ISSUANCE ON ORDER FOR NEW TRIAL.

An order of court granting a new trial upon the payment of all costs of the term is not a judgment upon which execution may issue for such costs. *Herndon v. Rice*, 21 Tex. 455.

L. ISSUANCE ON BOND.

It is provided by Pas. Dig., art. 4625, on bonds that are declared by law to have the force and effect of a judgment that on their forfeiture a writ of execution may issue, whether proceedings be instituted by motion or by injunction. *Janes v. Reynolds*, 2 Tex. 250, 253; *Portis v. Parker*, 8 Tex. 23; *Testard v. Neilson*, 20 Tex. 139, 140; *Chrisman v. Grayham*, 49 Tex. 491, 495; *Miller v. Clements*, 54 Tex. 351, 354.

A claim bond upon its forfeiture, is declared by Pas. Dig., art. 5316, to have the force and effect of a judgment, upon which execution may issue for the value of the property. *Chrisman v. Grayham*, 49 Tex. 491.

Dig, art. 2820, provides that, if the

claimant shall fail to return the property to the officer in as good condition as when he received it, within ten days after the rendition of judgment, the officer shall certify such failure to the court, whereupon the clerk shall indorse thereon that it has been forfeited; when the bond shall have the force and effect of a judgment against all the obligors for the value of the property, with interest, etc., upon which execution shall issue. The execution therefore issues for the value of the property not for the property specifically. *Wright v. Henderson*, 12 Tex. 43, 45.

A **delivery bond** has the effect of a judgment and upon its forfeiture execution may be issued. *Miller v. Clements*, 54 Tex. 351, 355.

A **forthcoming bond** also has the effect of a judgment, and upon its forfeiture the statute applies. *Burton v. Miller*, 14 Tex. 299.

M. TIME OF ISSUANCE.

1. Issuance Instanter.

An execution in less than 10 days after rendition of the judgment is warranted if a large portion of the debtor's property is about to be moved out of the county. *Clifford v. Lee* (Civ. App.), 23 S. W. 843. See *Gruner v. Westin*, 66 Tex. 209, 18 S. W. 512.

Under Rev. St. art. 1632, allowing an execution, in less than 10 days after rendition of judgment, on the filing of an affidavit that defendant "is about to remove his property out of the county, or is about to transfer or secrete his property for the purpose of defrauding creditors," it is not necessary to state that the property is being removed with intent to defraud creditors. *Clifford v. Lee* (Civ. App.), 23 S. W. 843.

The fact that an affidavit has been filed to obtain an execution instanter need not appear in or upon the execution. *Lebreton v. Lemaire* (Civ. App.), 43 S. W. 31.

2. After Adjournment of Term.

Under the act of June 4, 1873, Pas.

Dig., art. 7372, an execution could be issued on a money judgment at the close of the term at which the judgment was rendered. *Gruner v. Westin*, 66 Tex. 209, 18 S. W. 512. See Rev. Stat. 1895, art. 2324.

The **issuance of execution on a judgment for costs** in the supreme court before the adjournment of the term is an irregularity, but is not sufficient to make void a sale under such execution. *House v. Robertson*, 89 Tex. 681, 36 S. W. 251, reversing 34 S. W. 640, on other grounds.

3. Within Twenty Days.

It is provided by Rev. Stat. 1895, art. 2325, that the clerk of the court shall issue execution upon a judgment upon the application of the successful party after twenty days from its rendition. *Gruner v. Westin*, 66 Tex. 209, 18 S. W. 512; *Texas Co. v. Beddingfield* (Civ. App.), 114 S. W. 894.

The fact that the court rendering a final judgment has not adjourned at the time of the issuance of the execution on such judgment is immaterial if twenty days have elapsed between the date of judgment and the date of the issuance of the writ. *Bumpass v. Morrison*, 70 Tex. 756, 8 S. W. 596.

4. After Twelve Months.

An original execution can not be issued after twelve months without first reviving the judgment. *Bennett v. Gamble*, 1 Tex. 124, 133; *Lubbock v. Vince*, 5 Tex. 415, 417; *Hall v. McCormick*, 7 Tex. 269; *Sydnor v. Roberts*, 13 Tex. 598; *Hancock v. Metz*, 15 Tex. 205; *Watson v. Newsham*, 17 Tex. 437; *Oldham v. Erhart*, 18 Tex. 147, 148; *Hawley v. Bullock*, 29 Tex. 216, 224; *Scogin v. Perry*, 32 Tex. 21; *Cravans v. Wilson*, 35 Tex. 52; *Black v. Epperson*, 40 Tex. 162; *Trevino v. Stillman*, 48 Tex. 561; *Sampson v. Wyatt*, 49 Tex. 627; *Riddle v. Turner*, 52 Tex. 145; *Gruner v. Westin*, 66 Tex. 209, 18 S. W. 512; *Seymour v. Hill*, 67 Tex. 385, 3 S. W. 313; *Maverick v. Flores*, 71 Tex. 110, 8 S. W. 636.

In the case of *Sampson v. Wyett*, 49 Tex. 627, it was held that execution must be issued within twelve months after the rendition of judgment.

But in *Trevino v. Stillman*, 48 Tex. 561, 566, it was held that execution must be issued within a year from the adjournment of the term at which it is affirmed and within a year from the filing of the mandate.

In *Muller v. Boone*, 63 Tex. 91, it was held that execution must be issued within twelve months from the time an appeal has lapsed.

Constructive Notice of Dormancy of Judgment.—Where executions issue on dormant judgments, all parties and privies are chargeable with notice and can acquire no title to land sold under such executions. *Johnston's Adm'r v. Shaw*, 33 Tex. 585.

One purchasing under an execution issued on an original judgment so old on its face as to be barred, and discoverable on inquiry to be discharged in bankruptcy, acquires no title as against a former purchaser, of whose interest he had no actual notice. *Hart v. McDade*, 61 Tex. 208.

Under Stay Laws.—The law of November 10, 1866, though unconstitutional, authorized the issuance of executions within twelve months after the adjudication of the unconstitutionality of the enactment by the supreme court in January, 1866. *Cravans v. Wilson*, 35 Tex. 52. As to issuance under stay laws to preserve judgment lien, see the title JUDGMENTS AND DECREES.

Effect of Issuance after Twelve Months.—It was formerly held in this state that an execution sued out after the expiration of twelve months of the rendition of the judgment was void. *Bennett v. Gamble*, 1 Tex. 124; *Scott v. Allen*, 1 Tex. 508, 514; *Fessenden v. Barrett*, 9 Tex. 475, 477.

But the present rule is that an execution so issued is voidable and not void. *Sydnor v. Roberts*, 13 Tex. 598;

Boggess v. Howard, 40 Tex. 153, 158; *Riddle v. Turner*, 52 Tex. 145, 150; *Meador Co. v. Aringdale*, 58 Tex. 447, 450; *Maverick v. Flores*, 71 Tex. 110, 118, 8 S. W. 636; *Cleveland v. Tittle*, 3 Tex. Civ. App. 191, 193, 22 S. W. 8; *Taylor v. Doom*, 43 Tex. Civ. App. 59, 95 S. W. 4.

Same—Under Act of 1841.—An execution not sued out within a year from time judgment was rendered is void under the limitation act of 1841. *Johnston v. Shaw*, 33 Tex. 585, 587.

Same—On Rights of Purchaser.—A sale under an execution issued under a dormant judgment is not void, but only voidable and at the instance of the defendant in execution. *Sydnor v. Roberts*, 13 Tex. 598; *Hancock v. Metz*, 15 Tex. 205, 209; *Andrews v. Richardson*, 21 Tex. 287, 296; *Hawley v. Bullock*, 29 Tex. 216, 225; *Boggess v. Howard*, 40 Tex. 153, 158; *Gruner v. Westin*, 66 Tex. 209, 18 S. W. 512; *Maverick v. Flores*, 71 Tex. 110, 118, 8 S. W. 636; *Cleveland v. Tittle*, 3 Tex. Civ. App. 191, 193, 22 S. W. 8; *Odum v. Menafee*, 11 Tex. Civ. App. 119, 33 S. W. 129; *Taylor v. Doom*, 43 Tex. Civ. App. 59, 95 S. W. 4.

As between a prior purchaser from a judgment debtor and a subsequent purchaser under an execution sale, the former may urge the loss of the judgment lien relied on by the latter. *Gruner v. Westin*, 66 Tex. 209, 18 S. W. 512; *Adams v. Crosby*, 84 Tex. 99, 19 S. W. 355.

The title of a purchaser under an execution issued in 1846 is good, though the previous execution was issued in 1843, and the judgment was obtained in 1842, and no writ had been issued on the judgment. *Andrews v. Richardson*, 21 Tex. 287.

A sheriff's deed, under an execution issued more than seven years after entry of judgment, and the docket showing the issuance of such execution, are admissible in evidence to show title in the purchaser at the

sheriff's sale, although no execution had been issued on the judgment within one year after its rendition, since an execution issued on a dormant judgment is only voidable. *Maverick v. Flores*, 71 Tex. 110, 8 S. W. 636.

The judgment creditor's purchase at a sheriff's sale can not be effectually attacked collaterally by a stranger on the ground that the execution issued on a dormant judgment. *Riddle v. Turner*, 52 Tex. 145; *Bogges v. Howard*, 40 Tex. 153; *Hill v. Newman*, 67 Tex. 265, 3 S. W. 271.

Where land was sold under an execution, issued as original from another county, anterior to which more than a year had intervened since the judgment, without issuance of execution, it was held that the irregularity rendered the execution voidable, if taken advantage of by the proper person, in proper time, but did not affect the title under it in an action brought by the representatives of the judgment debtor against the vendee of the purchaser, two years after sale. *Hancock v. Metz*, 15 Tex. 205.

As to setting aside sale because execution issued after twelve months, see the title SHERIFFS' SALES.

After Issuance of Prior Execution.—Although an alias or pluries writ was not issued within twelve months of the issuance of a prior writ, the writ is voidable but not void, and does not invalidate the title of the purchaser. *Sydnor v. Roberts*, 13 Tex. 598; *Hawley v. Bullock*, 29 Tex. 216, 224.

An execution issued more than twelve months from issuance of a former execution will be enjoined. *Watson v. Newsham*, 17 Tex. 437, 438.

On Scire Facias.—See the title SCIRE FACIAS.

"By the common law, if no execution was sued out within a year and a day from the judgment, none could be taken out at all, and the plaintiff was compelled to commence a new suit on his judgment and obtain another judg-

ment before he could have execution. This was altered by the statute of Westminster, and the writ of scire facias was given to revive the judgment." *Scott v. Allen*, 1 Tex. 508, 514.

After the lien of the judgment has been lost by failure to issue execution within a year, the writ can not be issued until the judgment has been revived. *Bennett v. Gamble*, 1 Tex. 124, 135; *Shapard v. Bailleul*, 3 Tex. 26, 28.

Presumption of Issuance within Year.—In the absence of testimony the court will not presume that an execution upon a judgment in district court was not issued within one year after its rendition. *Laughter v. Seela*, 59 Tex. 177, 179; *Humason v. Lobe*, 76 Tex. 512, 513, 514, 13 S. W. 382.

Where land was sold under execution more than a year after the rendition of judgment, during which period Pasch. Dig. arts. 3772, 7005, require an execution to issue in order to keep the lien alive, the fact that the execution under which the sale took place was an alias raises no presumption that the former execution was issued within the year. *Gruner v. Westin*, 66 Tex. 209, 18 S. W. 512.

The presumption will not be indulged that a mandate upon appeal was issued before adjournment of the term of the supreme court at which the cause was decided, if the effect will be to impeach an execution afterwards issued, because not issued within a year from date of filing mandate. *Trevino v. Stillman*, 48 Tex. 561.

Where the record shows a sale under execution in 1867 on a judgment rendered in 1863, it will be presumed that the execution legally issued, no failure to issue execution within the year being shown, nor whether it was the first or an alias or pluries execution. *Laughter v. Seela*, 59 Tex. 177.

Enjoining Execution Issued after Year.—See post, "After Twelve Months," XII, D, 7, a.

Issuance of Execution on Decree.—Rev. St. art. 3160, which requires an

execution to issue within 12 months after the rendition of a judgment to preserve its lien, has no reference to decrees establishing or foreclosing contract liens. *Willis v. Smith*, 66 Tex. 31, 17 S. W. 247.

5. After Death of Party.

See post, "After Death of Party," XII, D, 7, b.

a. Plaintiff.

If a *feri facias* bears test after the death of the plaintiff, it is void. *Bennet v. Gamble*, 1 Tex. 124, 133.

b. Defendant.

(1) In General.

See the title EXECUTORS AND ADMINISTRATORS. And see ante, "Void Judgment," IX, I, 3, k.

(3) Where Judgment Revived by Scire Facias.

See the titles JUDGMENTS AND DECREES; SCIRE FACIAS.

By Statutory Notice.—The statute provision (4 Laws 4th Leg.[Ex. Sess.] p. 20) must be followed, by filing an affidavit of the party's death and a certificate of the administrator's appointment, or else a formal judgment of revival must be made, before an execution in a suit by a party deceased can issue in the name of the administrator. *Fowler v. Burdett*, 20 Tex. 34.

"This act may be cumulative and substitutes the affidavit and certificate for a formal judgment of revival." *Fowler v. Burdett*, 20 Tex. 34, 37.

"The same legal consequence does not follow from a suggestion of the death of the plaintiff by his attorney, and the coming in of administrators. Those acts can not operate as a revival of the judgment, but are the first steps to be taken to revive the judgment by a formal entry of a judgment of revival, which has not been made in this case. There has, therefore, not been a legal pursuit of either of the two remedies, which has been provided in such case by statute." *Fowler v. Burdett*, 20 Tex. 34, 37.

(3) Where There Are Several Defendants.

On a joint and several judgment against three defendants, levy was made on the land of one of defendants, who, pending levy and before the day of sale, died. Held, that after the death of such defendant the judgment creditors had a right to execution against the surviving defendants without first proceeding against the estate of the deceased defendant. *Boyce v. Woods*, 37 Tex. 245.

6. After Receipt of Mandate.

Paschal's Dig., art. 1571, provides that clerks shall proceed to issue execution on the receipt of the mandate of the supreme court. *Trevino v. Stillman*, 48 Tex. 561, 564.

7. While Suit for Injunction Pending.

The pendency of a suit for an injunction against an execution which has been irregularly issued, is no bar to the regular issue of another execution. *Turner v. Smith*, 9 Tex. 626.

8. Effect of Premature Issuance.

The premature issuance of an execution is a mere irregularity, which can not be attacked in trespass to try title to lands sold thereunder. *House v. Robertson* (Civ. App.), 34 S. W. 640, reversed in 89 Tex. 681, 36 S. W. 251. See the title SHERIFFS' SALES.

N. FORGED ISSUANCE.

No title passes by a sale under a forged execution, even to an innocent purchaser. *Silvan v. Coffee*, 20 Tex. 4.

O. IRREGULAR ISSUANCE.

Where there is a valid judgment, irregularities in the issuance of executions, must be taken advantage of by the proper person and in proper time, or they will not affect the validity of the title of the purchaser at a sale under the execution. *Hancock v. Metz*, 15 Tex. 205.

If there are irregularities in the executions, through which the rights of a surety, as between himself and his principals and cosureties, are preju-

diced, in that the executions are for sums for which he may not have been responsible, that is a matter of which he alone can complain. *Wren v. Peel*, 64 Tex. 374, 380. See the title **SHERIFFS' SALES**.

P. OF ALIAS AND PLURIES WRITS.

The writs which issue after the original are named alias, pluries and then by number. *Scott v. Allen*, 1 Tex. 508, 514.

Form and Requisites.—See ante, "Recital of Issuance of Prior Execution," V, K.

Grounds for Issuance.—If a valid levy of an execution be made, it is prima facie sufficient, and an alias can not be legally issued until the insufficiency of such levy be made to appear. *Bryan v. Bridge*, 10 Tex. 149.

Where an order of sale was returned by the sheriff without execution as a writ of possession, the clerk may properly issue a new writ directing execution of such balance of the judgment. *Morris v. Morgan*, 92 Tex. 92, 93, 94, 45 S. W. 1002.

Time for Issuance.—See ante, "Time of Issuance," IX, M. And see the title **JUDGMENTS AND DECREES**.

An alias execution, issued after the lapse of one term of the court after the return term of the original execution, is voidable, but not void. *Portis v. Parker*, 22 Tex. 699.

To keep alive a judgment which is not dormant, an execution having issued within one year from its rendition, it is only necessary to issue an alias execution before the expiration of ten years from the issuance of first execution. *Glasscock v. Stringer* (Civ. App.), 32 S. W. 920, affirmed in 93 Tex. 684, no op.

Into What County Issued.—See ante, "To What County Writ Issued," IX, H.

Judgments on Which Issued.—See ante, "Issuance on Judgment," IX, I.

While an appeal from a judgment

quashing the levy and return of an execution is pending in the supreme court, no other execution can be legally issued nor a new levy made, but, after such judgment is affirmed, the plaintiff in execution may take out an alias. *Bryan v. Bridge*, 10 Tex. 149.

As Substituted for Writ of Venditioni Exponas.—It is the usual practice to issue an alias or pluries writ and endorse on it the levies returned by the sheriff on the former writ rather than issue a writ of venditioni exponas. *Lockridge v. Baldwin*, 20 Tex. 303.

Q. PRESUMPTIONS.

Presumption of Issuance within Year.—See ante, "After Twelve Months," IX, M, 4.

Presumption of Consent of Parties.—It will be presumed that an execution was issued with the consent of the plaintiff unless the contrary is shown. *Smith v. Perkins*, 81 Tex. 152, 157, 16 S. W. 805.

Presumption of Regularity.—Where an alias order of sale was lost, the recital in the execution docket that the alias was issued and delivered to the sheriff of G. county raised a presumption that it conformed to the legal requirements, especially when it was shown that an original order of sale had previously issued directed to the sheriff of G. county and was returned by him for want of time to sell and the alias was issued thereon. *Terry v. Cutler*, 4 Tex. Civ. App. 570, 23 S. W. 539.

R. EFFECT OF ISSUANCE.

As Adding Finality to Judgment.—See the title **FINAL JUDGMENTS AND DECREES**.

As Bar to Issuance of Other Writ.—Where plaintiff had two judgments to secure the same debt, and had issued execution on the later one, a vend. ex. issued on the first judgment was irregular. *Cook v. Sparks*, 47 Tex. 28.

As Creating Lien.—See post, "As Creation of Lien," XVI, S. 3.

"The mere lodging an execution with the sheriff gives the plaintiff in execution no preference, or lien upon personal property, or right to choses in action of the defendant in execution." *McClane v. Rogers*, 42 Tex. 214, 218.

As Bar to Granting New Trial.—By the issuance of an execution under the act of January 27, 1842, the court is not deprived of the power to grant a new trial. *Garza v. Baker*, 58 Tex. 483.

X. Receipt of Writ by Officer.

The penalty under Hart. Dig. art. 1332, is not incurred by the sheriff's failure to date or number an execution where it does not appear that more than one was received. *DeWitt v. Dunn*, 15 Tex. 106, 108; *Bailey v. Harris*, 19 Tex. 109; *Garner v. Cutler*, 28 Tex. 175, 181. See post, "Between Different Executions," XIX, B, 1.

XI. Abandonment and Withdrawal of Writ.

It is incompetent to impeach a sheriff's deed by parol evidence that the execution had been withdrawn and the levy abandoned. *Owen v. Navasota*, 44 Tex. 517, 521.

XII. Enjoining Execution.

A. IN GENERAL.

Injunction is the only means to prevent a levy on and sale of land under execution, where there is no adequate legal remedy. *Purinton v. Davis*, 66 Tex. 455, 456, 1 S. W. 343; *Glass v. Smith*, 66 Tex. 548, 2 S. W. 195.

B. JURISDICTION AND VENUE.

1. Court Where Judgment Rendered.

Subdivision 15, art. 1198, Rev. Stat., provides: "Where suit is brought to enjoin the execution of a judgment, etc., the suit shall be brought in the county in which such judgment was

rendered." *Van Ratcliff v. Call*, 72 Tex. 491, 10 S. W. 578.

Article 3932, Pas. Dig. (Rev. Stat., art. 2880) provides that injunctions to stay execution on a judgment shall be returnable and tried in the district court of the county where the judgment was rendered. *Winnie v. Grayson*, 3 Tex. 429, 430; *Cook v. Baldridge & Co.*, 39 Tex. 250, 252; *Van Ratcliff v. Call*, 72 Tex. 491, 10 S. W. 578; *Leachman v. Capps*, 89 Tex. 690, 36 S. W. 250; *Reagan v. Van Evans*, 2 Tex. Civ. App. 35, 21 S. W. 427; *Adoue v. Wettermark*, 22 Tex. Civ. App. 545, 55 S. W. 511 (see 94 Tex. 81); *Hugo v. Dignowitty*, 1 App. Civ. Cases, § 158.

Under Sayles' Civ. St. art. 2880, providing that writs of injunction granted to stay proceedings on execution shall be returnable in the court where the judgment was rendered, a judge of a court other than the one in which the judgment was rendered having granted an interlocutory order, his jurisdiction ceases, and the final hearing must be in the court where judgment was rendered. *Capps v. Leachman (Civ. App.)* 35 S. W. 397, reversed in 89 Tex. 690.

Where the judgment of a court of civil appeals affirms the judgment below and adjudges that the appellee recover from the appellant and the sureties on his supersedeas bond "such amounts as were adjudged to them below, and all costs," it is prima facie a valid judgment, and the district court of a county other than the one in which the original judgment was entered has not jurisdiction to enjoin an execution issued after filing of the mandate below on the ground that it is not a money judgment against the sureties. *Adoue v. Wettermark*, 22 Tex. Civ. App. 545, 55 S. W. 511 (see 94 Tex. 81).

The district court of a county in which a levy of an execution on land was made under a judgment rendered in the district court of another county has no jurisdiction to enjoin the sale of land under such execution and set

it aside as being a cloud on title, where the judgment of the court of civil appeals had affirmed the judgment under which the execution issued. *Ellis v. Harrison*, 24 Tex. Civ. App. 13, 20, 56 S. W. 592, 57 S. W. 984, affirmed in 93 Tex. 637, no op., 94 Tex. 690, no op.

The court in which a judgment was originally rendered is the court in which an injunction restraining the execution of the judgment is returnable, and a suit brought in the district court of another county, where the levy was made on the land, to enjoin its sale and to set aside the judgment of the court of civil appeals affirming the judgment of the district court, was properly dismissed for want of jurisdiction. *Ellis v. Harrison*, 24 Tex. Civ. App. 13, 57 S. W. 984; 56 S. W. 592, affirmed in 93 Tex. 637, no op., 94 Tex. 690, no op.

Article 2880 is imperative and not a privilege which can be waived by the parties. *Capps v. Leachman* (Civ. App.), 35 S. W. 397, reversed in 89 Tex. 690; *Hugo v. Dignowitty*, 1 App. Civ. Cases, § 158.

Waiver of Privilege of Art. 1194.—But a defendant, who proceeds to the trial of an action to enjoin the execution of a judgment in a county other than that in which the judgment was rendered, waives the privilege given him by Rev. Stat., art. 1194, clause 17, to have the action tried in such county. *Foust v. Warren* (Civ. App.), 72 S. W. 404.

Of District Court over Execution from County Court.—Under Rev. Stat. art. 2996, the district court was held to have no jurisdiction of suit to enjoin the defendants from issuing execution on judgment rendered in county court. *Smith v. Morgan*, 28 Tex. Civ. App. 245, 67 S. W. 919 (see 95 Tex. 686, no op.).

A district court, under the constitution of Texas, is without jurisdiction to enjoin a sale under the levy of an execution issued upon judgment in the county court. *Lincoln v. Anderson* (Civ. App.), 51 S. W. 278, 279.

Where Execution Issued to Another County.—Where judgment was rendered in one county, and execution levied thereon in another, an injunction may be granted in the latter county, and be made returnable to the county where judgment was rendered, to be tried; Rev. St. arts. 1198, 2880, providing that such a suit shall be brought in the county in which judgment was rendered. *George v. Dyer*, 1 White & W. Civ. Cas. Ct. App. § 780.

Where judgment was rendered in one county, and an execution thereon was sent to another county and there levied upon property, an injunction obtained in the latter county enjoining the execution is returnable to the county where the judgment was rendered. *George v. Dyer*, 1 White & W. Civ. Cas. Ct. App. § 780.

Where an injunction questions the validity of an order of sale, it must be returned to the court from which the order issued. *Seligson v. Collins*, 64 Tex. 314, 315.

Execution against County.—See the title COUNTIES, vol. 5, p. 1.

Dismissal for Return to Wrong Court.—If the writ be not so made returnable, the petition therefore should be dismissed. *Hendrick v. Cannon*, 2 Tex. 259.

2. Other Courts.

Issued on Void Judgment.—Under Rev. Stat., arts. 1194, 2996, where the judgment on which a writ of execution is issued is void, jurisdiction to enjoin such writ is not vested exclusively in the court where judgment rendered. *Leachman v. Capps*, 89 Tex. 690, 36 S. W. 250, reversing 35 S. W. 397; *Adoue v. Wettermark*, 22 Tex. Civ. App. 545, 55 S. W. 511 (see 94 Tex. 81).

Issued on Judgment of Justice of Peace.—An injunction to restrain an execution sale upon a judgment of a justice of the peace is properly returnable before the county court of the county of the plaintiff's domicile. *Brown & Co. v. Young*, 1 App. Civ. Cases, § 1240.

Rev. Stat., art. 2996, requiring writs of injunction to restrain the execution of a judgment to be made returnable to and tried in the court rendering the judgment, has no application to a writ issued to restrain the collection of a justice's judgment. *Foust v. Warren* (Civ. App.), 72 S. W. 404.

Issued on Judgment of County Court.—See ante, "Court Where Judgment Rendered," XII, B, 1.

Issued into Another County.—See ante, "Court Where Judgment Rendered," XII, B, 1.

Suit by Stranger to Judgment.—Where the property of a person, who is not a party to the judgment, has been levied upon, he may claim that his rights shall be tried in the court of his domicile. *Winnie v. Grayson*, 3 Tex. 429; *Huggins v. White*, 7 Tex. Civ. App. 563, 27 S. W. 1066, affirmed in 93 Tex. 664, no op.; *Brown & Co. v. Young*, 1 App. Civ. Cases, § 1240.

A suit to enjoin the sale of land under an execution and judgment, brought by one not a party to such judgment, is properly instituted in the jurisdiction where the land lies. *Huggins v. White*, 7 Tex. Civ. App. 563, 567, 27 S. W. 1066, affirmed in 93 Tex. 664, no op.; *McCargo v. Smith*, 23 Tex. Civ. App. 714, 58 S. W. 188.

The district court of M. county had jurisdiction to enjoin execution upon a judgment of the district court of H. county at a suit of one, not a party to that judgment, seeking to prevent a cloud upon his title to land in M. county. *Corbett v. Provident Nat. Bank*, 23 Tex. Civ. App. 602, 57 S. W. 61, affirmed in 94 Tex. 699, no op.

Where two petitioners in a suit to enjoin the sale of land levied on were not parties to the action in which the execution issued, but joined their co-plaintiffs in the execution of a supersedeas bond on appeal of the case, they were not such strangers to the judgment of the district court as to entitle them to maintain a suit in an-

other county, where the levy was made on their land, to enjoin its sale and set aside the judgment of the court of civil appeals affirming the judgment of the district court. *Ellis v. Harrison*, 24 Tex. Civ. App. 13, 57 S. W. 984, 56 S. W. 592, affirmed in 93 Tex. 637, no op., 94 Tex. 690, no op.

Where Property Exempt from Execution.—The statutory provisions above set out do not apply to injunctions seeking to restrain sale of the homestead of defendant on the ground of exemption. *Van Ratcliff v. Call*, 72 Tex. 491, 10 S. W. 578; *Leachman v. Capps*, 89 Tex. 690, 36 S. W. 250, reversing 35 S. W. 397.

Article 2996, Rev. Stat., regarding jurisdiction of trial in injunction to stay proceedings on execution, does not apply to an injunction to restrain the sale of a homestead. *Leachman v. Capps*, 89 Tex. 690, 36 S. W. 250, reversing 35 S. W. 397.

The jurisdiction of a court other than the one in which a judgment was rendered to grant an injunction to stay proceedings on execution, on the ground that the property levied on was the homestead of the debtor, is not avoided by the allegation, as a second cause of action, that the execution was void for irregularities on its face, though the court has no jurisdiction to grant an injunction on such second ground, under *Sayles' Civ. St. art. 2880*. *Leachman v. Capps*, 89 Tex. 690, 36 S. W. 520, reversing 35 S. W. 397.

3. Retention of Jurisdiction.

Jurisdiction, when once obtained, should be exercised to finally determine the rights involved under the issues made; and, if necessary, to perpetuate the injunction. *Stein v. Frieberg, etc., Co.*, 64 Tex. 271, following *Willis v. Gordon*, 22 Tex. 241, 243.

C. PARTIES.

1. Plaintiffs.

a. Owner.

"If an execution against a person

who had once been the owner of the property be levied upon it, and it be no longer liable to levy and sale under such execution, the present owner of the property may, in equity, prevent his title being clouded by such sale." *Texas Land, etc., Co. v. Worsham*, 5 Tex. Civ. App. 245, 249, 23 S. W. 938.

b. Holder of Record Title.

Where complainant was in possession and was the record holder of the legal title to certain real estate levied on as the property of another at the time of the levy, he was not entitled to an injunction to restrain a sale, since the purchaser at the sale could acquire only the title of the defendant in execution. *Magoffin v. San Antonio Brewing Ass'n* (Civ. App.), 84 S. W. 843.

c. Trustee.

Where the taking of goods under execution is a trespass, and will work irreparable injury to the one entitled thereto as trustee, he is entitled to an injunction to prevent sale of them. *Sumner v. Crawford* (Civ. App.), 41 S. W. 825.

A trustee in possession of a stock of goods conveyed to him by a firm for sale to pay creditors can, by injunction, compel the restoration of goods out of such stock unlawfully levied upon (by seizure upon execution against one of the partners, instead of by notice as provided by Rev. Stat., arts. 2349, 2352), by showing that such taking greatly depreciated in value the remainder of the stock and damaged the trust estate. *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994, affirming 41 S. W. 825.

d. Cestui Que Trust.

The equitable owner of lands held in trust may sue to enjoin a sale under execution against the trustee, as a cloud upon the title. *Hawkins v. Willard* (Civ. App.), 38 S. W. 365.

Owners of the equitable title to land, whose trustees threaten no breach of trust, but stand ready to convey, are

not entitled to an injunction restraining the sale of the trust property under an execution directed against a stranger to the paper title, nor does the fact that their title rests in parol give them that right. *Brown v. Ikard*, 77 S. W. 967, 33 Tex. Civ. App. 661.

e. Vendor.

A vendor of land, conveyed by a warranty deed, has such interest therein, that he can sue out an injunction to restrain the wrongful sale of such land under an execution, which would cast a cloud on his vendee's title. *Huggins v. White*, 7 Tex. Civ. App. 563, 567, 27 S. W. 1066, affirmed in 93 Tex. 664, no op.

f. Purchaser.

Where the plaintiff is the equitable owner of land, he may enjoin the execution of a judgment against his vendor which would apparently create a title superior to the plaintiffs' and cloud his title. *Rodriguez v. Buckley* (Civ. App.), 30 S. W. 1123, 1124.

An injunction will not issue to restrain the execution sale of land at the suit of a third person, to whom the judgment debtor has sold land. *Carlin v. Hudson*, 12 Tex. 202, 203.

Where the plaintiff purchased the property of the judgment debtor after judgment, but before execution, he was not entitled to an injunction restraining the sale of the property under an execution on the ground that the judgment was had on a note for which the property in question was not liable, and the execution was therefore void. *Loan, etc., Co. v. Campbell*, 27 Tex. Civ. App. 52, 65 S. W. 65.

Complainant alleged his purchase of the land, a part of the rural homestead of defendant in execution, March 11, 1889. The execution was levied April 10, 1889, on the land, no prior lien being alleged. Held, in application for injunction that there was no necessity shown for a resort to a court of equity for protection. *Mann v. Wal-*

lis, etc., Co., 75 Tex. 611, 12 S. W. 1123.

g. Mortgagee.

If a mortgagee is endangered, in respect to his lien, by the levy of an execution, his remedy is to invoke the equitable powers of the court by an original proceeding. *Wright v. Henderson*, 12 Tex. 43, 46; *Wootton v. Wheeler*, 22 Tex. 338; *Baker v. Clepper*, 26 Tex. 629, 634; *Belt v. Raguet*, 27 Tex. 471, 472; *Raysor v. Reid*, 55 Tex. 266, 271.

h. Attaching Creditor.

An attaching creditor is entitled to an injunction to restrain the sheriff who has levied on goods under an execution fraudulently obtained. *Blum v. Schram & Co.*, 58 Tex. 524, 530.

Attaching creditors have a right to enjoin the sale of their debtor's property under a judgment foreclosing a prior attachment, where such judgment was void as being rendered in a county court having no jurisdiction of the amount in controversy. *Orr v. Moore*, 1 White & W. Civ. Cas. Ct. App. § 589.

i. Garnishee.

See the title GARNISHMENT.

j. Husband and Wife.

Community Property.—Where plaintiff's title to land is derived through a grant from a married woman made subsequent to the entry of a judgment against her husband, injunction will lie to restrain the execution sale thereof under the judgment against her husband as community property on which the judgment was a lien at the time of the conveyance to plaintiff, where as a matter of fact such property was the wife's separate estate and not subject to the lien of the judgment, since to permit such sale would cast a cloud on plaintiff's title, the invalidity of which could only be shown by evidence dehors the record. *Roe v. Dailey*, 1 Posey, Unrep. Cas. 247.

Separate Property of Wife.—A court of equity has no jurisdiction to enjoin a threatened sale of lands belonging to the wife, under an execution against her husband, for the wife has an adequate remedy at law, and the sale is not a cloud on her title. *Purinton v. Davis*, 66 Tex. 455, 1 S. W. 270; *Spencer v. Rosenthal*, 58 Tex. 4, 5.

A petition for injunction showed that a stock of horses, the separate property of petitioner, was about to be sold under a judgment foreclosing an attachment lien in favor of defendant against petitioner's husband; that, though originally a party to the attachment suit, petitioner had been, at her own instance, dismissed therefrom long prior to the judgment. Held, that the petition failed to show grounds for the interposition of a court of equity. *Perrin v. Stevens* (Civ. App.), 29 S. W. 927.

Property in Part Community and in Part Separate.—A sheriff can not be enjoined from levying on land partly community and partly separate property of wife where a schedule is filed by the latter. *Braden v. Gose*, 57 Tex. 37, 42.

An execution was levied on land conveyed by the execution defendant to his wife during coverture in consideration of money paid, two-thirds of which was the separate property of the wife and one-third was interest on a loan of her money. A schedule of the wife's separate estate, which included the land, was filed before the levy. Held, that the fact that the levy was on the entire tract afforded the wife no ground for an injunction. *Braden v. Gose*, 57 Tex. 37.

Homestead Property.—“In cases where the property sought to be sold under execution against the husband was a homestead, or had been dedicated as such, our courts have exercised their equitable jurisdiction at the instance of the wife, and sometimes at the instance of the husband, to restrain the sale, upon the ground that

it would be a cloud upon title." *Texas, Land, etc., Co. v. Worsham*, 5 Tex. Civ. App. 245, 249, 23 S. W. 938.

k. Surety.

Sureties can not enjoin an execution on the ground of extension of time on the debt merged in the judgment, given without their consent and not discovered by them until after judgment, where they allege no excuse for delay in making discovery. *Alexander v. Banner Bros.*, 10 Tex. Civ. App. 111, 113, 30 S. W. 563, affirmed in 93 Tex. 654, no op.

An injunction will not be granted against an execution issued against the complainants as securities on a 12-months bond, given under section 17 of the execution law of 1840 for a purchase of land sold under *fieri facias*, and admitted by them to have been forfeited, on the ground that the execution had been issued without the authority of any court of justice and without the sanction of the judicial tribunals of the land; nor will such injunction be granted upon an allegation that the complainants "are informed and believe that the bond on which said execution was issued was not taken in conformity with law, and is not such a one as execution could issue on." *Bryan v. Knight*, 1 Tex. 180.

A surety on an appeal bond who learns that the judgment has been erroneously rendered on the bond against him, during the term of court at which such judgment is rendered, is not entitled to an injunction to restrain the enforcement of the execution, where he made no application for relief to the court during such term. *Rowlett v. Williamson*, 18 Tex. Civ. App. 28, 44 S. W. 624.

Sureties on a replevin bond are bound only for the value of the property not forthcoming on demand; and as the sheriff's valuation of the property levied on in this case was not in accordance with law, he having made

an aggregate valuation of real and personal property, the sureties should have been allowed, on their injunction bill, to prove the value of the property not forthcoming, and to enjoin the execution as to the residue of the judgment. *Miles v. Davis*, 36 Tex. 690.

l. Stranger to Judgment.

To entitle a person not a party to the execution to injunction he must show that his right will be injuriously affected, or that some irreparable injury will follow if the sale be made. This is the settled rule of the supreme court. *Henderson v. Morrill*, 12 Tex. 1; *Carlin v. Hudson*, 12 Tex. 202, 203; *Whitman v. Willis & Bros.*, 51 Tex. 429, 432; *Spencer v. Rosenthal*, 58 Tex. 4; *Purinton v. Davis*, 66 Tex. 455, 1 S. W. 270; *Mann v. Wallis, etc., Co.*, 75 Tex. 611, 613, 12 S. W. 1123.

A petitioner is not entitled to an injunction restraining the sale of land under an execution issued on a judgment to which petitioner was not a party unless the petition states that by the sale a cloud would be cast on the petitioner's title to the land, and it is not sufficient to allege that there is an apprehension of a multiplicity of suits in consequence of such contemplated sale. *Cook v. Texas & P. Ry. Co.*, 3 Tex. Civ. App. 145, 22 S. W. 58.

Since Sayles' Civ. St. art. 1340a, gives an order of sale under a judgment foreclosing a lien the force of a writ of possession, injunction will lie to restrain a sale under such order of land belonging to a stranger to the foreclosure judgment. *Wofford v. Booker*, 10 Tex. Civ. App. 171, 30 S. W. 67.

2. Defendants.

The plaintiff in execution is a necessary party to a suit against a sheriff to enjoin the sale of property levied on under execution. *Ryburn v. Getzendaner*, 1 Posey, Unrep. Cas. 349.

D. GROUNDS FOR RELIEF.**1. In General.**

In order for a petitioner to be entitled to a writ of injunction to restrain an execution, he must show a serious infringement of his legal rights for irreparable injury to his property. *Whitman v. Willis & Bro.*, 51 Tex. 429, 432.

2. As Determined by Existence of Other Remedy.**a. In General.**

The remedy by injunction to restrain an execution can only be invoked where there is no adequate legal remedy. *Purinton v. Davis*, 66 Tex. 453, 456, 1 S. W. 270.

Injunction will not lie to restrain the sale of land where there is an adequate legal remedy to protect the title. *Hahn v. P. J. Willis & Bro.*, 73 S. W. 1084, 31 Tex. Civ. App. 643.

Injunction does not lie to restrain a sale of a wife's land on execution against her husband, since there is an adequate remedy at law. *Spencer v. Rosenthal*, 58 Tex. 4, following *Kirk v. Houston*, etc., Nav. Co., 49 Tex. 213, and distinguishing *Wallace & Co. v. Campbell*, 54 Tex. 87.

The execution of an order for the sale of lands under a judgment, as the property of the judgment debtor, will not be enjoined on the petition of the children of the judgment debtor, on the ground that they are the owners of an undivided half interest in the property, as the heirs of their deceased father, and that said sale will operate to their injury, when such sale can not cloud the title of the children, and, so far as their interests are concerned, a plain and adequate remedy is afforded them at law. *Modisette v. National Bank of Kalamazoo*, 56 S. W. 1007, 23 Tex. Civ. App. 589.

b. Action for Damages.

Where property in the hands of a constable by virtue of a distress war-

rant is taken by a sheriff under other process, the remedy is an action for damages against the sheriff or for the recovery of the specific property, and not a suit to enjoin a sale by the sheriff. *Demmitt v. Garnier*, 2 Posey Unrep. Cas. 333.

A sheriff can not be enjoined from selling property which the complainant claims he has taken without process, and which the complainant had caused to be seized under a distress warrant, as the remedy against the sheriff was for damages or for the recovery of the property itself in the hands of the sheriff. *Demmitt v. Garnier*, 2 Posey Unrep. Cas. 333. See *Fuller v. Sparks*, 39 Tex. 136.

c. Trespass to Try Title.

The action of trespass to try title is an adequate legal remedy after sale in all cases in which the sale will pass on as the title of the defendant. *Purinton v. Davis*, 66 Tex. 455, 1 S. W. 270.

A sale on execution, under a judgment against a firm, of the homestead of one of its members, which had been conveyed before the judgment creditors had done anything to fix a lien on the land, and of which conveyance they had notice when they levied their execution, will not be enjoined, as the possession of the grantee will not be disturbed by the sale, and he has an ample remedy in trespass to try title. *Mann v. Wallis*, 75 Tex. 611, 12 S. W. 1123.

An allegation of title by limitations founded on the possession by an agent, which, if adverse to them would have invested the agent with title, when contradicted by other allegations of the petition showing that plaintiffs had been under the disability of minority until less than four years before institution of suit, shows no grounds for injunction to restrain the sale of lands under execution directed against the agent, as their remedy by trespass to try title against purchaser would have been adequate. *Brown v.*

Icard, 77 S. W. 967, 33 Tex. Civ. App. 661.

An injunction, in favor of an administrator, to restrain the sale on execution of the interest of certain heirs in land belonging to an estate in course of administration, on the ground that such sale would cast a cloud on the title to such land, and prevent its selling for its value at an administrator's sale, will not lie, as a purchaser at the execution sale would take title subject to administration, and trespass to try title would be an adequate legal remedy for the purchaser at the administrator's sale. *Hahn v. P. J. Willis & Bro.*, 73 S. W. 1084, 31 Tex. Civ. App. 643.

d. Trial of Right of Property.

The claimant of property levied on under execution can not invoke relief by injunction to prevent its sale, unless some good reason be alleged in the petition why he did not resort to his legal remedies by affidavit and claim bond to try the right of property. *George v. Dyer*, 1 White & W. Civ. Cas. Ct. App. § 781.

It is error to grant a perpetual injunction restraining a sale of chattels under execution in a suit by the mortgagee, where the only question involved is that of title to the property or its value, as the mortgagee has the adequate remedy at law of a trial of the right of property under 2 Sayles' Civ. St. art. 5286. *Williams v. Farmers' Nat. Bank*, 56 S. W. 261, 22 Tex. Civ. App. 581, distinguishing *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994, affirming 41 S. W. 825.

Where an execution against one person has been levied upon property of another, the party thus aggrieved has a remedy by injunction, or by common-law action, and is not restricted to his statutory "trial of the right of property" alone. *Hardy v. Broadus*, 35 Tex. 668.

A mortgagee and claimant became sureties on an attachment bond in an

action against the mortgagor, and, on execution being subsequently issued in the action, sought to intervene; the claimant asserting that he was owner of one-half the property, and the mortgagee asserting the mortgage. Intervention was refused, the replevin bond declared forfeited, and execution issued thereon against the claimant and mortgagee. Held, that an injunction restraining the execution was properly dissolved, since the claimant had ample remedy by resorting to the trial of property under the statute, and there was no averment in the petition that the debtor was insolvent, or that he had no other property subject to execution. *Bayless v. Alston*, 1 White & W. Civ. Cas. Ct. App. § 1031.

"It is contended that under the authority of *Ferguson v. Herring*, 49 Tex. 126, the trustee had an adequate remedy under the statute providing a proceeding for the trial of the right of property, and that therefore he was not entitled to an injunction. We do not think this position can be sustained." *Sumner v. Crawford*, 91 Tex. 129, 131, 41 S. W. 994, affirming 41 S. W. 825.

Such injunction could not be denied on the ground that the trustee had a remedy at law, by trial of right of property under the statute—such remedy being, for reasons given, inadequate; nor would the trustee have, in an action for damages against the sheriff, a remedy adequate, i. e., as practical and efficient as the remedy in equity, for the damage by depreciation of the remainder of the stock. *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994, affirming 41 S. W. 825.

It was error to grant and perpetuate the injunction, because the bank had an adequate remedy at law, to wit, the statutory remedy of trial of the right of property. Rev. Stat., arts. 5286, et seq.; *Geers v. Scott* (Civ. App.), 33 S. W. 587, affirmed in 93 Tex. 707, no op.; *Alexander v. Banner Bros.*, 10 Tex. Civ. App. 111, 30 S. W. 563, af-

firm in 93 Tex. 654, no op. We distinguished clearly this case from the case of *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994, affirming 41 S. W. 625. The facts of that case show that the statutory remedy would not have been adequate, but in this case it was purely a question of title to the cattle of their market value if carried away, and the statutory remedy would have been complete and adequate. *Williams v. Farmers' Nat. Bank*, 22 Tex. Civ. App. 581, 582, 56 S. W. 261.

e. Motion for New Trial.

See post, "Pursuit of Other Remedy," XII. G, 4, b. And see the title NEW TRIALS.

f. Appeal.

When an error occurs in the proceedings leading to a judgment, or in the judgment itself, the error can only be corrected by proceedings in the case by appeal, etc. But if the matter complained of grew out of unlawful proceedings subsequent and with regard to the process issuing out of the judgment, the remedy is by injunction. *Wills Point Bank v. Bates*, 76 Tex. 329, 13 S. W. 309.

An injunction is a proper remedy to restrain a sale under execution issued against the securities on a claim bond which had been quashed against the consent of their principal, without trial of the right of property, and the obligors were not bound to seek relief by appeal or certiorari. *Alsup v. Allen*, 43 Tex. 598.

Where, in a statutory proceeding to try rights of property, a claimant's bond is filed, the court has jurisdiction over the person of a surety on such bond; and, where a judgment is entered against him by stipulation between the principal parties, he can not, by a separate suit, enjoin the enforcement of such judgment, but his remedy is by appeal. *Johnson v. Blum*, 42 S. W. 791, 17 Tex. Civ. App. 260.

g. Certiorari.

An injunction will not be issued to

restrain proceedings on a judgment where the party has a remedy by certiorari. *Jordan v. Corley*, 42 Tex. 284; *Givens v. Delprat*, 28 Tex. Civ. App. 363, 67 S. W. 424.

An injunction to restrain the execution of a justice of the peace will not be granted for error in the decision, where the party, through negligence, has failed to prosecute a certiorari. *Fitzhugh v. Orton*, 12 Tex. 4.

The refusal of a justice of the peace to approve a proper appeal bond tendered by the defendant in a case tried before him does not afford ground for an injunction to restrain the enforcement of his judgment in such case, where no further effort was made to effect an appeal by application for certiorari or for process to compel the approval of the appeal bond. *Houston, etc., R. Co. v. Ellis*, 14 Tex. Civ. App. 706, 37 S. W. 972.

h. Supersedeas.

Injunction will not lie to restrain a sheriff from levying an execution; the remedy is by supersedeas. *Forbes, etc., Co. v. Hill*, *Dallam* 486, 487.

i. Legal Defenses.

Equity will not relieve, by enjoining the enforcement of a judgment, against which the defendant had a valid legal defense, as that the contract sued on was usurious, if the party seeking the relief, without excuse for his neglect, failed to make his defense to the action wherein the judgment was rendered. *Crawford v. Wingfield*, 25 Tex. 414; *Menifee v. Myers*, 33 Tex. 690; *Freeman v. Miller*, 53 Tex. 372; *Anderson v. Oldham*, 82 Tex. 228, 18 S. W. 557.

A petition for a writ of injunction to restrain the issuing of execution on a judgment on a promissory note which fails to show that petitioner was deprived of the opportunity of making his defense, or that his defense was of such a nature as to be inadmissible in courts of common law or any matter justifying the court of chancery in

interfering, must be denied. *Ballard v. Rogers*, Dallam Dig. 460.

To enjoin a money judgment, the petitioner alleged that he had a good defense against a large part of his creditor's demand, but had not set it up in the original suit, because, during its pendency, he believed his creditor would give him the benefit of it after judgment; but that, since the judgment, the creditor refused so to do. Held, that the petition showed no equity. *Coleman v. Goyne*, 37 Tex. 552.

The surety on a bond executed in the course of judicial proceedings, and on which a judgment of forfeiture has been rendered, can not enjoin an execution issued under the judgment of forfeiture for causes which he might with due diligence have known and pleaded to the suit in which the judgment was obtained, and which his negligence prevented him from presenting at the proper time. *Clegg v. Darragh*, 63 Tex. 357.

The surety on a claim bond, after judgment of forfeiture, sought to enjoin the execution on the ground that the principal (which was a corporation) never executed the bond, but that its name was signed thereto without authority. The surety made no effort for eight months to ascertain whether the attorney who assumed to represent the principal had authority; his cosurety was dead, the residence of the corporation was in a distant state, and the surety took no steps to defend against proceedings on the bond. Held, that he was not entitled to injunction. *Clegg v. Darragh*, 63 Tex. 357.

When a defendant, through accident or mistake, and without default in the proper degree of watchfulness and care required of careful men in their own cases of equal importance, fails to present his defense fully the court will, in its discretion, grant relief by injunction to stay proceedings under the judgment, and re-examine

the case. *Taylor, etc., Co. v. Fore*, 42 Tex. 256.

Judgment in Violation of Agreement.—A writ of injunction should be granted to restrain execution on a judgment, where the petitioner shows he had a good defense which he could not make because the court rendered judgment by default in his absence, in violation of an agreement. *Gulf, etc., R. Co. v. King*, 80 Tex. 681, 683, 16 S. W. 641.

3. As Determined by Injury to Plaintiff.

a. In General.

To entitle a person not a party to an execution to enjoin a sale of land thereunder, he must show that his right will be injuriously affected or that some irreparable injury will follow if the sale be made. *Mann v. Wallis*, 75 Tex. 611, 613, 12 S. W. 1123.

The petition alleged that complainants had bought the land while it was the homestead of the defendant against whom the judgment lien was about to be enforced; that it was bought for the purpose of sale; that if sold under the execution its market value would be injured, and that the parties seeking to enforce the sale are insolvent. Held, the allegations contained sufficient ground for injunction. *Van Ratcliff v. Call*, 72 Tex. 491, 10 S. W. 578.

b. Cloud on Title.

A sale of land under judicial process which will confer no title, and the effect of which will be to cloud the title of others, should be enjoined. *Carlin v. Hudson*, 12 Tex. 202; *Tucker v. Brackett*, 28 Tex. 336; *Moke & Bro. v. Brackett*, 28 Tex. 443; *Robinson v. Sanders*, 33 Tex. 774; *Mayes v. Woodall*, 35 Tex. 687; *Click v. Stewart*, 36 Tex. 280; *Whitman v. Willis & Bro.*, 51 Tex. 429; *Purinton v. Davis*, 66 Tex. 455, 1 S. W. 270; *Mann v. Wallis, etc., Co.*, 75 Tex. 611, 12 S. W. 1123; *Cook v. Texas, etc., R. Co.*, 3 Tex. Civ. App. 145, 22 S. W. 58; *Texas,*

Land, etc., Co. v. Worsham, 5 Tex. Civ. App. 245, 249, 23 S. W. 938; Alexander v. Banner Bros., 10 Tex. Civ. App. 111, 113, 30 S. W. 563, affirmed in 93 Tex. 654, no op.; Paddock v. Jackson, 16 Tex. Civ. App. 655, 41 S. W. 700, affirmed in 93 Tex. 648, no op.

"But no generally accepted test, applicable to all cases, as to what will constitute such a cloud upon title as to authorize the interference for its prevention by a court of equity has ever been established, at least in this state. Elsewhere the test seems to be, where a sale, if made, would create a title under which the purchaser could in ejectment recover against the true owner, unless the latter placed his own title in evidence, or by some other means established the invalidity of the purchaser's title, then such is a cloud on the title of the true owner." Texas Land, etc., Co. v. Worsham, 5 Tex. Civ. App. 245, 248, 23 S. W. 938.

"If the title to be created by a sale is such that its invalidity can be determined from inspection, or that the true owner need offer no evidence to protect himself from it, then it is not a cloud on his title, and the sale will not be enjoined." Texas Land, etc., Co. v. Worsham, 5 Tex. Civ. App. 245, 249, 23 S. W. 938.

Where Invalidity of Title Shown by Parol.—Where a judgment was rendered foreclosing a vendor's lien on land, which the plaintiff therein assigned, and afterwards released the lien of record, and the assignee (though paid the amount he paid for the judgment) had execution issued, and the land advertised for sale, held, the judgment and execution being valid on their face, such as would require parol evidence to show their invalidity, the sale thereunder would cast such a cloud upon the title of the true owner of the land as a court of equity should interfere to prevent. Injunction perpetuated and judgment canceled. Texas Land, etc., Co. v. Worsham, 5 Tex. Civ. App. 245, 23 S.

W. 938, following Carlin v. Hudson, 12 Tex. 202.

Rev. St. 1895, art. 2731, authorizes any creditor of the estate of a ward, whose claim has been approved by the court, or established by judgment, to obtain an order from the probate court directing payment of the claim by the guardian on proof that there are funds in the hands of the guardian subject thereto, or, in the absence thereof, directing the sale of the property of the estate to pay the debt. Article 2732 provides that on failure to obey the order for payment of the claim the creditor may have an execution against the property of the guardian for the amount ordered to be paid, with costs. Held, that an execution running against property of the minor, which showed on its face that an order for payment had been obtained from the probate court, was void on its face, and could neither disturb the guardian's possession, nor work a cloud on his title, and hence could not be enjoined, not being within article 1989, authorizing an injunction, where it shall appear that the party applying for such writ is entitled to the relief demanded, and such relief requires restraint of some act prejudicial to the applicant, or where, pending litigation, it appears that a party was about to do some act in violation of the rights of the applicant which would tend to render judgment ineffectual, or where the applicant for such writ shows himself entitled thereto under the principles of equity. Thompson v. Gooldsby, 48 Tex. Civ. App. 23, 106 S. W. 936.

Where Invalidity of Title Appears of Record.—An injunction will be granted to prevent a cloud on title by sale of the property under an execution only where the invalidity or illegality of the title alleged to be a cloud can only be shown by evidence dehors record therein, and will not be granted where such illegality or invalidity appears on the face of the record. Rogers v. Nichols, 20 Tex.

719; *Gardner v. Douglass*, 64 Tex. 76; *Van Ratcliff v. Call*, 72 Tex. 491, 10 S. W. 578; *Mann v. Wallis, etc., Co.*, 75 Tex. 611, 614, 12 S. W. 1123; *Ivory v. Kempner*, 2 Tex. Civ. App. 474, 477, 21 S. W. 1006; *Huggins v. White*, 7 Tex. Civ. App. 563, 568, 27 S. W. 1066, affirmed in 93 Tex. 664, no op.; *Ryburn v. Getzendaner*, 1 Posey 349, 354.

An injunction will be granted to restrain an execution sale at the suit of a prior mortgagee, whose mortgage was wrongfully marked "Satisfied" by a person without authority from him, and who took a subsequent mortgage on the faith of a contract with the mortgagors that the prior mortgage should remain in force until the entire debt was satisfied, since the rights of the mortgagee are not evidenced in whole by title of record, and the execution sale would place a cloud on his title. *Ivory v. Kempner*, 2 Tex. Civ. App. 474, 21 S. W. 1006.

In sales of homestead the title to the property at the time of the levy being in the name of the husband, a sale of it under execution against him would apparently vest title in the purchaser at execution sale, and it would require extrinsic evidence under such sale, which is the true principle upon which the equitable jurisdiction of courts of chancery rests, to prevent a cloud from being cast upon title to real property. And it is confined to instances where the proceeding complained of appears to be valid on its face, but is in fact void or invalid for some reason or another which can only be shown by extrinsic evidence. *Texas Land, etc., Co. v. Worsham*, 5 Tex. Civ. App. 245, 249, 23 S. W. 938.

"In *Gardner v. Douglass*, 64 Tex. 76, sale under execution was enjoined at the prayer of husband and wife on the ground that the property sought to be sold was the homestead of the family whose head was defendant in execution, and on the further ground that the property was in part the separate property of the wife by reason

of the fact that in part it was paid for with her separate funds. The property had not been actually used for home prior to time an abstract of the judgment under which the execution issued was recorded. The decision in that case is in line with all the decisions which hold that injunction will issue to prevent cloud upon title, when the evidence on which the right depends is not of record or shown in the papers through which the right depends." *Mann v. Wallis, etc., Co.*, 75 Tex. 611, 614, 12 S. W. 1123.

4. As Determined by Nature of Execution.

a. Void Execution.

"The execution, having issued without authority of law, was void, and was, therefore, very properly enjoined." *Trammell v. Watson*, 25 Tex. Supp. 210, 216.

Where, in rendering a judgment of affirmance, the clerk had omitted the name of one of the sureties, an execution was not warranted by the judgment of the supreme court, nor by the statutory effect of the appeal bond; and the execution against such surety was void, and it was properly perpetually enjoined. *Trammell v. Watson*, 25 Tex. Supp. 210.

Where Judgment Valid.—In an action to enjoin an execution invalid on its face, it is no defense that the judgment was valid and that therefore new execution might be issued. *Capps v. Leachman* (Civ. App.), 35 S. W. 397, reversed in 89 Tex. 690.

Where Invalidity Appears on Face of Execution.—See ante, "Cloud on Title," XII, D, 3, b.

An injunction will not issue to restrain an execution sale upon an execution void upon its face. *Harrison v. Crumb*, 1 White & W. Civ. Cas. Ct. App. § 991.

b. Voidable Execution.

Levy of an execution will not be enjoined on the ground that it misdescribes and does not follow the judg-

ment, and does not contain an itemized bill of costs, these being irregularities only. *Dunson v. Spradley* (Civ. App.), 40 S. W. 327.

c. Excessive Execution.

Where an execution against sureties on a replevin bond is for a greater amount than their bond, the execution is liable to be enjoined for the excess. *Miles v. Davis*, 36 Tex. 690.

5. As Determined by Existence of Judgment.

See ante, "Necessity for Judgment," IX, I, 1.

There is no error in enjoining an execution where there is no judgment to support it. *Trammell v. Watson*, 23 Tex. Supp. 210, 216.

6. As Determined by Nature of Judgment.

a. Valid Judgment.

Under Sayles' Civ. St. art. 2880, providing that injunction will be granted to stay proceedings on execution in certain cases, it is sufficient that the validity of the execution is attacked, and not the judgment; hence the fact that, the judgment being valid, a new execution might be issued, does not take the application for injunction out of the provisions of the statute. *Capps v. Leachman* (Civ. App.), 35 S. W. 397, reversed 89 Tex. 690.

b. Void Judgment.

See ante, "Void Judgment," IX, I, 3, k.

Where a judgment is void, the defendant has the right to enjoin the plaintiffs from enforcing an execution thereon. *Witt v. Kaufman*, 25 Tex. Supp. 384; *Edrington v. Allsbrooks*, 21 Tex. 186; *Willis v. Gordon*, 22 Tex. 241.

For Want of Summons.—In an action to enjoin the execution of a judgment, the plaintiff, though not served with summons, must show that he had a defense or other equity, or such relief will be denied. *Foust v. Warren* (Civ. App.), 72 S. W. 404.

For Want of Jurisdiction.—An injunction is the proper remedy of creditors to restrain a sale of their debtor's property under a judgment in favor of another creditor, void for want of jurisdiction of court granting it. *Orr v. Moore*, 1 App. Civ. Cases, § 587.

c. Voidable Judgment.

See ante, "Erroneous Judgment," IX, I, 3, l.

d. Dormant Judgment.

Injunction is the proper remedy to restrain the enforcement of an execution on a dormant judgment. *Gabel v. McMahan*, 1 White & W. Civ. Cas. Ct. App. § 717; *Watson v. Newsham*, 17 Tex. 437; *North v. Swing*, 24 Tex. 193; *Jordan v. Corley*, 42 Tex. 284; *Seymour v. Hill*, 67 Tex. 285, 3 S. W. 313; *Corder v. Steiner* (Civ. App.), 54 S. W. 277.

The collection, by execution, of a judgment rendered eight years previously, may be enjoined on the ground of dormancy. *Buie v. Crouch*, 37 Tex. 53.

Whether a claimant or property levied on as that of another can enjoin the sale, upon the ground that the execution was not issued within the 12 months, *quære*. *Clegg v. Varnell*, 18 Tex. 294.

e. Lost Judgment.

An execution on a judgment, where the records have been destroyed by fire, may be enjoined. *Cyrus v. Hicks*, 20 Tex. 483, 487.

f. Satisfied Judgment.

(1) In General.

See post, "Satisfaction of Judgment," XII, G, 4, g.

One who has sold land with covenants of warranty is entitled to an injunction to restrain a sale thereof on execution under a judgment which has been paid, when such sale would create a cloud on his vendee's title. *Hugins v. White*, 7 Tex. Civ. App. 563, 27 S. W. 1066.

A petition for injunction alleged that defendant paid off a judgment against plaintiff, agreeing to take in payment therefor certain land, that under this agreement defendant was put in possession, but claiming to be the owner of the judgment had sued out execution and levied it on plaintiff's lands. Held, that the petition showed good grounds for a writ enjoining the sale. *Love v. Powell*, 67 Tex. 15, 2 S. W. 456.

As to presumption of satisfaction of judgment, see ante, "Satisfied Judgment," IX, I, 3, i; post, "Satisfaction and Discharge," XX.

(2) By Prior Levy.

An injunction to restrain a second levy of an execution will not be granted, unless it is shown that the goods seized under the first levy are sufficient to satisfy the judgment. *Garrity v. Thompson*, 67 Tex. 1, 2 S. W. 750.

(3) By Delivery of Property.

A petition by the surety of a judgment debtor to enjoin the enforcement, as against the surety, of a judgment which foreclosed a lien on the judgment debtor's personalty, states a cause of action where it alleges that the property was delivered to an agent of the judgment creditor to be sold so that the proceeds might be applied to the payment of the judgment; that the property was of sufficient value to more than satisfy the judgment; and that the judgment creditor converted the property, and failed to apply the proceeds to the payment of the judgment. *Harrison Mach. Works v. Templeton*, 82 Tex. 443, 18 S. W. 601.

The facts that a judgment debtor has placed claims in the hands of the judgment creditor's attorney for collection, with directions to apply the proceeds in satisfaction of the judgment, and that the attorney has collected and has in his hands a sufficient amount to satisfy the judgment, will not authorize issuance of an injunc-

tion to stay execution on the judgment. *Williams v. Bradbury*, 9 Tex. 487.

Promise to Deliver.—The attorney of a claimant of property levied on under execution told the sheriff on the street that the claimant wanted to deliver up the property. It consisted of a stock of goods, and was then in the possession of the grantee of the claimant and debtor. The sheriff merely expressed his willingness to receive the property. Held, in a suit to enjoin further proceedings to collect the judgment, that there was no redelivery of the property. *Garrity v. Thompson*, 67 Tex. 1, 2 S. W. 750.

(4) By Discharge in Bankruptcy.

See the title BANKRUPTCY AND INSOLVENCY, vol. 2, p. 647.

7. As Determined by Time of Issuance.

a. After Twelve Months.

See ante, "After Twelve Months," IX, M, 4.

b. After Death of Party.

An execution issued after the death of the judgment creditor will be enjoined. *Dailey v. Wynn*, 33 Tex. 614, 621.

A preliminary injunction against an execution was obtained on the ground that the petitioner was only a surety for a codefendant, who, when the judgment was recovered, had ample property, and that plaintiff by his negligence had suffered such principal to become insolvent, etc. These equities being denied under oath by the attorney of plaintiff in the execution, the petitioner amended, alleging that he had just learned that plaintiff in execution was dead when execution issued in his name, and this was neither denied nor admitted by the other side. Held, in view of the uncontroverted allegation that the plaintiff in execution was dead, it was error to dissolve the injunction. *Dailey v. Wynn*, 33 Tex. 614.

8. As Determined by Ownership of Property.

In a suit to restrain a sheriff from further executing an execution, an allegation that he had levied the execution on divers tracts of land belonging to other persons than plaintiff does not entitle plaintiff to relief. *Davis v. Beall*, 50 S. W. 1086, 21 Tex. Civ. App. 183.

An injunction to restrain the sale of property levied on under an execution should not be granted upon the ground that a portion of the property did not belong to the defendant in execution, but to a deceased defendant. *Corder v. Steiner* (Civ. App.), 54 S. W. 277.

An execution sale of land will not be enjoined at the instance of one not a party to the execution on the sole ground that such party owns the property. *Mann v. Wallis, etc., Co.*, 75 Tex. 611, 12 S. W. 1123.

Of Husband and Wife.—The levy of an execution against the husband upon lands not occupied as the homestead, the title to which stands in the name of the wife by a deed which does not recite that it is her separate property, creates a cloud on her title thereto, because of the presumption that the land is community property. *Nowlin v. Frichott*, 11 Tex. Civ. App. 442, 32 S. W. 831.

Of Partnership.—Where the property of a partnership is levied on under an execution against an individual, the proper remedy is by injunction. *Brown & Co. v. Young*, 2 Posey 335, 337.

Of Purchaser.—The mere fact that one had acquired title from the judgment debtor before any lien had attached by virtue of the judgment will not entitle him to enjoin the execution sale. He must show that sale will defeat his title or embarrass him in prosecuting his legal remedies for injury to the possession. *Whitman v. Willis*, 51 Tex. 421, 429.

A bill to enjoin a judgment creditor of a grantor from selling, under execution, realty held by plaintiff under a

conveyance made and recorded before the levy of the writ of execution, which alleges that unless the execution sale is prevented a cloud on the title will result, does not present a case for equitable relief. *Chamberlain v. Baker*, 67 S. W. 532, 28 Tex. Civ. App. 499.

A bill to enjoin a judgment creditor of a grantor from selling, under execution, realty conveyed to plaintiff, alleged that the conveyance was made and recorded before the levy of the writ of execution, and that if the sale was not prevented a cloud on the title would result. The answer averred that the deed was made in fraud of the grantor's creditors. The reply denied the fraud, and alleged that the grantor was insolvent, that the property conveyed was worth about \$25,000, that he paid \$800, and assumed to pay a mortgage on the premises of about \$20,000. Held, that the trial court was warranted, on the pleadings, in finding that the deed was void as against the grantor's creditors. *Chamberlain v. Baker*, 67 S. W. 532, 28 Tex. Civ. App. 499.

A bill to enjoin a judgment creditor of a grantor from selling, under execution, realty conveyed to plaintiff before the judgment was rendered, is good as against a general demurrer, where it alleges that the realty is held by plaintiff for purposes of sale, that sales have been hindered by the levy, and that the execution sale will cause irreparable injury by casting a cloud on the title, which will deter persons from buying, and require to remove it by expensive litigation, which will depreciate the market value of the lots. *Paddock v. Jackson*, 41 S. W. 700, 16 Tex. Civ. App. 655.

Same—Under Trust Deed.—A sale under a power given by a trust deed defeats the lien of a judgment rendered after the record of the trust deed, hence an injunction to restrain a sale under the judgment will not lie. *Kennard v. Mabry*, 78 Tex. 151, 158, 14 S. W. 272.

9. As Determined by Liability of Property to Execution.

An injunction lies to restrain the sale under execution of exempt property. *Alexander v. Holt*, 59 Tex. 205; *Stein v. Frieberg, etc., Co.*, 64 Tex. 271, 272; *Withee v. Brown*, 1 App. Civ. Cases, § 544.

An injunction properly issued to prohibit the sale under execution of a carriage, it being shown that it was the only vehicle owned by defendant in execution. *Nichols v. Claiborne*, 39 Tex. 363.

Where a petition to enjoin sale set forth the articles of property levied on under execution and averred that they were exempt under the constitution and laws, the court erred in dissolving the injunction for want of equity in the bill but it should have heard the evidence. *Withee v. Brown*, 1 White & W. Civ. Cas. Ct. App. § 544.

10. As Determined by Manner of Levy.

Where, in a suit to restrain a levy on certain property, plaintiffs' petition alleged that they were entitled to point out property to be levied on by the sheriff, but the petition failed to specify other property on which plaintiffs desired the levy made, such portion of the petition was subject to exception. *Stone v. Tilley* (Civ. App.), 95 S. W. 718, reversed 101 S. W. 201.

Where defendant seeks to restrain a sale under execution on the ground that the levy was made in violation of his right to point out property, he must show that he pointed out or offered as a substitute property, liable to execution, sufficient to satisfy the execution, or, if such other property is insufficient, that he requested the sheriff to levy on and sell it before selling the property he desired to reserve, and that the sheriff, in either case, refused. *Kingsland v. Harrell*, 1 White & W. Civ. Cas. Ct. App. § 739.

An application for injunction of a

sale under execution, on the ground that the sheriff had levied on valuable improved city lots for a comparatively insignificant debt, when he knew that petitioners had ample personal property and unimproved land in the county sufficient to satisfy the execution, will be denied, where the petitioners had not pointed out the property to the sheriff, and omitted even to designate in the petition what or where their other property subject to execution was. *Smith v. Frederick*, 32 Tex. 256..

Where a defendant in execution sued out an injunction against the sale of property levied on, on the ground that he had pointed out other property which the sheriff had oppressively refused to levy on, but failed to allege that he had any title to the property so pointed out, it was error to perpetuate an injunction restraining the sale of the property levied on. *Forbes v. Hill*, 1 Dall Dig. 486.

An injunction will not be granted because the petitioner's statutory right to point out the property, subject to levy, was denied, when it does not appear that the petitioner attempted to stop the sale by the offer of other property or took any steps to obtain relief before applying to equity. *Alexander v. Banner Bros.*, 10 Tex. Civ. App. 111, 113, 30 S. W. 563, affirmed in 93 Tex. 654, no op.

11. As Determined by Release of Levy.

Where, pending suit to enjoin an injunction, a levy thereunder is released, and execution is returned with the release indorsed thereon, the injunction will be denied. *Thompson v. Gooldsby*, 18 Tex. Civ. App. 23, 106 S. W. 936.

An agreement by a plaintiff that he will release certain of the defendants from all liability on the note sued on and from the judgment that may be rendered against them, and that no execution shall ever be levied upon their

property, will not afford ground for injunctive relief against the judgment and execution thereunder until levy is actually made upon the property of such defendants. *Crook v. Lipscomb*, 70 S. W. 993, 30 Tex. Civ. App. 567.

12. As Determined by Manner of Sale.

See the title *SHERIFFS' SALES*.

13. As Determined by Right to Contribution between Defendants.

As between the codefendants in the judgment, whatever rights they had for contribution exist unaffected by an execution thereon, and the one may enforce those rights against the other's estate; but he can not make them a pretense, nor do they constitute any ground in equity, for an injunction against the plures execution. *Boyce v. Woods*, 37 Tex. 245, 247.

E. PREREQUISITES TO BRINGING SUIT.

In an application for an injunction, after the levy of an execution, to restrain the collection of a larger amount than was due on the judgment, it was not necessary to deposit the amount due in court in order to maintain the action. *Hamburger v. Kosminsky* (Civ. App.), 61 S. W. 958.

F. MULTIFARIOUSNESS.

Where several executions against the husband, in favor of different plaintiffs, are levied upon property claimed by the wife, it would seem a suit by the husband and wife, in behalf of the wife, to enjoin the sale of her property and in behalf of the husband to enjoin the executions, or some of them, absolutely, for objections to the judgments, is not bad for multifariousness. *Clegg v. Varnell*, 18 Tex. 294.

Defendants obtained separate judgments against C., and attached property thereon. In actions by defendants against plaintiff, to whom the property had been transferred by C., to try title

to the property, all the actions were made to depend on the result of one, and judgments were entered against plaintiff for the value of the property attached, which was, in each instance, in excess of the judgment against C. Held, that defendants were properly joined in one action to restrain the executions on the ground of this excess. *Wills Point Bank v. Bates*, 76 Tex. 329, 13 S. W. 309.

"The judgments against plaintiffs originated in the same transaction. The questions with regard to their validity and interpretation are the same. The executions were levied upon the same property, and the question upon which it is sought to restrain them was common to all the cases, and substantially affect them all alike, and in addition to that the litigation has heretofore been conducted as if the different proceedings were but one cause." *Wills Point Bank v. Bates*, 76 Tex. 329, 333, 13 S. W. 309.

G. PETITION.

1. Nature.

The defendant's application to the court in which the judgment was rendered against him to quash the advertisement for execution sale and enjoin the sheriff from making the sale, is in the nature of a motion in the suit and the sheriff need not be made a party. *Citizens' Nat. Bank v. Interior Land, etc., Co.*, 14 Tex. Civ. App. 301, 305, 37 S. W. 447.

2. Verification.

Where an execution on a judgment is sought to be enjoined, there is good reason why a petition should be under oath, as the defendant has rights which should not be disturbed, unless on real and substantial grounds. The reason why an answer to a petition for this purpose should be under oath is not so manifest. *Eccles v. Daniels*, 16 Tex. 136; *Edrington v. Allsbrooks*, 21 Tex. 186.

But in the case of *Menifee v. Myers*, 33 Tex. 690, 691, it was held that a pe-

tition for a writ of injunction to restrain an execution is within art. 3929, Pas. Dig., which requires that "all petitions for injunctions and answers thereto shall be verified by the oath or affirmation of the party filing the same."

3. Sufficiency of Allegations.

Matters necessary to be stated in the petition should be made to appear from the facts alleged and not by mere conclusions of the pleader. *Alexander v. Banner Bros.*, 10 Tex. Civ. App. 111, 113, 30 S. W. 563, affirmed in 93 Tex. 654, no op.

4. Alleging Particular Facts.

a. Want of Other Remedy.

An execution will not be enjoined where the petitioner does not allege that he is deprived of an adequate legal remedy. *Ballard v. Rogers*, Dallam 460, 461.

b. Pursuit of Other Remedy.

Where the petition on its face does not show diligence on the part of the one asking for an injunction, it is not error to refuse the relief sought. *Morris v. Edwards*, 62 Tex. 205.

Although a petition for an injunction to stay execution discloses matters which would, if proved, have established a good defense to the original action, yet the petition is bad for want of equity if it shows no reason why such defense was not interposed, nor why the petitioner had not resorted to legal remedies afforded him. *Menifee v. Myers*, 33 Tex. 690.

A petition to enjoin an execution for "mistake, accident or omission" must show facts and excuse for not moving for a new trial during term. *Fisk v. Miller*, 20 Tex. 572, 578.

Where a petition in a suit for an injunction by a person claiming property levied on under execution gives no good reason why he did not pursue his legal remedy by affidavit and claim bond the injunction will be dismissed. *Ferguson v. Herring*, 49 Tex. 126.

Execution of a judgment should not be enjoined on the ground that the judgment debtor was not served with summons, where he fails to allege or prove that he had a defense or other equity. *Foust v. Warren* (Civ. App.), 72 S. W. 404.

c. Injury to Petitioner.

(1) In General.

"The petition was rightly adjudged insufficient upon demurrer for the reason that it does not disclose any injury as likely to occur to the plaintiff by reason of the proceeding sought to be enjoined." *Gothard v. Reiley*, 14 Tex. 461.

(2) Cloud on Title.

In an action by the purchaser of the homestead of a judgment debtor, to enjoin a sale under execution against his vendor, issued after the purchase, if plaintiff bases his right to relief on the fact the sale would be a cloud on his title because his deed was not recorded and that the creditors denied notice of his purchase when the levy was made, or denied that the property was homestead when plaintiff bought or that he was a bona fide purchaser for value, the complaint must allege such facts. *Mann v. Wallis, Landes & Co.*, 75 Tex. 611, 12 S. W. 1123.

A petition to enjoin an execution sale of lands, alleging that the levy is a cloud on plaintiff's title, is insufficient where, although it alleges that the lands are occupied as a homestead, and that plaintiff is a married man and the head of a family, it does not disclose whether the record title is in the name of plaintiff or his wife, nor state facts showing how the threatened sale would cause a cloud upon his title. *Alexander v. Banner*, 10 Tex. Civ. App. 111, 30 S. W. 563.

"In the case of *Purinton v. Davis*, 66 Tex. 455, 1 S. W. 270, where seven tracts of land had been levied upon as the property of the defendant in the execution, an injunction of the sale at the instance of one not a party

to the judgment was refused, because the petition did not state facts showing that a sale would cast a cloud upon the title of the owner." *Cook v. Texas, etc., R. Co.*, 3 Tex. Civ. App. 145, 146, 22 S. W. 58.

d. Interest of Petitioner.

A bill for an injunction to restrain the levy of an execution on property because not belonging to the execution defendant, held defective for failure to allege that the injunction plaintiff owned it. *Forbes, etc., Co. v. Hill, Dallam* 486, 487.

In a suit to enjoin a sale of land levied on as the property of the plaintiff's husband, a petition stating that land was her separate property, paid for from her separate estate, and that he in no wise contributed and had no interest therein, need not further state why, how, or when it became her separate property. *Cabell v. Menczer* (Civ. App.), 35 S. W. 206.

In a suit to restrain a levy of execution on bank stock in which plaintiff has an equity, the nature of his interest must be stated in the petition. *Davis v. Beall*, 50 S. W. 1086, 21 Tex. Civ. App. 183.

"The court can not supply by indictment so material an averment as that the property of which he seeks to enjoin the sale is the property of the plaintiff. It must be taken, therefore, upon the averments of the petition that the plaintiff was not the owner or interested in the property, since he has not averred such ownership or interest in himself." *Gothard v. Reiley*, 14 Tex. 461, 462.

e. Value of Property.

Where in a suit to enjoin an execution sale of exempt property, the value of the property is not shown, writ of error will not lie from the supreme court to the court of civil appeals on appeal from the district court. *Smith v. Horton*, 92 Tex. 21, 46 S. W. 627, affirming 19 Tex. Civ. App. 28, 46 S. W. 401.

f. Invalidity of Judgment.

In a petition for an injunction against an execution on the ground that the judgment under which it issued had been rendered in violation of an agreement made between counsel for the parties, it should be alleged that the attorneys making such agreement had authority to make it, or that the parties had ratified it. The absence of such allegation is a fatal defect. *Anderson v. Oldham*, 82 Tex. 228, 18 S. W. 557.

g. Satisfaction of Judgment.

Petition charging that the judgment had been "paid off and satisfied in full," and praying that the injunction be made perpetual, and for general relief, was sufficient to justify a decree enjoining issuance of execution on the judgment. *Deleshaw v. Edelen*, 72 S. W. 413, 31 Tex. Civ. App. 416.

Where an execution is issued after twelve months from the issuance of the previous execution, it may be enjoined upon simple allegation of the fact without allegation of payment. *Watson v. Newsham*, 17 Tex. 437.

Where an injunction was prayed, on the ground that an execution had been issued for the "amount of the judgment and costs," whereas certain payments, specifying them, had been made, without a direct averment that the payments had not been credited on the execution, it was held that a general demurrer was improperly sustained. But, quære, if the objection had been taken by special exception. *Williams v. Bradbury*, 9 Tex. 487. See the title DEMURRERS, vol. 6, p. 270.

h. Issuance of Prior Executions.

Application to enjoin sale on execution issued on a judgment, on the ground that it was issued more than 12 months after the judgment, is insufficient. It should also negative the fact that any other execution had issued before that time. *Jordan v. Corley*, 42 Tex. 284.

5. Construction of Allegations.

The averments in a petition which seeks to enjoin the execution of a judgment on mere technical grounds, and without disclosing merits, must be taken most strongly against the party making them. *Gothard v. Reiley*, 14 Tex. 461.

H. PLEA OR ANSWER.

In a suit to enjoin an execution, on the ground that the judgment has become dormant, the defendant may plead the judgment in reconvention. *Oldham v. Erhart*, 18 Tex. 147.

I. BURDEN OF PROOF.

In a suit to enjoin a sale under an execution on the ground that the judgment was dormant, it was held that the defendant need not show that it was due and unpaid. *Corder v. Steiner* (Civ. App.), 54 S. W. 277.

J. INSTRUCTIONS.

Where, in proceedings to enjoin a sale under execution, the issue was whether an unsuccessful claimant in a trial of right of property had offered to return the engine in as good condition as he received it, as required by his bond, and the pleadings and evidence showed that the engine was composed of a carriage, boiler, steam engine, etc., the fact that the court described the property as a steam engine, carriage boiler, etc., did not render the instruction objectionable. *Parlin & Orendorff Co. v. Coffey*, 61 S. W. 512, 25 Tex. Civ. App. 218.

K. VERDICT.

Where, in a suit to enjoin collection of a joint judgment and to recover damages for the levy of execution thereon on the ground that it had been paid by defendant, who was one of the judgment debtors, the court charged that the judgment had been extinguished, such charge took from the jury the issue of validity of the judgment, and a verdict merely finding for plaintiff in sums certain for

actual damages, vindictive damages, and expenses was sufficient. *Deleshaw v. Edelen*, 72 S. W. 413, 31 Tex. Civ. App. 416.

L. TIME OF ISSUANCE.**1. Within Six Months.**

The act of 1846, § 151 (Hart. Dig., p. 495, provided that "no injunction to stay an execution shall be granted, but within six months after the judgment is obtained," etc. *Doss v. Miller*, 6 Tex. 338, 340.

Where an injunction to stay execution upon a judgment was granted more than six months after its rendition, and the grounds upon which the injunction was obtained appeared to have existed within the knowledge of the party when the judgment was rendered, and no excuse was offered for not having made the application within the time prescribed by law, held, that the injunction was properly dissolved and the suit dismissed on demurrer. *Doss v. Miller*, 6 Tex. 338.

2. Within Twelve Months.

Sayles' Civ. Stat., art. 2875, provides that no injunction to stay execution shall be granted after one year after judgment. *Cook v. Baldridge & Co.*, 39 Tex. 250, 252; *Miller v. Clements*, 54 Tex. 351; *Willis Point Bank v. Bates*, 76 Tex. 329, 13 S. W. 309; *Kempner v. Ivory* (Civ. App.), 29 S. W. 538, 539.

An injunction for the purpose of staying an execution sued out more than a year after judgment obtained is unauthorized and void, unless it presents a case coming within some of the exceptions pointed out by the statute. *Hayes v. Bass*, 1 White & W. Civ. Cas. Ct. App. § 16.

In a suit to enjoin the execution of a judgment rendered more than five years before, brought after an appeal, and the execution of a supersedeas bond describing the judgment, a petition alleging that plaintiff did not know that the judgment included, contrary to an alleged agreement between

the parties, the title to or possession of certain land claimed by plaintiff, but failing to explain the long delay, or to allege that plaintiff did not know that the judgment had been entered as it was, before adjournment of court, so as to move for a new trial or to correct the judgment during the term, is insufficient to bring plaintiff within the exception of Sayles' Civ. St. art. 2875, providing that no injunction to stay execution shall be granted after one year unless it appears that the application therefor has been delayed by the fraud or false promises of the judgment plaintiff, practiced or made at the time of, or after, the rendition of the judgment, or unless for some equitable matter or defense arising after its rendition. *McCray v. Freeman*, 43 S. W. 37, 17 Tex. Civ. App. 268.

In Cases of Fraud.—Art. 2875, Rev. Stat., which allows fraud as an excuse for the failure to apply within twelve months for an injunction against a judgment, contemplates some act other than the mere taking of a judgment that ought not to have been taken, which delays the party in making his application. *Williams v. Lumpkin*, 96 Tex. 641, 642, 26 S. W. 493, affirming 26 S. W. 103.

For Grounds Subsequently Arising.—The act of 1846 (Hart's Dig. art. 1599), limiting the time for obtaining injunction to stay execution, applies only to the granting of injunction for cause existing at the rendition of the judgment, and not to injunction sought for cause arising subsequently. *Clegg v. Varnell*, 18 Tex. 294.

The statute (Hart. Dig. art. 1599) prescribing the time within which an injunction staying execution may be granted manifestly has no application to an injunction to stay execution sought for causes which have arisen subsequent to the rendition of the judgment. *Williams v. Bradbury*, 9 Tex. 487.

In Suit by Stranger to Judgment.—Rev. St. art. 2875, providing for an in-

junction against a judgment to be brought within 12 months, does not apply to a suit to enjoin an execution brought by one not a party to the judgment. *Kempner v. Ivory* (Civ. App.), 29 S. W. 538.

Act 1846 (Hart. Dig. art. 1599), relating to enjoining execution, has reference to the granting of injunctions for causes existing at the rendering of judgment, and has no application to an injunction sought on the ground that the execution was levied on the property of a stranger to the execution. *Clegg v. Varnell*, 18 Tex. 294.

After Affirmance of Appeal.—In a suit to restrain executions on judgments, the objection that the judgments were rendered more than a year before the filing of the petition is not good where the petition was filed within a year from the affirmance on appeal of one judgment, and the others were made to depend on that by stipulation of the parties. *Wills Point Bank v. Bates*, 76 Tex. 329, 13 S. W. 309.

Effect of Issuance after Twelve Months.—An injunction for the purpose of staying an execution sued out over a year after judgment was obtained is unauthorized and void. *Hayes v. Bass*, 1 App. Civ. Cases, § 15.

3. During Pendency on Appeal.

A court of civil appeals will not restrain the levy and sale of lands under an execution from a court of a different county from that in which the lands is situated, pending an appeal of the suit in county where lands situate, to restrain such sale. *Ellis v. Harrison*, 24 Tex. Civ. App. 13, 20, 56 S. W. 592, 57 S. W. 984, affirmed in 93 Tex. 637, no op., 94 Tex. 690, no op.

M. JUDGMENT.

1. Requisites and Validity.

Conformity to Petition.—A petition praying to enjoin a sale under an execution and for general relief, warrants a judgment allowing the sale but requiring it to be made in subordination

to the plaintiff's lien. *Kempner v. Ivory* (Civ. App.), 29 S. W. 538.

Disposal of Issues.—Where plaintiff in a suit for an injunction to restrain the sale of property under an execution alleged that the judgment on which the execution was based created no lien, because seeking to subject exempt property, which was also the separate estate of a married woman, to the satisfaction of the debt, there was an admission that there would have been a lien but for such circumstance, so that a finding that such property was not in fact exempt, and that the judgment was rendered against the married woman, disposed of the contentions, and a holding that the judgment created a lien was not rendered erroneous by the fact that the abstract was not certified as having been indexed. *Loan & Deposit Co. of America v. Campbell*, 65 S. W. 65, 27 Tex. Civ. App. 52.

2. Perpetuating Injunction.

The only ground for not issuing execution on a dormant judgment being the legal presumption of its payment, when this presumption ceases, to perpetuate the injunction would be in effect to violate a rule which denies the writ, unless irreparable injury would result from its being refused. *Seymour v. Hill*, 67 Tex. 385, 3 S. W. 313.

Where an injunction to restrain an execution for costs was obtained on the ground that the costs were excessive, there being no answer filed, it was error to give judgment by default and perpetuate the injunction. There should have been an interlocutory order for the retaxation of the costs, after which the injunction might have been perpetuated as to the excess. *Charlton v. Ragnet*, 6 Tex. 529.

3. Dissolving Injunction.

An injunction issued more than twelve months after the rendition of a judgment should be dissolved where no sufficient reason appears why the writ was not applied for sooner and

no fraud alleged. *Miller v. Clements*, 54 Tex. 351.

Where Damages Prayed for.—It is error to dismiss a suit brought to enjoin the sale of property on execution, where the plaintiff, having prayed for damages, has stated a case for nominal relief. *Dearborn v. Phillips*, 21 Tex. 449.

Where Execution on Dormant Judgment.—An injunction will issue against an execution issued after the expiration of a year from rendition of the judgment, because it is presumed from the delay in taking out execution that the judgment has been paid. But, if it appears that the judgment had in fact not been paid, the injunction will be dissolved, and any money which had come into the hands of the sheriff under the execution will be applied to the judgment under a proper prayer therefor on the part of the creditor. *Seymour v. Hill*, 67 Tex. 385, 3 S. W. 313.

Rendering Final Judgment.—Upon the dissolution of an injunction restraining an execution sale, judgment should not be rendered finally determining the suit, if the plaintiff demands trial. *Ferguson v. Herring*, 49 Tex. 126, 130.

Rendering Judgment on Injunction Bond.—It is the practice of the courts, on the dissolution of an injunction restraining the collection of an execution, to enter up judgment against the principal and sureties in the injunction bond, for the amount of the execution, under St. arts. 1602, 1603. *Fall v. Ratliff*, 10 Tex. 291.

On the dissolution of an injunction to restrain the execution sale of improved realty on the ground that the defendant had unimproved property subject to execution, the judgment should be rendered against the principal and sureties on the injunction bond. *Kendrick v. Rice*, 16 Tex. 254, 261.

Rendering Judgment for Amount Due.—Where the pleadings and evi-

dence in a suit to enjoin the execution sale of real estate on the ground that it is a homestead do not attack the judgment as being dormant or void, the district court is not required to render a judgment as to the indebtedness due in denying the relief demanded. *Warren v. Kohr*, 64 S. W. 62, 26 Tex. Civ. App. 331.

Rendering Judgment for Original Judgment.—On dissolving an injunction restraining an execution, obtained by a purchaser from a judgment debtor, the rendition of judgment against plaintiff and sureties in injunction for original judgment is erroneous. *Carlin v. Hudson*, 12 Tex. 202, 204.

Requiring Refunding Bond.—It was error to dissolve an injunction of a money judgment in vacation, without requiring of the defendant the refunding bond prescribed by art. 3937, Pas. Dig. *Coleman v. Goynes*, 37 Tex. 552.

Dissolving Temporary Injunction.—Where a petition for an injunction restraining execution contained a good cause of action, but all the material facts were traversed, a temporary injunction should be dissolved, though the petition should not be dismissed. *Fulgham v. Chevallier*, 10 Tex. 518.

4. Reviving Original Judgment.

An injunction will issue to restrain service of an execution issued too late; but it seems that the plaintiffs in execution may have relief by a revival of their judgment, if they seek it by proper allegations in their answer. *North v. Swing*, 24 Tex. 193.

On an injunction to restrain an execution issued upon a dormant judgment, when the defendant in the injunction suit asks that his judgment be revived, it is proper that such action be taken, there being no reason against it shown. *Trevino v. Stillman*, 48 Tex. 561.

5. Substituting Destroyed Judgment.

In a suit to enjoin an execution on a judgment destroyed, substitution of

judgment may be asked, but no costs allowed against plaintiff. *Cyrus v. Hicks*, 20 Tex. 483, 487.

6. Enjoining Writ of Possession.

In a suit in the district court of Milam county, to enjoin an order of sale and writ of possession against lands therein, issued on a judgment in Dallas county, the court may allow the sale but prohibit the enforcement of the writ of possession. *Modisett v. National Bank*, 23 Tex. Civ. App. 589, 593, 56 S. W. 1007, affirmed in 94 Tex. 701, no op.

N. RETURN OF WRIT OF INJUNCTION.

See ante, "Jurisdiction and Venue," XII, B. And see the title COUNTRIES, vol. 5, p. 1.

O. APPEAL.

Where an injunction is obtained against an execution and dissolved, and an appeal taken, and the judgment affirmed, the first judgment is not merged in the judgment in the suit for the injunction. *Austin v. Townes*, 10 Tex. 24.

P. EFFECT OF INJUNCTION.

1. On Levy and Lien.

An injunction against the property levied on releases the levy and restores the property to the defendant, substituting in its stead the security of the injunction bond. *Turley v. Brewster*, 33 Tex. 188, 192; *Attoway v. Still*, 2 Porter 697, 710.

A sale thereunder being perpetually enjoined, no lien attaches through the levy of an execution. *Snow v. Nash*, 50 Tex. 216, 224.

Where, after levy of an execution on real estate, further proceedings were perpetually enjoined because the judgment on which it issued was dormant at the time of its issuance, the lien of the execution was thereby extinguished. *Snow v. Nash*, 50 Tex. 216.

2. On Sale.

A suit to enjoin an order of sale of

specific property suspends the sale. *Seligson v. Collins*, 64 Tex. 314, 315.

Where the validity of an execution which had been levied on land was in issue in a proceeding to enjoin a sale thereunder, the rights of the execution plaintiff were in no way affected by a sale of the land under another execution. *Sampson v. Wyett*, 49 Tex. 627.

"The object of plaintiffs' suit was to stop proceedings to sell the property until the question of homestead was adjudicated, and the object and purpose of the writ was to prevent the sale of the lot by any process of the court under the judgment until the court decided the homestead issue. Defendants attempted to defeat these purposes of the suit and the writ by suing out execution and causing sale to be made before any adjudication of the homestead question, and while the injunction was still in force. This was a contempt of the court's order enjoining the sale; no title could pass by such proceeding." *Ward v. Bilups*, 76 Tex. 466, 468, 13 S. W. 308.

3. On Recovery on Injunction Bond.

Where the plaintiff, after the levy of an execution, applied for an injunction to restrain the collection of a larger amount than was due on the judgment against him, the defendant it was held was not entitled to a judgment against the sureties on the injunction bond for the amount due. *Hamburger v. Kosminsky* (Civ. App.), 61 S. W. 958.

Q. COSTS OF INJUNCTION.

In a suit to restrain a sale under an execution levy, plaintiff being successful it was proper that the party who procured the levy should pay the costs. *Schiffer v. Fort*, 1 Posey Unrep. Cas. 198.

When execution on a void money judgment is enjoined, and judgment in favor of defendant for the amount due him is rendered, the costs of the injunction suit should be taxed against

defendant. *Hickman v. White* (Civ. App.), 29 S. W. 692.

Where Legal Remedy Exists.—

Where, on final hearing, an injunction, issued at the instance of the owners of an undivided half interest in lands, and restraining the execution of an order of sale and writ of possession against the entire tract, is dissolved, on the ground that plaintiffs have an adequate remedy at law, the plaintiffs are liable for the costs of the proceeding. *Modisette v. National Bank of Kalamazoo*, 56 S. W. 1007, 23 Tex. Civ. App. 589.

Where Execution for Costs.—See the title COSTS, vol. 4, p. 971.

Division of Costs.—The court upon awarding a judgment restraining the sale of a portion of the land under execution upon the ground that it is exempt property, properly adjudges against defendant all costs to the date of his admission that part of such land was not subject to execution, and against plaintiff for all costs thereafter. *Williams v. Cleveland & Co.*, 18 Tex. Civ. App. 133, 44 S. W. 689, affirmed in 93 Tex. 723, no op.

R. DAMAGES FOR WRONGFUL INJUNCTION.

Where goods are illegally seized under execution, the execution plaintiff can not recover damages by reason of an injunction to prevent a sale, sued out by the person entitled to the goods, even if the injunction was not warranted by law. *Sumner v. Crawford* (Civ. App.), 41 S. W. 825.

In the case of *Carlin v. Hudson*, 12 Tex. 202, it is held, that art. 3935 of Pas. Dig. authorizing the assessment of damages upon the dissolution of an injunction upon motion, has reference to injunctions to restrain the collection of money, obtained by the judgment debtor, or some one who is a party to the judgment. The same may be said of article 3936 of Paschal's Digest, under which judgment may be rendered for the principal sum en-

joined. *Ferguson v. Herring*, 49 Tex. 126, 131. See *Pryor v. Emerson*, 22 Tex. 162, 165.

It does not follow as a matter of law that because an application for a temporary injunction to restrain an execution sale is, on final hearing, adjudged insufficient, that damages are to be awarded for the delay, and a judgment refusing damages will only be reversed for palpable error in such refusal. *Citizens' Nat. Bank v. Interior Land, etc., Co.*, 14 Tex. Civ. App. 301, 307, 37 S. W. 447.

Where Part of Property Subject to Execution.—When an injunction is sued out against the sale of personal property seized in execution, some of which is subject to execution, the measure of damages upon dissolving the injunction is the value of the property subject to execution. *Coates v. Caldwell*, 71 Tex. 19, 8 S. W. 922.

Where Issued without Notice to Sureties.—"It is held by this court in *Sharp v. Schmidt*, 62 Tex. 263, that the defendant may recover his damages for the wrongful issue of the writ of injunction upon the proper pleadings and proof without serving citation upon the sureties. We think this practice was clearly contemplated by the laws existing at the time the Revised Statutes were adopted. (Pas. Dig., art. 3936.)" *Coates v. Caldwell*, 71 Tex. 19, 23, 8 S. W. 922.

Where Issued for Costs.—See the title COSTS, vol. 4, p. 971.

Upon the dissolution of an injunction to restrain an execution for costs it is error to allow damages on costs ascertained to be due and interest on judgment. *Lockart v. Stuckler*, 49 Tex. 763, 767.

Measure of Damages.—When an injunction is sued out against the sale of personal property seized in execution, some of which is subject to execution, the measure of damages upon dissolving the injunction is the value of the

property subject to execution. *Coates v. Caldwell*, 71 Tex. 19, 8 S. W. 922.

Proceedings to Obtain.—The defendant in an injunction suit may either plead the damages sustained by reason of the injunction in reconvention, or he may have an action on the bond for the injury thus occasioned. *Carlin v. Hudson*, 12 Tex. 202; *Ferguson v. Herring*, 49 Tex. 126, 131.

On dissolution of an injunction to restrain the sale by the sheriff of property seized on execution, the defendant can only recover damages on a claim set up in reconvention. The provisions of Pasch. Dig. arts. 3935, 3936, do not apply. *Ferguson v. Herring*, 49 Tex. 126.

XIII. Staying, Quashing and Superseding.

A. STAYING EXECUTION.

1. Grounds for Stay.

It is error to suspend execution under a judgment for plaintiff in an action for certain funds until a proceeding wherein defendant was garnished on account of such funds is disposed of. *Foy v. East Dallas Bank* (Civ. App.), 28 S. W. 137.

2. Contract for Stay.

Certain instruments held to form part of the same transaction, and not to constitute contract to stay execution. *Atcheson v. Hutcheson*, 51 Tex. 223, 233.

That the parties to a judgment have agreed to a stay of execution for the principal of the judgment does not prevent execution issuing in behalf of the court officers for their costs. *Clegg v. De Bruhl*, 45 Tex. 141.

If one who is bound to the exercise of reasonable diligence in the ordinary course of law, should use discretion and grant a stay of execution, he does so at his own risk. *Johnston v. Mills*, 25 Tex. 704, 720.

In the legal enforcement of the collection of a note against the maker and the indorser, the granting by the plain-

tiffs to the defendants a valid binding stay of execution for a limited specified period of time, is no part of the regular ordinary proceeding of a suit instituted for the collection of money in the district court. *Johnston v. Mills*, 25 Tex. 704.

3. Effect of Stay.

a. On Judgment Lien.

A judgment lien is not affected by stay of an execution issued in favor of creditors whose claims accrued subsequent to the judgment and issuance of execution. *Ayers v. Waul*, 44 Tex. 549.

If execution be stayed twelve months, the lien of the judgment will still commence at the date of the judgment, and it will cease at the end of twelve months from that date. *Russell v. McCampbell*, 29 Tex. 31.

b. On Issuance of Other Executions.

An agreement between the parties for a stay of execution will not preclude an execution on behalf of the officer for costs. *Clegg v. De Bruhl*, 45 Tex. 141, 145.

c. As Release of Surety.

A stay of execution granted by a creditor to a principal debtor ordinarily has the effect to release the surety. *Johnston v. Mills*, 25 Tex. 704.

A surety on a bond, given on claim by a third person of property on which execution had been levied, was not released from liability on a judgment taken on such bond by the fact that execution thereon was stayed during a period when the principal in the bond was solvent, in consideration of payment by him of part of the judgment. *Yeary v. Smith*, 45 Tex. 56.

B. QUASHING EXECUTION.

1. Time of Quashing.

After an execution has been returned, and the return day therein has expired, it is too late to move to quash the same, though the motion is made by defendant therein. *Meador Co. v.*

Aringdale, 38 Tex. 447; *Toler v. Ayres*, 1 Tex. 398, 399; *Scott v. Allen*, 1 Tex. 508, 512; *Martin v. Rice*, 16 Tex. 157, 160; *Cook v. Sparks*, 47 Tex. 28, 32.

An execution can not be quashed after it has performed its functions and has been returned by the sheriff, although the levy and return may still be in a condition to be acted upon by the court. *Scott v. Allen*, 1 Tex. 508.

2. Grounds for Quashing.

a. Where Execution Void.

A void execution may be quashed. *Durborn v. Phillips*, 21 Tex. 449, 451.

b. Where Defects of Record.

"Defects only that are apparent on the face of the execution and records on which the questions presented under the motion arise can be reached by the motion to quash." *Meador Co. v. Aringdale*, 38 Tex. 447, 450; *Hill v. Cunningham*, 25 Tex. 25, 32.

c. In Trial of Right of Property.

In a proceeding to try the right of property seized under the plaintiff's execution, the court was not authorized to quash the execution at the first term, where the plaintiff did not appear, on the ground of his absence, because an attorney stated in the clerk's presence that he represented the plaintiff and requested his name to be so entered on docket. *Stevens v. Perrin*, 19 Tex. Civ. App. 554, 555, 47 S. W. 802.

3. Proceedings for Quashing.

a. Nature of.

Where the plaintiff brought an action to supersede an execution, and vacate the judgment on which it issued, on grounds which attacked the validity of the judgment, it was held that the motion was essentially a separate proceeding, forming no part of the main action, and that the judgment thereon was not before the supreme court for revision. *Perry v. Gregory*, 13 Tex. 328.

b. Notice.

A motion to set aside and quash the

proceedings and the return of the sheriff on an execution, where land has been sold on execution, will not be entertained where the purchaser under the execution has had no notice of the motion. *Toler v. Ayres*, 1 Tex. 398.

c. Hearing.

On a motion to set aside a levy, the execution, and the circumstances under which it was issued, and the judgment on which it is based, as well as extraneous facts affecting their validity, may be inquired into by the court. *Bennett v. Gamble*, 1 Tex. 124, 132; *Scott v. Allen*, 1 Tex. 508, 512; *Martin v. Rice*, 16 Tex. 157, 160; *Cook v. Sparks*, 47 Tex. 28; *Irvin v. Ferguson*, 83 Tex. 491, 496, 18 S. W. 820.

4. Appeal.

A judgment overruling a motion to quash an execution is a final judgment and may be appealed from. *Scott v. Allen*, 1 Tex. 508. See the title FINAL JUDGMENTS AND DECREES.

In reviewing a judgment refusing to quash a levy and the return thereof, made by the sheriff, the appellate court is not restricted to the particular grounds assigned for the motion in the court below. *Scott v. Allen*, 1 Tex. 508; *Bryan v. Bridge*, 6 Tex. 137.

C. SUPERSEDING EXECUTION.

Where an execution is improperly issued the remedy is by supersedeas applied for before the execution has performed its office. *Scott v. Allen*, 1 Tex. 508, 512.

XIV. Abatement of Writ.

See ante, "After Death of Party," IX, M, 5; post, "After Death," XVI, E, 2; "Levy on Property of Decedent," XXIV, B, 6.

XV. Withdrawal of Writ.

An invalid execution may be withdrawn at any time before sale of property levied on, or the intervention of the rights of third parties. *Wingfield v. Hackney*, 69 S. W. 446, 30 Tex. Civ. App. 39.

XVI. Levy of Writ.

A. IN GENERAL.

The levy constitutes a part of the return. *Howard v. North*, 5 Tex. 290, 307.

B. NECESSITY FOR.

1. To Preserve Judgment Lien.

See the title JUDGMENTS AND DECREES.

2. To Bind Surety.

In *Parker v. Nations*, 33 Tex. 210, and *Jenkins v. McNeese*, 34 Tex. 190, the doctrine is distinctly announced, that the surety is discharged when the creditor takes out execution against the principal debtor and has it returned unexecuted. *Brown v. Chambers*, 63 Tex. 131, 136. See *Hunter v. Clark*, 28 Tex. 159, 163.

3. Where Property Described in Order of Sale.

Where an order of sale describes the goods as set out in the judgment foreclosing a lien thereon, a levy is unnecessary. *Patton v. Collier*, 13 Tex. Civ. App. 544, 546, 38 S. W. 53.

C. PROPRIETY OF LEVY.

See post, "On How Much Property Levied," XVI, I; "Duty and Liability of Officer," XVI, F, 7.

D. PREREQUISITES TO LEVY.

The provisions of the statute requiring demand by the sheriff of the judgment debtor against whom a money judgment has been rendered, before levy, are directory, and a failure to comply with its requirements, in the absence of fraud, will not render a sale void. *Odle v. Frost*, 59 Tex. 684, citing *Pearson v. Flanagan*, 52 Tex. 266, 280.

E. TIME OF MAKING LEVY.

1. After Twelve Months.

An execution levied more than twelve months after the rendition of judgment is voidable and may be enjoined by the defendant and probably by a third person claiming the prop-

erty levied on. *Clegg v. Varnell*, 18 Tex. 294, 305.

2. After Death.

See the title EXECUTORS AND ADMINISTRATORS.

A levy under a writ of execution issued after the death of the judgment debtor is voidable, but not void. *Webb v. Mallard*, 27 Tex. 80, 83.

The correctness of the ruling in *Conkrite v. Hart & Co.*, 10 Tex. 140, questioned—where it was held that a sale under an execution issued in the lifetime of the debtor, but levied after his death, was a nullity. *Webb v. Mallard*, 27 Tex. 80.

3. After Return Day.

After the return day an execution is *functus officio*, and not valid for the purpose of a levy, and the officer has no authority to attempt to further execute it, and, except for the purpose of justifying the detention and sale of property previously levied on, the writ is of no force, and does not even authorize the officer holding it to receive payment of it. *Tillman v. McDonough*, 2 Willson, Civ. Cas. Ct. App. § 53; *Nance v. Barber*, 7 Tex. Civ. App. 111, 26 S. W. 151; *Harris, etc., Co. v. Ellis*, 30 Tex. 4, 6.

Without execution, after return day, sheriff can neither enforce payment of judgment nor give discharge from it on voluntary payment. *Harris, etc., Co. v. Ellis*, 30 Tex. 4, 6.

4. After Making Return.

The mere fact of levy and forfeiture of delivery bond would not authorize sheriff in seizing property after return of execution under which he acted without other process. *Harris, etc., Co. v. Ellis*, 30 Tex. 4, 6.

F. BY WHOM LEVY MADE.

1. In General.

A justice of the peace has no authority to appoint a person to execute a writ of execution issued from the district court. *Webb v. Harris*, 1 White & W. Civ. Cas. Ct. App. § 1291.

2. Sheriff.

A sheriff has no authority to levy on and sell land lying out of his county or district. *Alred v. Montague*, 26 Tex. 732.

An execution addressed to the sheriff of one county does not justify a seizure of property by the sheriff of another county. *Steel v. Metcalf*, 4 Tex. Civ. App. 313, 314, 23 S. W. 474.

A sale under execution by a sheriff of lands lying partly outside of his county is valid as to that within, and void as to that without, the county. *Alred v. Montague*, 26 Tex. 732.

The sheriff becomes the agent of the plaintiff in execution when an operative execution is placed in his hands and so continues while the execution remains in force. *Harris, etc., Co. v. Ellis*, 30 Tex. 4, 6.

3. Deputy Sheriff.

The fact that a deputy sheriff levying an execution styles himself a "special deputy sheriff" does not invalidate the levy. *Miller v. Clements*, 54 Tex. 351, 354.

4. Constable.

Under Pasch. Dig. arts. 987, 993, authorizing a constable to execute process throughout the county, a constable may levy an execution on lands within the county, though outside his precinct. *Cundiff v. Teague*, 46 Tex. 475.

"The levy, which was, in the case of *Leland v. Wilson*, 34 Tex. 79, 94, held invalid, because made on land not within the constable's beat was made in 1841, and the decision was founded on the statute then in force." *Cundiff v. Teague*, 46 Tex. 475, 477.

5. Marshal.

Under article 418 of the Revised Statutes, providing that a mayor or recorder may issue an execution for any fine, penalty, and costs imposed by them, a marshal may levy such execution on property anywhere in the county. *Dudley v. Jones*, 6 Tex. Civ. App. 466, 468, 26 S. W. 445.

6. Disqualification of Officer.

A sale under execution is not void because the sheriff making the levy is a brother-in-law to one of the defendants in the execution. *Brackenridge v. Cobb*, 2 Tex. Civ. App. 161, 21 S. W. 614, affirmed in 85 Tex. 448.

A sheriff or constable who enforces by levy and sale the collection of a judgment in which he has an interest beyond his regular fees, is a trespasser; so also is the judgment creditor who directs or procures such levy or sale, after creating by contract such an interest in the officer. *Erwin v. Bowman*, 51 Tex. 513.

7. Duty and Liability of Officer.**a. Duty.**

See post, "Manner of Making Levy," XVI, J.

An officer charged with the execution of a writ is not required to investigate and determine the respective equities of the different defendants as against each other. *Mitchusson v. Wadsworth*, 1 App. Civ. Cases, § 976.

The officer is entitled to require an indemnity before levying an execution on personal property. *Seasongood v. Campbell* (Civ. App.), 49 S. W. 407.

Where goods seized by the sheriff under an execution are in fact practically of value of the penalty of an indemnity bond, the officer may refuse to make another levy unless further bond is given. *Seasongood v. Campbell* (Civ. App.), 49 S. W. 407.

As to duty to levy on property of insolvent defendant, see the title SHERIFFS, CONSTABLES AND MARSHALS.

b. Liability.

See post, "Liabilities," XXIV, A, 2. And see the title SHERIFFS, CONSTABLES AND MARSHALS.

c. Under Indemnity Bond.

A sheriff making a levy without a bond of indemnity, can not afterwards, in a suit for insufficient levy, plead the

want of such bond. *Dewitt v. Openheimer & Co.*, 51 Tex. 103.

The execution of an indemnity bond subsequent to the levy of an execution does not render the maker of the bond liable as a joint trespasser with the sheriff. *Longcope v. Bruce*, 44 Tex. 434, 438.

G. WHO MAY HAVE LEVY MADE.

There is no objection to a levy because it was at the instance of the attorney of the plaintiff in execution. *Bryan v. Bridge*, 6 Tex. 137; *Sydnor v. Roberts*, 13 Tex. 598, 622; *Alexander v. Miller*, 18 Tex. 893, 897.

H. ON WHAT PROPERTY LEVY MADE.**1. Designated by Law.**

An averment in a petition to enjoin the sale of land under an execution, that the petitioner "has personal property, subject to execution, sufficient to satisfy said debt," does not show that he had such property at the time of the levy, so as to make it the duty of the officer to levy thereon instead of on land. *Anderson v. Oldham*, 82 Tex. 223, 18 S. W. 557.

The defendant can not profit by the provisions of Revised Statutes, article 2287, classifying property for purpose of levy, if he did not avail himself of the opportunity to point out the property. *Anderson v. Oldham*, 82 Tex. 228, 233, 18 S. W. 557.

Plaintiff, a purchaser under execution sale of certain real estate, brought action to try the title. S., one of the defendants, the owner of the property, and the original judgment debtor, set up, by way of special answer, that plaintiff at the execution sale, for the purpose and with intent of defrauding defendant, induced the officers to forego levying on personal property, as required by law, before touching improved real estate, and that, as a consequence, the said real estate sold for much less than its value. Plain-

tiff demurred to this answer, on the ground that the alleged fraudulent conduct amounted to irregularities only, and could not be taken advantage of collaterally; the plaintiffs in execution not being parties to this suit. The court sustained the demurrer, and struck out the answer. Held error. *Stone v. Day*, 69 Tex. 13, 5 S. W. 642.

Where Parties Fail to Designate.—

By statute, defendant has the right in all cases to designate property for levy; but, should he fail to exercise this privilege, the sheriff may proceed to levy in the order prescribed by law. *Bryan v. Bridge*, 6 Tex. 137.

Pasch. Dig. art. 3775, which provides how a levy should be made if defendant in execution fails or refuses to point out property is directory only, and failure to make the levy as provided will not invalidate a sale thereunder. *Pearson v. Flanagan*, 52 Tex. 266.

If a defendant in execution failed to designate property subject thereto, the levy shall be made by the officer. *Jackson v. Browning*, 1 White & W. Civ. Cas. Ct. App. § 606.

If the defendant in execution fails to exercise the privilege offered to him by law, of pointing out property in the first instance, the course to be pursued by the sheriff is a clear one. He should in that event levy on such as he could find belonging to the defendant, observing the order pointed out by the statute, first on personal property, excepting slaves, then on unimproved lands, then on slaves, and lastly on improved lands, provided such different kinds of property, belonging to the defendant, could be found in the county; if not, then on such as could be found. Sec. 4, act of January 27, 1842. *Scott v. Allen*, 1 Tex. 508, 518.

2. Designated by Execution.

An execution can not specify the property to be levied on but must be levied on such property as is liable

for the debt represented by the judgment. *Carter v. Conner*, 60 Tex. 52, 58.

The fact that an execution orders a sale of specified chattels in the first instance does not invalidate a sale of the judgment debtor's land, where it appears that the chattels could not be found. *Willis v. Nichols*, 5 Tex. Civ. App. 154, 23 S. W. 1023.

Where both the judgment for taxes and the writ of *venditioni exponas* commanded the sheriff to seize and sell an entire lot owned by the judgment debtor, the sheriff has no discretion to levy on an unimproved portion which would have been sufficient. *Bordages v. Higgins*, 1 Tex. Civ. App. 43, 51, 19 S. W. 446, 20 S. W. 184, 726.

3. Designated by Parties.

a. In General.

When the property is to be sold under appraisement, defendant has the privilege of twice pointing out such as he may choose to surrender in satisfaction of the debt; but, on the third levy, plaintiff has the right of designation. The levy of the sheriff must be based on the act of the party who has the right to point out property, or it may be annulled. *Bryan v. Bridge*, 6 Tex. 137.

b. By Defendant.

(1) In General.

The defendant in execution has the right to designate the property to be levied on. *Bryan v. Bridge*, 6 Tex. 137; *Atcheson v. Hutchison*, 51 Tex. 223; *Avindino v. Beck & Co.* (Civ. App.), 73 S. W. 539; *Jackson v. Browning & Co.*, 1 App. Civ. Cases, § 605.

This is a right that the defendant can not be deprived of, if he chooses to exercise it. *Scott v. Allen*, 1 Tex. 508, 518.

A defendant in execution, his agent or an attorney, in all cases, has the right to designate the property to be levied on, provided it is in the county where judgment is rendered or to

which the execution may be issued. *Jackson v. Browning*, 1 White & W. Civ. Cas. Ct. App. § 606.

An execution debtor can select what of his property he wishes to be exempted under the law, provided it be done in good faith and without attempting thereby to cover up other property from the officer seeking a levy. *Fuller v. Sparks*, 39 Tex. 136.

"The plaintiff has a lien on all the property of the defendant in ordinary cases at the time he issues his execution; yet this does not deprive the defendant of the right of designating property first to be levied on." *Cloud v. Smith*, 1 Tex. 611, 620.

(3) Where Property All of Same Class.

Rev. St. art. 2287, requires that execution shall be first levied on personal property designated by defendant in execution, if such property be delivered into the possession of the officer. Const. art. 10, § 4, provides that rolling stock of a railroad company shall be considered real property, and that all its property shall be liable to execution. Held, that a constable could lawfully refuse to first levy on a box car pointed out to him by defendant railroad company, before levying on the depot grounds. *Texas Mexican Ry. Co. v. Wright*, 88 Tex. 346, 31 S. W. 613.

(3) Where Right Denied.

(a) No Request to Defendant.

A sheriff or other officer to whom a writ of execution is delivered may levy the same on property of defendant without a demand on the latter to point out and designate property on which the levy should be made; and such levy is valid if defendant, on being apprised of the fact, fails or refuses to point out other property sufficient to satisfy the execution. *Barbee v. Heflin*, 1 White & W. Civ. Cas. Ct. App. § 744.

Where, a week before the levy, defendant was requested by the sheriff

to point out property, and refused, thereafter it developed on him to point out other property without further solicitation. *Barbee v. Heflin*, 1 White & W. Civ. Cas. Ct. App. § 745.

(b) Effect on Sale.

The statute that entitles defendant in execution to the privilege of pointing out property to be levied on is directory only, and sales on execution will not be disturbed when defendant, for want of opportunity, has been denied this right. But when defendant avails himself of his privilege and actually points out property to be levied on, which is subject to execution and sufficient in value to make the debt, his right so asserted can not be ignored by the parties levying the writ, except at their peril either to have the sale set aside or to subject themselves to damages, or of both. *Beck & Co. v. Avondino*, 82 Tex. 314, 18 S. W. 690; *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 433, 35 S. W. 324.

"In cases wherein it was sought to set aside sales under execution, an account of the failure of the officer to comply with the requirements of this article, it has been held that its provisions are directory only, and that, in the absence of a fraudulent combination between the officer and judgment creditor, it would not necessarily render a sale void." *Fatheree v. Williams*, 13 Tex. 430, 433, 35 S. W. 324; *Pearson v. Flanagan*, 52 Tex. 266, 280; *Odle v. Frost*, 59 Tex. 684.

But in *Forbes, etc., Co. v. Hill*, Daltam 486, 487, it was held that the sheriff is not bound to levy on property pointed out by the execution debtor.

In an action to set aside an execution sale on the ground that the levy was made in disregard of plaintiff's right to point out property and in disregard of the statute regulating the order in which property of different kinds is to be levied on, a charge sub-

mitting to the jury whether the sheriff had made reasonable inquiry and search for defendant before he made the levy was sufficient. *Atcheson v. Hutchison*, 51 Tex. 223.

The title of a purchaser of lands at an execution sale is not affected by irregularities with which he was not connected, such as the failure of the officer to call upon the judgment debtor to point out property before the levy. *Donnebaum v. Tinsley*, 54 Tex. 362; *Crain v. Hogan* (Sup.), 16 S. W. 1019.

A mere irregularity in an execution sale of land, such as failing to demand a previous levy on personal property as directed by statute, is not sufficient, though accompanied by gross inadequacy of price, to vacate the sale, unless shown to have conduced in some way to such inadequacy. *Driscoll v. Morris*, 2 Tex. Civ. App. 603, 21 S. W. 629.

In an action to set aside an execution sale of land, the execution defendant testified that he had personal property but was not called on for a levy, and had no opportunity to point out the same. There was evidence tending to contradict his statement that he had property, but none beyond the return of the officer that he was called upon for a levy. Held sufficient to warrant an instruction that the facts detailed by defendant, if found to exist, would constitute an irregularity. *Driscoll v. Morris*, 2 Tex. Civ. App. 603, 21 S. W. 629.

Where, on an execution sale, the land was sold for a grossly inadequate price, the defendant was not called on to point out the property levied on, the writ was made returnable in 90 days instead of 60 days, as required by law, and the sale took place after 60 days, and the land levied on and sold was so described as to render it doubtful what land was covered by the levy and deed, and whether the land levied on was that which was sold, the court was justified in setting aside the sale.

Day v. Johnson, 72 S. W. 426, 32 Tex. Civ. App. 107.

An execution sale of land worth over \$500 for \$10—the plaintiff being the purchaser, and presumed to have notice of an irregularity in the levy, namely, the sheriff's omission to call on the defendant to point out personal property—held to be properly set aside. *Pearson v. Hudson*, 52 Tex. 352.

(4) Where Right Afforded.

"The evidence shows that reasonable opportunity was afforded plaintiff to point out property, and this, we think, is all he was entitled to under the statute and the decisions." *Atcheson v. Hutchison*, 51 Tex. 223, 233, citing *Cook v. De La Garza*, 13 Tex. 431; *Kendrick v. Rice*, 16 Tex. 254, 259.

(5) Where Defendant Not Found after Search.

Sheriff must first exercise ordinary diligence in his county to ascertain whether the defendant has an agent or personal property therein; and where he makes a levy on land, and the defendant applies for an injunction, it will be presumed that the sheriff exercised proper diligence, unless the contrary be shown. *Cook v. De La Garza*, 13 Tex. 431; *Kendrick v. Rice*, 16 Tex. 254.

"In *Atcheson v. Hutchison*, 51 Tex. 223, the duty of the sheriff to give the defendant an opportunity to point out property is recognized, by the court's holding him discharged from it in making reasonable search for the defendant before making the levy." *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 433, 35 S. W. 324.

Defendant Resident of Another County.—It is not necessary for a sheriff, in whose hands an execution is placed to levy on property of defendant whose residence is in another county, to go out of his county to seek defendant, to afford him the opportunity of pointing out property, or to ascertain whether he have an agent or

personal property in the county subject to execution, before he will be authorized to levy on the lands of defendant in the county. *Cook v. De La Garza*, 13 Tex. 431; *Kendrick v. Rice*, 16 Tex. 254, 260; *Pearson v. Flanagan*, 52 Tex. 266; *Kingsland, etc., Co. v. Harrell*, 1 App. Civ. Cases, § 736.

A judgment debtor, living out of the county, without other property there than his improved land, which was levied on, can not complain that he was not called on to point out land on which the execution might be levied. *Kendrick v. Rice*, 16 Tex. 254.

Nonresident Defendant.—The sheriff need not search for a nonresident defendant in order to have him point out the property to be levied on. *Cook v. De La Garza*, 13 Tex. 431, 436.

(6) Where Defendant Has No Other Property.

An objection to a levy of execution, because the sheriff did not give the defendant an opportunity to point out other property subject to sale, can not avail where it is not shown that he had such other property, which he desired to be sold. *Yett v. Iron City Nat. Bank* (Civ. App.), 45 S. W. 1033.

(7) Mode and Sufficiency of Pointing Out.

Revised Statutes, art. 2287 does not seem to make a mere designation of personal property sufficient to require the officer to levy upon it; but further requires that the owner of such property desiring to have it levied upon shall deliver possession thereof to the officer; by which, however, we do not understand is meant necessarily an actual delivery, but that the property must be identified in some way and placed subject to the right of the officer to take possession of it. *Anderson v. Oldham*, 82 Tex. 228, 233, 18 S. W. 557.

Describing Property.—Under Rev. St. art. 2344, providing that an officer levying an execution shall first levy on property pointed out by the owner,

provided that, if real estate, a description thereof by metes and bounds be delivered to him, a verbal description, designating the property as lots 15 and 22 in block No. 11 of Tilson & Pitcher's addition to the city of Texarkana, Tex., was sufficient. *Beck v. Avindino*, 68 S. W. 827, 29 Tex. Civ. App. 500.

Substituting Other Property.—

Where defendant in execution objects to the levy on the ground that while he was absent from home the sheriff levied on a favorite piece of property, without calling on him to point out the property to be levied on, he should offer to point out other property sufficient to satisfy the execution. *Choate v. Redding*, 18 Tex. 579.

Where the defendant in execution seeks to enjoin a sale under the execution, on the ground that the levy made in violation of his right to point out property, he must show that he pointed out or offered as a substitute other property, liable to execution, sufficient to satisfy the execution; or, if such other property is insufficient, that he requested the sheriff to levy on it also, and sell it before selling the property which he desired to reserve; and that the sheriff, in either case, refused. *Ross v. Lister*, 14 Tex. 469.

A petition for an injunction to restrain a sheriff from levying an execution on certain property, alleging that the petitioner has other property subject to execution, is insufficient, where no property is pointed out. *Smith v. Frederick*, 32 Tex. 256.

Defendant in execution, if he wishes to exercise this right to point out property to be levied on after a partial levy has been made, must point out other property as a substitute, liable to execution and sufficient, or, if such other property is insufficient, he must request the sheriff to levy on it also, and sell it first. If he proposes to exercise his right, he must put the officer in possession of the property, or give him such control over it as may en-

able him to deliver it to the purchaser. *Ross v. Lister*, 14 Tex. 469.

The levy of an execution is valid though made without a demand that the defendant designate property to be levied on if defendant fails or refuses to point out other property sufficient to satisfy the execution. *Barbee v. Heflin*, 1 App. Civ. Cases, § 744.

The burden of proof is upon the defendant to show that he offered to point out property to be levied on. *Barbee v. Heflin*, 1 App. Civ. Cases, § 744.

Tendering Other Property.—Where an execution defendant made no tender of personal property sufficient to satisfy the judgment, he can not recover damages on the ground that execution was levied on his land without a levy first being made on his personal property. *Ellis v. Harrison*, 57 S. W. 984, 24 Tex. Civ. App. 13.

Putting Officer in Possession.—Art. 2287, Rev. Stat. requires that the owner should deliver the personal property to the officer, or to furnish the officer with some identification of it so that he could take possession. *Ross v. Lister*, 14 Tex. 469, 475; *Anderson v. Oldham*, 82 Tex. 228, 18 S. W. 557; *Texas Mexican R. Co. v. Wright*, 88 Tex. 346, 31 S. W. 613, affirming 29 S. W. 1134; *Ellis v. Harrison*, 24 Tex. Civ. App. 13, 20, 56 S. W. 592, 57 S. W. 984, affirmed in 93 Tex. 637, no op., 94 Tex. 690, no op.

To properly point out property on levy, the defendant must put the officer in possession of it in the manner suitable to the circumstances. *Ross v. Lister*, 14 Tex. 469, 475.

A party exercising the privilege of pointing out property must, if required, put the officer in possession of it, by such act of giving possession as the nature of the case will reasonably admit. *Ross v. Lister*, 14 Tex. 469, 475.

A statement to the levying officer that the defendant had "horses in his lot here in town subject to execution sufficient to satisfy said execution, and

to levy on them," is not such a pointing out of property as will satisfy Revised Statutes, article 2287. *Anderson v. Oldham*, 82 Tex. 228, 233, 18 S. W. 557.

The act of a station agent of a railroad in pointing out a box car as personal property for the levy of an execution against the company, does not amount to a delivery necessary under article 2287 of the Revised Statutes. *Texas-Mexican R. Co. v. Wright*, 88 Tex. 346, 350, 31 S. W. 613, affirming 29 S. W. 1134.

A judgment debtor pointed out realty subject to forced sale, more than sufficient to make the judgment, and requested the officers having an execution to levy thereon, which the latter refused, and levied on and sold personal property of the debtor in one mass. Held, in an action for damages and to set the levy and sale aside, that as the debtor, in his pleadings, made no offer to put the officer in possession of property out of which the judgment could be made, and did not tender title to the realty upon the trial, and the record failing to show that he had property out of which the demand could be collected, the value of the personalty could not be recovered without paying the debt, which should be deducted therefrom. *Beck v. Avondino*, 52 Tex. 314, 18 S. W. 690.

A request by a judgment debtor to levy on horses in a lot in town, in the absence of a more specific designation, does not make it the officer's duty to levy thereon before levying on real estate, under Rev. St. art. 2287, which requires that levy shall first be made on property designated by defendant, provided that, if it be personal property, defendant deliver it into the officer's possession. *Anderson v. Oldham*, 82 Tex. 228, 18 S. W. 557.

(8) Property That May Be Pointed Out.

(a) Property Exempt.

Property reserved by law for the

family and exempt from execution is not subject to be levied on, though with the consent of the head of the family, and therefore where such property is pointed out by the defendant in execution, the sheriff can not properly receive it. *Ross v. Lister*, 14 Tex. 469.

Where a judgment debtor points out exempt or encumbered property of insufficient value to satisfy an execution the sheriff may levy on such property, subject to execution as he can find. *Ross v. Lister*, 14 Tex. 469, 474.

(b) Property of Surety.

The principal debtor can not require that a levy be made on his surety's personalty rather than on his own improved realty. *Kendrick v. Rice*, 16 Tex. 254, 261.

(c) Property of Third Person.

Where the sheriff has decided that certain property, which was pointed out to him by a defendant as the property of his codefendant, is not liable to levy, plaintiff need not move against the sheriff in order to determine whether his decision is correct or not, but may proceed at once to have the judgment collected. *Carey v. Tinsley*, 22 Tex. 383.

(9) Substituting Property.

If after a levy on certain property, sufficient other property be tendered as a substitute, it ought to be accepted any time before the advertisement of sale. *Ross v. Lister*, 14 Tex. 469, 474.

c. By Plaintiff.

Under Hart. Dig. art. 1327, declaring that defendant in execution shall have the right to designate the property to be levied on, and, if he refuse, it shall be the duty of the sheriff to select the property, though plaintiff had no right to make a designation, if he did so, and the sheriff selected the property so designated, the sale is

valid. *Bryan v. Bridge*, 6 Tex. 137; *Fleming v. Powell*, 2 Tex. 225.

This would be the officer's course if the property levied on and appraised should not sell for two-thirds its appraised value, when he went to make the second levy, provided the defendant failed to point out other property than that first shown and offered for sale. *Scott v. Allen*, 1 Tex. 508, 518.

"The plaintiff's right to point out property does not depend on the number of executions that may have been issued, but upon what has been done. If the defendant has had the privilege of twice pointing out property—of appraisal and offer of sale under the same execution, the plaintiff's right to point out would accrue on the second; when this had occurred, all those facts should appear on the sheriff's return on the first execution." *Scott v. Allen*, 1 Tex. 508, 518.

The fact that the plaintiff in execution has no right to point out the property does not bind the sheriff to receive his designation, but his having done so did not make the levy void. *Sydnor v. Roberts*, 13 Tex. 598, 622.

The plaintiff can not designate the property where an execution is issued to sell without appraisal; but the sheriff may adopt the plaintiff's designation after the defendant fails to designate. *Bryan v. Bridge*, 6 Tex. 137, 142.

While it is not the duty of counsel for a plaintiff in execution to point out property for a sheriff to levy upon, yet, if he be applied to by the sheriff to indicate property from which to satisfy the execution, and withholds from the officer knowledge in his possession, which would enable him to make a levy, that fact would exonerate the officer from liability. *Batte v. Chandler*, 53 Tex. 613.

Conformity to Statute.—Act Jan. 27th, 1842, § 4 relating to executions provides that the defendant may designate the property to be levied on.

Section 17 provides that on the day of sale plaintiff may choose one and the defendant another appraiser but if either party fail to attend or make his selection, the sheriff shall appoint an appraiser for the absentee. Section 12 provides that in case there is no sale as contemplated in section 17 the sheriff may, after the expiration of three months, proceed to make a second levy on property pointed out to him by defendant, not being the same levied on in the first instance and in case the property levied on in the second instance will not bring two-thirds of its appraised value then, after the expiration of three months from the last-mentioned day the plaintiff may designate such property of defendant as he may think proper to be levied on. Three executions were issued on which the sheriff returned that he had levied on property pointed out by defendant but that the plaintiff not attending to select an appraiser, he could not get any one to act for him and did not offer the property for sale. Held, that these returns did not show a compliance with law by the plaintiff and therefore he was not entitled to point out the property on which a fourth execution might be levied. *Scott v. Allen*, 1 Tex. 508.

d. By Surety.

Where the principal defendant in execution refuses to point out property, it becomes the duty of the officer to find the property, if he can, whereon to levy the execution; and it is the right of the sureties in the judgment to aid him in finding the property of the principal, if they see proper to do so; it is therefore no objection to a levy, in such a case, that it purports to be made on property of the principal, pointed out by the surety. *Martin v. Rice*, 16 Tex. 157; *Kendrick v. Rice*, 16 Tex. 254.

Where a judgment is obtained against a vendee and vendor on the vendee's notes transferred by the vendor, the

vendor may as surety point out the land for which they were given to the sheriff levying execution on said judgment. *Kelso v. Pratt*, 26 Tex. 381, 382.

e. By Mortgagee.

Where a registered mortgage covers a number of animals of a certain brand in a larger herd of the same brand, a creditor of the mortgagor purchasing at his own execution sale is charged with notice of the mortgagee's right to designate which shall be subject to the lien, and is put on inquiry as to whether it has been done. *Avery v. Popper* (Civ. App.), 45 S. W. 951, modified 48 S. W. 572 and 49 S. W. 219, 50 S. W. 122, 92 Tex. 337.

f. By Claimant of Property.

A third person, claiming slaves which had been taken on execution, can not introduce evidence that the defendant in execution owned personal property and uncultivated lands, which were first subject to levy under execution. *Mosely v. Gainer*, 10 Tex. 393.

I. ON HOW MUCH PROPERTY LEVIED.

The amount of property on which an officer may levy by virtue of his process is not defined by law, and it would be extremely difficult to prescribe a rule on the subject. A large discretion in this respect is of necessity to be confided to the officer. *Cornelius v. Burford*, 28 Tex. 202.

All circumstances are to be considered in determining whether a levy is excessive. *Cornelius v. Burford*, 28 Tex. 202, 210.

"In determining what is a sufficient levy for the purpose of satisfying the writ, the officer is left to exercise his own judgment, free from the constraint of either the plaintiff or defendant; and is accountable to the plaintiff, on the one hand, if he fails to levy on as much as a reasonably prudent man would deem sufficient for that purpose, making a proper allowance for the sacrifice usually incident

to forced sales; and on the other hand, he is answerable to the defendant for an unreasonable and unnecessary levy on his property. He is not bound to take exactly enough and no more; this would be unreasonable, if not impossible. It is only where the estimate is so far from that which a prudent, discreet man would make as to render him accountable from a presumption of negligence or design to wrong or injure the party aggrieved." *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 433, 35 S. W. 324.

Where the agent of defendant in execution points out to an officer for levy the whole of a tract of land, though a part would suffice, and the whole was purchased at a sale by a stranger, the agent is estopped to attack the title of the purchaser on the ground that the levy was excessive. *Cornelius v. Burford*, 28 Tex. 202.

Under Rev. St. 1895, arts. 2363, 2364, giving an execution defendant whose land had been levied on the right to have the land subdivided and sold in small tracts, an execution defendant can not recover damages for excessive levy on his land. *Ellis v. Harrison*, 57 S. W. 984, 24 Tex. Civ. App. 13.

A levy can not be made on an entire trust estate for the purpose of subjecting an inconsiderable interest mixed with it, it should be confined to that particular interest. *Parker v. Portis*, 14 Tex. 166, 170.

The amount of an execution and the value of the property taken by virtue thereof, are not in all cases the only facts to be considered in determining whether the levy was excessive. *Cornelius v. Burford*, 28 Tex. 202.

If in a sale under execution of shares of stock no mention of the number of shares is required, then there would be nothing to prevent an excessive levy, and a very large estate might be sold to satisfy a very small judgment, and that, too, when the property was capable of division, leading to sacrifice to

both debtor and creditor. There should be no such uncertainty in execution sales. *Keating v. Stone, etc., Co.*, 83 Tex. 467, 18 S. W. 797.

Allowance for Depreciation and Costs.—It is the duty of the officer in levying to make a proper allowance for depreciation in price as the usual effect of a forced sale. *Atcheson v. Hutchison*, 51 Tex. 223.

In making a levy there should be a proper allowance for depreciation in value incident to the forced sale, and the levy should cover costs and incidental expenses. *Dewitt v. Oppenheimer*, 51 Tex. 103.

Effect of Excessive Levy on Sale.—

The facts that the levy was excessive; that the land was sold for much less than its value; that the judgment debtor had ample personal property to satisfy the judgment, but was given no opportunity to point it out for levy; and that the sheriff refused to sell the land in small quantities, as the debtor requested,—are not sufficient to vitiate the sale where the land is bought by one not a party to the action. *Crain v. Hogan* (Sup.), 16 S. W. 1019.

Objections to Excessive Levy.—

Where an execution defendant points out a tract of land to be sold to satisfy the execution, and it is purchased by a stranger, defendant is estopped from impeaching the act of the officer or the title of the purchaser on the ground that the levy was excessive. *Cornelius v. Burford*, 28 Tex. 202.

J. MANNER OF MAKING LEVY.

1. In General.

The handing by an officer of a notice of levy to the execution defendant is not a levy, when it is immediately given back to the officer, and he, after consultation with such defendant and his attorneys, determines not to make the levy and returns the notice and copy to the execution plaintiff's attorney, and informs him that he will not make the levy without an indemnity

bond, which is refused. *Adoue v. Wettermark*, 82 S. W. 797, 36 Tex. Civ. App. 585.

2. Conformity to Statute.

Statutes prescribing the mode of making levy and sale of personal property must be strictly followed. *Gunter v. Cobb*, 82 Tex. 598, 607, 17 S. W. 848.

In the absence of a compliance with the statute under which an execution is levied, the presumption is that the property did not bring as much as it would had the law been complied with, and no inquiry will be made on that subject. *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848.

3. Conformity to Direction of Plaintiff.

It is the duty of a sheriff who has an execution in his hands, to obey all lawful instructions of the owner of the judgment on which it issued in making a levy and sale. When one, other than the judgment creditor, or his recognized attorney, assumes to direct him, he is not bound to obey, unless such party has the legal or equitable title to the judgment. The owner of the judgment has the right to control the execution, even as against his own attorney of record. *Daugherty v. Moon*, 59 Tex. 397.

4. By Use of Force.

A levy made by unauthorized force is void and the officer is liable therefor. *Hillman v. Edwards*, 28 Tex. Civ. App. 308, 66 S. W. 788.

Although an officer has in his hands an order of court for the sale of specific property upon which a lien has been foreclosed, he has not the right to make a forcible entry into the dwelling of the defendant for the purpose of seizing the property, nor the right to climb through an open window of the dwelling, if that is an unusual place of entry. *Hillman v. Edwards*, 28 Tex. Civ. App. 308, 66 S. W. 788.

Where an officer has effected a lawful entry into a dwelling house and thereby acquired the right to use all

necessary force in making the levy, and he voluntarily leaves without doing so, he is not entitled to re-enter the house by force. *Hillman v. Edwards*, 28 Tex. Civ. App. 308, 66 S. W. 788.

5. Of Execution from Another County.

There is no good reason for requiring an execution from another county to be levied with any greater formality than in other cases of execution sales. *Cundiff v. Teague*, 46 Tex. 475, 477.

6. Of Execution from Justice's Court.

There is no good reason for requiring an execution from a justice's court to be levied with any greater formality than in other cases of execution sales. *Cundiff v. Teague*, 46 Tex. 475, 477.

7. On Land.

Entry upon Land.—Rev. Stat. art. 2291, providing that "in order to make a levy on real estate it shall not be necessary for the officer to go upon the ground, but it shall be sufficient for him to endorse such levy upon the writ" is but declaratory of what the law was previous to the adoption of the revision. *Sanger Bros. v. Thos. Trammell & Co.*, 66 Tex. 361, 1 S. W. 378; *Riordan v. Britton*, 69 Tex. 198, 203, 7 S. W. 50.

Where the judgment is a lien on the land, the officer levying an execution thereon, need not enter thereon. *Leland v. Wilson*, 34 Tex. 79, 94.

But where the lands are not under the judgment lien, the officer must carry his execution to the premises and take pedal possession before he can make a valid sale. *Leland v. Wilson*, 34 Tex. 79, 94. But see below.

The practice is believed to have been the same, whether the judgment was or was not a lien on the land before the levy. *Cundiff v. Teague*, 46 Tex. 475, 477.

In *Cavanaugh v. Peterson*, 47 Tex. 197, 204, it was contended upon the authority of *Leland v. Wilson*, 34 Tex. 79, 94, that to make a valid levy upon land the sheriff must go upon it, but

it was held that the court, upon a full consideration of that case, in connection with the adverse views often held by the court previously, has decided directly the contrary more than once. See *Hancock v. Henderson*, 45 Tex. 479; *Cundiff v. Teague*, 46 Tex. 475; *Catlin v. Bennatt*, 47 Tex. 165.

A levy of execution by a constable on lands within the county, but outside his precinct, as authorized by Pasch. Dig. arts. 987, 993, may be sufficiently made without going on such lands. *Cundiff v. Teague*, 46 Tex. 475.

Service of Notice on Defendant.—An execution sale of land is invalid in the absence of notice of the levy served on the defendant in execution by the officer holding the same, though the defendant had actual notice of the sale. *Johnson v. Daniel*, 25 Tex. Civ. App. 587, 63 S. W. 1032.

8. On Personalty.

a. In General.

To constitute a valid levy of an execution on personal property, the sheriff must do such acts as would subject him to an action of trespass, but for the protection of the execution. *Bryan v. Bridge*, 6 Tex. 137; *Portis v. Parker*, 8 Tex. 23; *Frieberg, etc., Co. v. Johnson*, 71 Tex. 558, 9 S. W. 455.

Must Take Possession.—To make valid levy on personal property, officer should make seizure, or take actual possession. It is not sufficient if he have a view of it. *Bryan v. Bridge*, 6 Tex. 137, 141; *Portis v. Parker*, 8 Tex. 23, 25; *Converse & Co. v. McKee*, 14 Tex. 20, 30; *Cavanaugh v. Peterson*, 47 Tex. 197; *Frieberg, etc., Co. v. Johnson*, 71 Tex. 558, 9 S. W. 455; *Gunter v. Cobb*, 82 Tex. 598, 603, 17 S. W. 848; *Lindsey v. Cope*, 91 Tex. 463, 43 S. W. 29, 44 S. W. 276, affirming 43 S. W. 29.

"The law requires that a levy upon personal property shall be made by taking possession thereof when the defendant in execution is entitled to possession. Rev. Stats., art. 2292." *Gunter v. Cobb*, 82 Tex. 598, 606, 17 S. W. 848.

ter v. Cobb, 82 Tex. 598, 606, 17 S. W. 848.

A mere declaration of possession does not constitute a sufficient levy. *Converse & Co. v. McKee*, 14 Tex. 20, 30.

"What will constitute such possession as the law requires depends largely on the situation and character of the property." *Gunter v. Cobb*, 82 Tex. 598, 606, 17 S. W. 848.

A judgment creditor levying on personal property, one part of which is alleged to belong to the judgment debtor by virtue of two years' possession, under Revised Statutes, article 2547, must do so by actual seizure of the property, or a part thereof, and not by service of notice. *Hunstock v. Roberts* (Civ. App.), 65 S. W. 675.

The act of the officer in the assertion of his right to the property must be open and notorious, and such as would be susceptible of proof if called in question. If secret levies and claims to property without possession or control were tolerated, the rights of parties interested would be greatly embarrassed, and third parties without the means of knowledge of such claims might be made the victims of their ignorance. *Portis v. Parker*, 8 Tex. 23, 26.

b. Statutory Provision.

"The mode in which a levy on personal property must be made is not indicated in the statute regulating executions, but there are various provisions relative to the responsibility, etc., of the sheriff for the production of the property levied upon, which must be predicated upon the fact of previous seizure and possession." *Portis v. Parker*, 8 Tex. 23, 25.

c. On Stock of Goods.

The goods should be brought within the view of the officer and be subject to his control; that he may take an inventory of them, or perform some open and unequivocal act in assertion of his title which would operate to dis-

turb and divest the possession of the defendant. *Portis v. Parker*, 8 Tex. 23, 25.

Where an officer goes with an execution to defendant's store, which is locked, and, without gaining entrance, nails strips across the door, and reads the writ, and notifies defendant, there is no levy. *Lynch v. Payne* (Civ. App.), 49 S. W. 406.

A levy made in view of a stock of goods in gross is a good levy, and the sheriff, on so levying, is entitled to the necessary time in which to make his invoice. *Grove v. Harris*, 35 Tex. 320.

d. On Cattle.

"It is difficult to prescribe any special mode for a levy upon wild cattle. A levy must combine notoriety with such seizure as would enable the sheriff to control and keep in safety the property. At the same time the possession must be according to the nature of the property, and the act of the sheriff should not subject the defendant to any unnecessary expenses to be incurred for its preservation. If wild cattle were penned and fed until the day of sale, the expenses would consume a great portion of the property. If herdsmen were employed to guard them, the charges would be onerous on the defendant. It may be said that the latter can always avoid such expense by giving bond for delivery. This might not always be convenient, and in many cases would be oppressive. As the subject of a proper rule in such cases has not been discussed by counsel, I will waive further remarks." *Portis v. Parker*, 8 Tex. 23, 28.

A "range levy" may be made by designating by reasonable estimate the number of animals, and describing them by marks and brands, or either, without taking actual possession. *Elliot v. Long*, 77 Tex. 467, 14 S. W. 145; *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848; *Davis & Bro. v. Dallas Nat. Bank*, 7 Tex. Civ. App. 41, 26 S. W.

222; *Donald v. Carpenter*, 8 Tex. Civ. App. 321, 324, 27 S. W. 1053; *Swan v. Larkin*, 8 Tex. Civ. App. 421, 28 S. W. 217; *Carothers v. Wilkerson*, 2 App. Civ. Cases, § 353.

The officer is required to "designate by reasonable estimate the number of animals," and this measures the extent of the purchaser's right to select and hold, or in other words limits his purchase. *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848.

A levy upon certain cattle "running at large on the range in M. county" is presumed to be sufficient as a range levy, under Rev. St. art. 2293, where it is not shown that defendant's range extended beyond M. county. *Sparks v. McHugh* (Civ. App.), 43 S. W. 1045.

Rev. St. art. 2293, provides that an execution on cattle on range may be levied by designating the property and by estimating and describing the brands; and article 2314 declares that, when a levy is made, the stock need not be present at the place of sale, and the purchaser shall be authorized to gather and pen the stock and select the number purchased by him. Held that, until such selection was made, the purchaser's title did not attach to any animals. *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848.

Rev. St. art. 2293, provides that cattle running at large in a range may be levied on by designating by estimate the number of animals and describing them by their marks or brands, and article 2314 declares that when such levy is made the stock need not be present at the place of sale, and the purchaser shall be authorized to gather and pen such stock, and select therefrom the number purchased by him. Held, that the purchaser will have the right to gather from the entire stock, though found in a county other than that in which the levy and sale are made, a sufficient number to enable him to select and appropriate the number he is entitled to. *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848.

It is evident that the levy and sale do not pass title to any particular animals, but gives only the right to select the number sold. The right of the purchaser is "to gather and pen such stock and select therefrom the number purchased by him." *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848.

A return of execution recited a levy "on about 2,000 head of cattle, more or less, running at large upon [defendants'] range in H. and adjoining counties;" "said cattle branded" with two specified marks, "and also upon those branded" with a third mark, specified. Held, that the failure of the return to state the number of cattle included in each brand did not show that the levy was void. *Brown v. Hudson*, 38 S. W. 653, 14 Tex. Civ. App. 605.

Where Cattle in Inclosure.—Rev. St. 1895, art. 2350, providing that a range levy may be made upon stock, where it can not "be herded and penned without great inconvenience and expense," does not authorize such levy upon stock in an inclosure containing 1,280 acres. *Lindsey v. Cope*, 44 S. W. 276, 91 Tex. 463; *Cope v. Lindsey*, 43 S. W. 29, 17 Tex. Civ. App. 203.

"The stock were not running at large in a range, but that they were confined in pastures all under fence, the largest containing 1280 acres. The allegations negative the existence of the conditions which would justify a range levy as prescribed by article 2350, Revised Statutes. They negative the fact that the stock could 'not be herded and penned without great inconvenience and expense.' In fact, they indicate that the horses and cattle could be herded and penned without great inconvenience and expense." *Cope v. Lindsey*, 17 Tex. Civ. App. 203, 204, 43 S. W. 29, affirmed in 91 Tex. 463.

Where stock were confined in pastures all under fence, a range levy was

not justifiable. *Cope v. Lindsey*, 17 Tex. Civ. App. 203, 204, 43 S. W. 29, affirmed in 91 Tex. 463.

Where Range Extends to Several Counties.—Cattle ranging at will on pastures belonging to the owner, containing about 300,000 acres and including lands in several counties, though such pastures are inclosed, are within the provisions of Rev. St. art. 2293, providing that a levy upon cattle "running at large in a range, and which can not be herded and penned without inconvenience and expense," may be made by designating by reasonable estimate the number of animals, and describing them by their marks or brands. *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 484.

Under Rev. St. art. 2293, providing that a levy on cattle running at large in a range, and which can not be herded and penned without great inconvenience and expense, may be made by designating by reasonable estimate the number of animals, and describing them by their marks or brands, such levy to be made in the presence of two or more credible persons, and notice thereof to be given in writing to the owner or his agent, if residing in the county and known to the officer; and article 2314, declaring that when such levy is made the stock need not be present at the place of sale, and the purchaser shall be authorized to gather and pen such stock, and select therefrom the number purchased by him,—such a levy, where the cattle are running at large in a pasture including lands in several counties, must be made without restriction based on county boundaries or it will be invalid. *Gunter v. Cobb*, 82 Tex. 598, 17 S. W. 848.

e. On Crops.

In making an execution levy upon an unsevered crop, the officer must either take possession of the land to gather the crop or sell it ungathered. *Coates v. Caldwell*, 71 Tex. 19, 21, 8 S. W. 922.

Whether or not an officer levying an execution was in the field where certain cotton stood ungathered, when levy was made thereon, is immaterial as the plaintiff can maintain an action against the officer for the value of the property lost to him thereby, even though the levy was irregular. *Cox v. Patten* (Civ. App.), 66 S. W. 64, affirmed in 95 Tex. 676, no op.

f. On Corporate Stocks.

Article 2294, Revised Statutes, provides, that "a levy on the stock of any corporation or joint stock company is made by leaving a notice thereof with any officer of such company." Shares so levied upon may be sold under execution. Rev. Stat., art. 2297. *Keating v. Stone, etc., Co.*, 83 Tex. 467, 18 S. W. 797.

A levy on stock of a corporation, without leaving notice with an officer of the corporation, as required by Rev. St. art. 2294, is void. *Wagner v. Marple*, 10 Tex. Civ. App. 505, 31 S. W. 691.

Where execution was levied against S, which described the property as all the shares of stock owned by him in the S company, and all his right, title, and interest therein, and no effort was made by garnishment to ascertain the number of shares he held, the levy and sale were void, and passed no title to the purchaser. *Keating v. Stone & Sons Live Stock Co.*, 83 Tex. 468, 18 S. W. 797.

g. On Slaves.

A valid levy and sale of an undivided interest of a part owner of slaves can not be made without the slaves being present at the time of levy and sale, or in some way under sheriff's control. *Brown v. Lane*, 19 Tex. 203, 205.

h. Dependent on Possession.

Under the express terms of Rev. St. 1895, arts. 2349, 2352, execution officers, in levying on debtor's undivided interest in personalty in the possession of the other owner, may not take possession of the property, and hence the

levy is properly made by giving notice to the one in possession. *Hubert v. Hubert*, 46 Tex. Civ. App. 503, 102 S. W. 948.

It would seem that in a case like the present, where the debtor "is not entitled to the possession of the property," although he was in possession, and still had an interest therein at the date of the levy, the statutes do not authorize an actual seizure of the property in such case, but the levy of the execution should be levied by "notice." Such is the plain language of the law. Rev. Stat., arts. 2292, 2296, 166, 167. *Willis & Bro. v. Thompson*, 85 Tex. 301, 308, 20 S. W. 155.

"When a levy is made upon an undivided interest, the sheriff may take possession of the whole, if the defendant in the writ is entitled to such possession. Rev. Stat., arts. 2292, 2313." *Hamburg v. Wood & Co.*, 66 Tex. 168, 171, 18 S. W. 623.

9. On Property of Particular Persons. **a. Of Codefendants.**

Officers charged with the execution of a writ are not required to investigate and determine the respective equities of the different defendants as against each other, and may therefore levy on the property of either, without inquiring whether he was principal or surety in the liability which was merged in the judgment. *Mitchusson v. Wadsworth*, 1 White & W. Civ. Cas. Ct. App. § 984.

b. Of Partners.

To constitute a valid levy on personalty belonging to a partnership, to pay the debt of an individual partner, or on personalty in the hands of a trustee, notice of the levy must be given to one or more of the partners, or to the clerk of the partnership, or to the trustee, as the case may be. *Sumner v. Crawford* (Civ. App.), 41 S. W. 825.

Article 2295, Rev. Stat., prescribes that "a levy upon the interest of a partner in partnership property is made by leaving a notice with one or

more of the partners, or with a clerk of the partnership." *Rogers v. Nichols*, 20 Tex. 719; *Middlebrook & Bros. v. Zapp*, 79 Tex. 321, 15 S. W. 258; *Currie v. Stuart* (Civ. App.), 26 S. W. 147.

It is questioned whether by Rev. Stat., article 2352, the legislature meant to authorize levy upon the interest of one partner in a firm by notifying only the partner who is defendant in execution. *Wettermark v. Campbell*, 93 Tex. 517, 56 S. W. 331.

By Seizure.—This language indicates that it was the intention not only to provide that manner of levying upon such interest, but to exclude any other. A seizure is unlawful. *Middlebrook & Bros. v. Zapp*, 79 Tex. 321, 15 S. W. 258.

Under Rev. St. art. 2295, providing that "a levy on the interest of a partner in partnership property is made by leaving a notice," etc., a levy on a partner's interest by an actual seizure of part of the partnership property is illegal. *Middlebrook v. Zapp*, 79 Tex. 321, 15 S. W. 258.

In Possession of Trustee.—"The partnership property being lawfully in the possession of the trustee, could not be levied upon by actual seizure but only by notice under the statutes. Rev. Stat., arts. 2349, 2352." *Sumner v. Crawford*, 91 Tex. 129, 131, 41 S. W. 994, affirming 41 S. W. 825.

c. Of Husband and Wife.

One having control of an execution against the husband, and desiring to subject goods of the husband, subject to levy, in a house containing other goods not subject, which are the separate property of the wife, and being unable to discriminate, may levy on the interest of the husband, in analogy to the remedy given under execution against a member of a copartnership for his individual debt, and the mode of proceeding indicated in *Rogers v. Nichols*, 20 Tex., 719, 724. *Brown v. Bacon*, 63 Tex. 595.

d. Of Pledgee.

Where property in the possession of a pledgee is levied on—but not in the mode pointed out by Rev. Stat., arts. 2292-96—the pledgee may avail himself of the statute for the trial of the right of property. *Durham v. Flanagan*, 2 Willson, Civ. Cas. Ct. App. § 24.

K. SUFFICIENCY OF LEVY.

1. On Land.

a. Description of Property.

(1) In General.

"It must be determined, then, whether the description contained in the levy in this case, unaided by extrinsic testimony, other than such as would explain any latent ambiguity therein, is sufficient to identify with a reasonable degree of certainty the property sold. The earlier decisions of our supreme court were not so strict with regard to the description to be contained in the levy, and seemed to attach more importance to that contained in the deed. *Coffee v. Silvan*, 15 Tex. 354; *Alexander v. Miller*, 18 Tex. 893. But it is now well settled, that the levy itself should contain a description sufficient to identify the land that was sold by the sheriff." *Smith v. Crosby*, 4 Tex. Civ. App. 251, 254, 22 S. W. 1042, affirmed in 86 Tex. 15.

A levy must describe the property sufficiently to enable bidders at sale to know what is being sold. *Smith v. Crosby*, 4 Tex. Civ. App. 251, 253, 22 S. W. 1042, affirmed in 86 Tex. 15; *Mitchell v. Ireland*, 54 Tex. 301.

A levy upon land which does not describe it with sufficient exactness to enable one intending to purchase to locate it by proper inquiry of those familiar with it, is void for uncertainty upon its face, and can not be aided by parol evidence, nor by the description in the sheriff's deed made by virtue of his sale under the levy. *Hayes v. Gallaher*, 21 Tex. Civ. App. 88, 51 S. W. 280, affirmed in 93 Tex. 641, no op.

Where an execution levy on certain land failed to particularly describe the land, it was insufficient to confer title on the purchaser. *Veatch v. Gray*, 91 S. W. 324, 41 Tex. Civ. App. 145.

Return to execution levied on land need not particularly describe land; it may be identified by parol. *Coffee v. Silvan*, 15 Tex. 354, 359.

A levy, sale, and sheriff's deed of "all the right, title, and interest of defendant * * * in and to league No. 6, Galveston county, originally granted to B., and known as the 'Virginia Point League,'" is sufficient to convey whatever interest defendant has in such league. *Smith v. Crosby*, 86 Tex. 15, 23 S. W. 10, affirming 4 Tex. Civ. App. 251, 22 S. W. 1042.

In a levy of an execution, a description which does not give the county or locality where the land is situated, nor name of the original grantee nor other particulars than that it is a grant of 640 acres on San Jacinto river and was conveyed by H. to G., is void for uncertainty. *Hayes v. Gallaher*, 21 Tex. Civ. App. 88, 90, 51 S. W. 280, affirmed in 93 Tex. 641, no op.

The return upon an execution: "Levied on fourteen labors off of the Gilleland league of land, or so much of said tract as will satisfy the within execution, commencing at the N. E. corner,"—is not so uncertain a description of the land as to invalidate the sale. *Alexander v. Miller's Ex'rs*, 18 Tex. 893.

A description of the land in a sheriff's return of attachment, judgment, order of sale, and execution deed, as "fifty acres of the J. M. Moss survey, abstract No. 462, situated near the town of Burlington, in Montague county, Texas," is imperfect and insufficient. *Pfeiffer & Co. v. Lindsay*, 66 Tex. 123, 1 S. W. 264.

Sufficient to Identify Land.—In sales under execution, etc., the land sold must be designated with reasonable certainty but the description need not be such that the land may be identi-

fied by inspection of the levy and deed. If the description be general but sufficiently accurate to enable the parties to identify the land by such means as would be admissible in a court for that purpose, it is sufficient. *Smith v. Crosby*, 86 Tex. 15, 23 S. W. 10.

The premises are sufficiently described in a levy and deed on an execution sale if they may be identified by reference to the records and by other means usually resorted to. *Focke v. Garcia* (Civ. App.), 41 S. W. 187, 188.

By Metes and Bounds.—A sheriff's return, describing the land by reference to the deed made by him, wherein the land was described by metes and bounds, is sufficient. *Traylor v. Lide* (Sup.), 7 S. W. 58.

As Certain Tract.—A return of an execution, referring to the land as "one certain tract or parcel of land in the county of C. and state aforesaid, containing nine hundred acres, the said tract being part of the survey made in the names of the heirs of B., levied on as the property of M.," is void for the want of a sufficient description of the land levied on and offered for sale. *Stipe v. Shirley*, 64 S. W. 1012, 27 Tex. Civ. App. 97.

A return of a levy of execution on "1,135 acres in upper San Diego tract, D. county, Texas (original grantee, Julian Flores)," is sufficiently definite to pass title by the execution sale, where it appears that there is in D. county an "upper San Diego tract," which is part of the Julian Flores grant, and that the execution debtor owned an ascertained 1,135 acres therein. *Focke v. Garcia* (Civ. App.), 41 S. W. 187.

Immediately following such description there was also stated, as having been levied on, "the northern one-half of 1,152 acres, being 576 acres in share number 5 of the said Julian Flores grant." It appeared that there has been a partition of the tract into shares, one of which was No. 5, and that a subdivision of that share contained

1.152 acres. Held, that the description was sufficiently definite to pass title on the execution sale. *Focke v. Garcia* (Civ. App.), 41 S. W. 187.

An execution levy is sufficient in description when it describes the land on which it is made as "the Tide Haven tract on Trespacios, less 177 acres," and it is shown that the land sold was known by said name, and the land is amply described in the sheriff's deed as "league No. 39, being defendant's headright league in M. county," and the 177 acres not conveyed being described in said deed by metes and bounds, *Bludworth v. Poole*, 53 S. W. 717, 21 Tex. Civ. App. 551.

As More or Less.—Under Rev. St. art. 177, requiring the sheriff's return to "describe the property with sufficient certainty to identify it," a levy describing two tracts of land each as a certain tract containing 150 acres, more or less, on which is located the new town of M., in L. county, state of Texas, along the line of the said S. A. & A. P. Ry., including all of the right, title and interest of said railway company in and to any and all town lots and blocks theretofore laid off upon said tract, said interest being such as has been deeded, sold, released, or contracted to said railway company, or to any person as trustee for them, by S. B. M., of F. county, Tex., less such portions as had been theretofore legally disposed of by them, and donated and set apart for right of way and depot purposes, is insufficient, since, if it intended to describe a survey, it should have pointed out what survey was meant, or, if not, it should have described each lot and block intended. As it stands, it would compel a sale in mass. *San Antonio & A. P. Ry. Co. v. Harrison*, 72 Tex. 478, 10 S. W. 556.

As Certain Lots.—A description of property levied on as Lots No. 1, 2, 3, 4, and 5 in Block 7 of East Waco, located on the northwest side of Elm Street was sufficient to authorize the

admission of parol evidence to identify the property; it appearing that there were other lots of the same numbers lying northwest of Elm Street but not bordering thereon. *Frazier v. Waco Building Ass'n*, 25 Tex. Civ. App. 467, 61 S. W. 132.

Where a levy was on "nine lots in the town of L." a sale thereunder was not vitiated on the ground of uncertainty. *Coffee v. Silvan*, 15 Tex. 354.

As a University.—A description of property in the levy of an execution as "the B. University" in a specified town within the state, "with all its lands, buildings, improvements," etc., is not sufficient to pass any title to the purchaser at the execution sale. *Trustees of Union Baptist Ass'n v. Huhn*, 7 Tex. Civ. App. 249, 26 S. W. 755.

As Part of Tract.—The sale on execution of an undesignated part of a tract of land, there being no way of distinguishing the portion sold, is void; as where the levy describes the land as 100 acres, known as a certain named homestead, and consisting of the balance of the homestead tract left unconveyed, when in fact such tract embraces 400 acres of land, none of which has been conveyed. *Wooters v. Arledge*, 54 Tex. 395.

By Reference to Report of Commissioners.—A description of land in a levy of execution, and deed made in pursuance of the sale thereunder, by referring to the record of the report of commissioners of partition, and judgment of court, allotting the particular tract intended to be referred to in the levy and deed, is a sufficient description; evidence aliunde being admissible to show a partition and description of this allotment. *Watson v. McClane*, 45 S. W. 176, 18 Tex. Civ. App. 212.

As Property of Particular Person.—An execution levy on land describing it as a tract of one thousand acres, being the farm on which F. then resided, was not so indefinite as to de-

scription, as to render it void. *Fuller v. East Texas Land, etc., Co.* (Civ. App.), 23 S. W. 571, 573, affirmed in 93 Tex. 639, no op.

As in Town and County.—Though the return on an execution recited a levy on lands without naming the town or county, yet, where the sheriff's deed further describes the lands as situated in the town of Big Springs, title passes. *Whitney v. Krapf*, 3 Tex. Civ. App. 304, 27 S. W. 843.

On Undivided Interests.—A levy on "all the right, title, and interest of defendant * * * in and to league No. 6, Galveston county, originally granted to B., and known as the 'Virginia Point League,'" sufficiently identifies the interest levied on as an undivided half interest in 11-24 of the league lying west and south of the G. H. & H. R. R. *Smith v. Crosby*, 4 Tex. Civ. App. 251, 22 S. W. 1042.

A levy described the land as all the right, title and interest of the defendant, S. in and to league number 6 Galveston county, originally granted to B. and known as the Virginia Point league. Under this levy, an undivided half interest of defendant S. as heir of W. S. in and to 11-24 of the league set apart in a body to the estate of W. S. and lying south of a specified railway in a partition of the league between the estate and certain others. The evidence showed that the interest of the debtor prior to the partition extended to the whole of the league and that the partition decree was made in May 1878 but was not recorded until long after the levy which was made Aug. 13, 1879. Held, that the levy would have been unquestionably valid prior to the partition and the description, though defective, was sufficient to convey the debtor's interest in the land after partition. *Smith v. Crosby*, 4 Tex. Civ. App. 251, 22 S. W. 1042.

A levy and sale of land are void for uncertainty where the undivided half interest of R. and O. is levied on and sold, and R. and O. individually owned

such undivided half interest. *Rogers v. Bradford*, 56 Tex. 630.

Where Description May Be Made Certain.—A levy, judgment, and order of sale described land as "the southern portion of lot No. 147, district 5, containing 12½ acres, * * * being the same property conveyed * * * by deed recorded in the records of B. county, Book U. No. 2, page 86." The sheriff's deed described "the southern portion of lot No. 147," with like boundaries, but its references conflicted as to the book, and failed to name the county of record. None of the papers showed in what city, county, or state the land lay. Held, that the description in the levy, etc., would pass the title, since it referred to a record in a certain county, from which it could be made certain. *Brown v. Elmendorf* (Civ. App.), 25 S. W. 145, 87 Tex. 57.

While it is essential that the sheriff's return on execution under which land is levied on and sold, as well as his deed made by virtue thereof, should identify the land with reasonable certainty, yet neither will be declared void for uncertainty, where it is possible, by any reasonable rules of construction, to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed. *Buckner v. Vancleave*, 78 S. W. 541, 34 Tex. Civ. App. 312.

(2) Presumptions.

"The distinction to be observed in applying the description of real estate sought to be conveyed to the property in the case of sales in invitum and voluntary sales is well recognized, and the rule has received frequent application in this state." *Wofford v. McKinna*, 23 Tex. 36; *Norris v. Hunt*, 51 Tex. 609; *Pfeiffer & Co. v. Lindsay*, 66 Tex. 123, 1 S. W. 264; *Smith v. Crosby*, 4 Tex. Civ. App. 251, 22 S. W. 1042, affirmed in 86 Tex. 15.

When a sale is the voluntary act of a person, it will be presumed that

something was intended to be conveyed and every presumption will be indulged in aid thereof but no such presumption will be indulged in favor of an involuntary sale by a sheriff of the debtor's property because the debtor out of whom the title is to be divested, does not intend the sale, and hence, the property must be sufficiently described to enable the bidders to know what is being sold. *Smith v. Crosby*, 4 Tex. Civ. App. 251, 22 S. W. 1042.

Where, on an execution against D. Y. Portis, the officer returned that he had levied upon certain property which had been claimed by Rebecca Portis as her separate property, the presumption was that Rebecca Portis was the wife of the defendant. *Portis v. Parker*, 8 Tex. 23.

(3) Construction.

The word "tract" in the return on an execution, "Levied on fourteen labors off of the Gilleland league of land, or so much of said 'tract' as will satisfy the within execution, commencing at the N. E. corner," must be taken as referring to the words "fourteen labors," and the place of beginning to be the N. E. corner of said tract, supposed to contain 14 labors, though it was in evidence that the defendant owned at the time only 13 $\frac{3}{4}$ labors. *Alexander v. Miller's Ex'rs*, 18 Tex. 893.

(4) Aided by Deed.

The description in a sheriff's deed can not be looked to in aid of the levy. *Smith v. Crosby*, 4 Tex. Civ. App. 251, 22 S. W. 1042, affirmed in 86 Tex. 15; *Hayes v. Gallaher*, 21 Tex. Civ. App. 88, 51 S. W. 280, affirmed in 93 Tex. 641, no op. But see *Whitney v. Krap*, 8 Tex. Civ. App. 304, 27 S. W. 843.

(5) Effect of Insufficient Description.

The fact that a sheriff's return on execution does not describe the land levied on with sufficient certainty will not invalidate the title of the pur-

chaser at the execution sale, as against subsequent creditors of the judgment debtor, where the debtor pointed out the land to be levied on, and executed a deed to the purchaser to cure the defective description in the sheriff's levy. *Willis v. Nichols*, 5 Tex. Civ. App. 154, 23 S. W. 1025.

b. Description of Owner.

"In the case of *Meuley v. Zeigler*, 23 Tex. 88, 91, it was held that a levy of a writ of attachment upon land which did not state that the land was the property of the defendant, was void, because the jurisdiction of the court over the property depended on such a statement. Whether the reasoning of that opinion is sound or not, it plainly has no application to sales under execution." *Citizens Nat. Bank v. Interior Land, etc., Co.*, 14 Tex. Civ. App. 301, 306, 37 S. W. 447.

Where an execution against L. and J. was levied on a tract of land devised to L. for life, with remainder to her children, and neither the levy nor the order for sale showed what her interest was, and the land was sold as though it belonged to one person, the levy and sale were void. *Gray v. Ward (Tenn.)*, 52 S. W. 1028.

2. On Personalty.

Rev. St. 1895, art. 2349, provides: "A levy upon personal property is made by taking possession thereof, when the defendant in execution is entitled to the possession; where the defendant in execution has an interest in personal property, but is not entitled to the possession thereof, a levy is made thereon by giving notice thereof to the person who is entitled to the possession, or one of them when there are several." Article 2352 provides: "A levy upon the interest of a partner in partnership property is made by leaving a notice with one or more of the partners or with a clerk of the partnership." A levy was made by seizing property instead of by giving notice as provided in said articles, though one

of the claimants was in possession as joint owner. Held, that the levy was not void, however irregularly made. *Davis v. Jones*, 75 S. W. 63, 32 Tex. Civ. App. 424.

The expression "more or less," used in the return on a range levy on cattle, in connection with the number designated, does not introduce an element of uncertainty, but tends rather the other way. *Brown v. Hudson*, 13 Tex. Civ. App. 605, 38 S. W. 653, affirmed in 93 Tex. 656, no op.

3. Irregular Levy.

a. Presumptions.

See ante, "Conformity to Statute," XVI, J, 2.

b. Effect on Purchaser.

Where a plaintiff in execution purchases at the execution sale, he is chargeable with notice of irregularities of the sheriff in making a levy. *Pearson v. Hudson*, 52 Tex. 352.

c. Objections.

"In this suit the sufficiency of the levies is raised in a collateral proceeding. *Jacobs v. Daugherty*, 78 Tex. 682, 685, 15 S. W. 160. Unless the levies were actually void, they will be held sufficient in this suit." *Bennett v. Gamble*, 1 Tex. 124; *Earle v. Thomas*, 14 Tex. 583; *Deware v. Wichita, etc., Elevator Co.*, 17 Tex. Civ. App. 394, 398, 43 S. W. 1047.

d. Waiver.

Defendant in execution may expressly waive objections to the manner in which the levy has been made. *Alexander v. Miller's Ex'rs*, 18 Tex. 893; *Miller v. Alexander*, 13 Tex. 497, 506; *Wilson v. Smith*, 50 Tex. 365, 370; *Davis v. Jones*, 32 Tex. Civ. App. 424, 75 S. W. 63, affirmed in 97 Tex. 630, no op.

Defendant in execution, before sale, by his acts may waive irregularities. *Miller v. Alexander*, 13 Tex. 497.

Article 5311 Rev. St. 1895 provides "A claim made to property, under the provisions of this chapter [Trial of

Right of Property'], shall operate as a release of all damages by the claimant against the officer who levied on said property." Held, that by giving a claimants' bond, and proceeding under the statute to test their rights to the property, the claimants waived the manner of the levy. *Davis v. Jones*, 75 S. W. 63, 32 Tex. Civ. App. 424.

Where an execution had been levied on property not belonging to defendants, and plaintiffs afterwards moved to set aside the levy and for a new execution for the full amount, and there was no service of notice of the motion on defendants, and their attorney appeared and objected for want of notice, gave notice of appeal and agreed to a statement of facts, and nothing further relating to their appearance was shown on the record, it was held, on appeal, that the insufficiency of the service was not shown to have been waived. *De Witt v. Monroe*, 20 Tex. 289.

A defendant who has replevied the property, seized under an execution, must be considered to have waived all objections to mere irregularities in making the levy. *Miller v. Clements*, 54 Tex. 351, 354.

L. INDORSEMENT OF LEVY.

Whatever other acts may be performed by the sheriff in making the levy, the indorsement upon the execution must take place before the levy is complete. *Sanger Bros. v. Trammell & Co.*, 66 Tex. 361, 362, 1 S. W. 378; *Riordan v. Britton*, 69 Tex. 198, 203, 7 S. W. 50; *Carney v. Marsalis & Co.*, 77 Tex. 62, 13 S. W. 636.

Unless the officer making a levy indorse its proper execution there is no evidence that a seizure of the property was made by virtue of that execution. *Allison v. Brookshire*, 38 Tex. 199, 202.

A levy on land is not complete until an indorsement thereof has been made on the execution, and no other steps can give validity to a levy not accom-

panied by such indorsement. The lien dates only from the making of such indorsement. *Redlick v. Williams* (Sup.), 5 S. W. 375.

An imperfect description in the indorsement of a levy becomes immaterial, when it is followed by a sheriff's deed in which the property sold is clearly and correctly described. *Fitch v. Boyer*, 51 Tex. 336.

Failure to indorse on an execution the name of the court to which a bond of a claimant was returned is harmless error, when such indorsement is made on the bond itself, and the claimant finds the proper court, and duly defends the suit there. *Carney v. Mar-salis*, 77 Tex. 62, 13 S. W. 636.

Failure of an officer to indorse a levy and sale on an execution can not affect the rights of the purchaser at the sale when it is attacked collaterally. *Davis v. Harnbell* (Civ. App.), 24 S. W. 972.

From the time of making the indorsement upon the execution must be dated the lien acquired upon the property by plaintiff. *Sanger Bros. v. Trammell & Co.*, 66 Tex. 361, 362, 1 S. W. 378.

M. SIGNING OF LEVY.

There is no necessity of the levy being signed separately from the return. *Miller v. Alexander*, 13 Tex. 497.

A deputy sheriff may sign a return of levy, in his own name. *Miller v. Alexander*, 13 Tex. 497, 506; *Towns v. Harris*, 13 Tex. 507, 512.

N. AMENDMENT OF LEVY.

Mere alterations in a levy, before advertisement or notice, or anything done under the first levy can work no injury to the defendant in execution, and do not invalidate the levy. *Alexander v. Miller*, 18 Tex. 893, 896.

A sheriff may rectify a mistake in a levy, previous to the return of the execution, and, in a collateral proceeding subsequent to the sale, it will be pre-

sumed that the alteration, if without date, was made previous to the return of the execution, and was the correction of a mistake. *Miller v. Alexander*, 13 Tex. 497.

A levy, dated May 10th, to commence at the northwest corner of a piece of land, was altered to "tract to be offered to commence at the northeast corner thereof" by an alteration without date. There was a letter from defendant to plaintiff's attorney, dated June 5th, agreeing, in consideration of "your having postponed the sale of my land advertised for the first Tuesday of this month," to waive all legal exceptions to proceedings had on the execution, and to ratify the levy, etc., and that the sale might take place, etc., and the sale did take place of the land commencing at the northeast corner. Held, that the presumption was that the letter referred to the altered or amended levy. *Miller v. Alexander*, 13 Tex. 497.

An amendment of a previous entry of a levy need not be dated. *Miller v. Alexander*, 13 Tex. 497, 503.

O. CUSTODY OF PROPERTY.

By art. 1334 it is made the duty of the sheriff to securely keep all property levied upon by him for which no delivery bond is given, and he is made responsible for any losses and damages resulting from his negligence. *Portis v. Parker*, 8 Tex. 23, 25.

Where Delivery Bond Given.—See the title REPLEVY BONDS.

Where Indemnity Bond Given.—After receiving an indemnity bond, a sheriff making a levy upon property claimed by others, can either retain the goods or surrender them, but in the latter case, he would assume the burden of proving that they were not liable to seizure. *Freiberg, etc., Co. v. Johnson*, 71 Tex. 558, 9 S. W. 455.

Where Claim Bond Given.—See the title RIGHT OF PROPERTY, TRIAL OF.

P. CONSENT OF OWNER TO LEVY.

The consent of the owner is implied when goods are seized by the officer under the levy of an execution, or if not implied, is immaterial when the law makes the application. *Mississippi Mills v. Meyer & Co.*, 83 Tex. 423, 18 S. W. 748.

Q. PROOF OF LEVY.

Parol evidence is admissible to show what was done with an execution, and why it was returned, where its issuance is shown by the execution docket, and the papers of the cause, including the execution, are lost. *Davis v. Beall*, 21 Tex. Civ. App. 183, 50 S. W. 1086.

After the lapse of 30 years a valid levy of a lost execution on land is sufficiently shown by the execution docket, showing issuance of the execution, and the sheriff's deed, reciting the levy and sale. *West v. Loeb*, 42 S. W. 612, 16 Tex. Civ. App. 399.

R. QUASHING AND SETTING ASIDE LEVY.

See ante, "Staying, Quashing and Superseding," XIII.

A motion to set aside an invalid levy is proper practice in Texas. *Cook v. Sparks*, 47 Tex. 28, 34.

Where the levy is illegal, it is proper for the court to entertain a motion to quash it. *Cope v. Lindsey*, 17 Tex. Civ. App. 203, 204, 43 S. W. 29, affirmed in 91 Tex. 463.

Where a range levy on stock is illegal because the stock at the time of the levy was not upon the range, but in a pasture, it is proper that the district court on motion quash the levy. *Cope v. Lindsey*, 17 Tex. Civ. App. 203, 43 S. W. 29.

Time of Making Motion.—A motion to set aside a levy for merely a formal defect will not lie after the return of the writ. *Cook v. Sparks*, 47 Tex. 28, 32.

Notice of Motion.—An objection to the hearing of a motion to quash a

levy of execution and sheriff's return thereon for want of proper notice of the motion comes too late after the parties have argued the motion without objection, at the time of hearing. *Schiffer v. Fort*, 1 Posey, 198, 202.

Hearing on Motion.—"On a motion to quash, annul or set aside a levy made on the return on the execution, we may look to the execution and see if it carries on its face sufficient warrant for such levy and return. We may look back to the judgment, not for the purpose of reversing or of reforming it, but to ascertain if it affords authority for the issuance of the execution on which the levy and return were made. We may look likewise at the different executions that have been issued for the purpose of determining if by the law such levy and return can be sustained." *Scott v. Allen*, 1 Tex. 508, 513.

An appeal lies from a judgment on a motion to set aside a levy. *Cook v. Sparks*, 47 Tex. 28, 34.

S. EFFECT OF LEVY.

1. On Title and Possession.

Levy on Real Property.—"A levy on land gives no right of property or possession. It gives no authority to the officer to take possession and turn the defendant out, but only a right to enter for the purposes of the sale. It confers authority to pass the title merely, not to change the possession; and there must be in existence some lawful authority for the conversion and sale of the property. The execution could confer none after the return day; and hence the necessity of a venditioni exponas for that purpose." *Young v. Smith*, 23 Tex. 598, 600, *Cain v. Woodward*, 74 Tex. 549, 553, 12 S. W. 319; *Terry v. Cutler*, 4 Tex. Civ. App. 570, 23 S. W. 539 (see 93 Tex. 740, no op.); *Edwards v. Norton*, 55 Tex. 405, 410.

The sheriff does not put the purchaser in possession of the land when

he makes a levy. *Cavanaugh v. Peterson*, 47 Tex. 197, 204.

After a levy upon land the debtor, notwithstanding the levy, holds the title and possession, and is in the enjoyment of the profits of the land. The title does not pass by the levy. *White v. Graves*, 15 Tex. 183, 187.

The levy of execution on lands of the judgment debtor does not operate as a disseisin. *Cundiff v. Teague*, 46 Tex. 475; *White v. Graves*, 15 Tex. 183, 187; *Howeth v. Mills*, 19 Tex. 295; *Townsend v. Smith*, 20 Tex. 465, 470; *Cavanaugh v. Peterson*, 47 Tex. 197, 204.

A levy on land which does not belong to the debtor does not work a disseisin of the true owner. *Howeth v. Mills*, 19 Tex. 295.

Levy on Personal Property.—As to discharge of right of possession acquired by officer, see the title **REPLEVY BOND**.

"The seizure of personal property vests a special property in the sheriff, who may take possession for the purposes of the execution, and complete the sale after the return day, by virtue of the authority previously given." *Young v. Smith*, 23 Tex. 598, 600; *Cain v. Woodward*, 74 Tex. 549, 12 S. W. 319.

By the levy upon personal property the debtor is deprived of his property. *White v. Graves*, 15 Tex. 183, 187.

After the levy of an execution on partnership property, to satisfy a separate debt of one partner, the copartners can not dissolve the partnership, make a settlement of their joint effects, in which the debtor partner is paid for his share an amount in property (other than that levied on) greater than the amount of the executions, and thereby defeat the levies so made. *Thompson v. Tinnin*, 25 Tex. Supp. 56.

Same—Under Void Writ.—The consent of the owner is implied when goods are seized by legal process, or if not implied, is immaterial when the law makes the application. The owner-

ship of the goods is not affected by their seizure under a void writ, and they are subject to the claims of creditors while in the trespasser's hands as they were previously and if a trespasser is a creditor, he has the same right to have such goods seized as any other creditor. *Mississippi Mills v. Meyer & Co.*, 83 Tex. 433, 18 S. W. 748.

2. As Satisfaction of Judgment.

Levy on Real Property.—The levy of an execution upon land does not operate as a satisfaction of the judgment on which the execution was issued, until after a sale of the land for a sufficient amount. *White v. Graves*, 15 Tex. 183, 187; *Howeth v. Mills*, 19 Tex. 295; *Townsend v. Smith*, 20 Tex. 465; *Cundiff v. Teague*, 46 Tex. 475, 477; *Cavanaugh v. Peterson*, 47 Tex. 197.

Levy on Personal Property.—It has been repeatedly held, and may be considered well settled, that a levy upon sufficient personal property to satisfy the execution is a satisfaction of the debt, if the property be taken from the possession of the defendant in execution. *Bryan v. Bridge*, 10 Tex. 149, 153; *White v. Graves*, 15 Tex. 183, 187; *Garner v. Cutler*, 28 Tex. 175, 181; *Cornelius v. Burford*, 28 Tex. 202.

Though the levy of an execution on personal property is, as a general rule, prima facie evidence of satisfaction of the execution, this presumption does not arise when possession of the property remains with the defendant in execution. *Cravens v. Wilson*, 48 Tex. 324.

A levy upon personal property is, as a general rule, held to be prima facie evidence of satisfaction of the execution. But this presumption does not arise when possession of the property remained with the defendant in execution; and it is repelled whenever it is shown that the plaintiff has been prevented, either by the act of defendant or the operation of law, from

reaping the fruits of his levy. Pas. Dig., note 867, p. 620. *Garner v. Cutler*, 28 Tex. 175.

An execution is not always satisfied by a levy under it. It would not be if the property levied on was disposed of to the satisfaction of defendant in execution otherwise than in payment of the execution; and the fact that he pointed out land to be sold under a second levy would seem to be conclusive evidence that he was satisfied with the disposition of the property formerly levied on. *Cornelius v. Burford*, 28 Tex. 202.

If the levy be overreached by a prior lien, or be abandoned at the request or for the benefit of the debtor, or be defeated by his misconduct, or if he reclaim possession of the property, and it be not sold, then the levy is not a satisfaction of the judgment. *Cornelius v. Burford*, 28 Tex. 202.

A judgment creditor after a levy on sufficient personal property to satisfy the execution, must look for his money to the officer making the levy. *Cornelius v. Burford*, 28 Tex. 202.

3. As Creation of Lien.

See post, "From Date of Levy," XIX, A, 1, b. And see the title JUDGMENTS AND DECREES.

The judgment lien attaches by the levy of execution. *Cavanaugh v. Peterson*, 47 Tex. 197.

No lien attaches to land until the levy of the execution. *Braden v. Gose*, 57 Tex. 37, 41.

4. As Estoppel.

If a defendant in execution acquiesce in a real estate levy and sale, he is thereby estopped from questioning the title of the purchaser at such sale on the ground that such writ issued unlawfully against some other defendant therein named. *Stark v. Carroll*, 66 Tex. 393, 1 S. W. 188.

5. As Trespass.

It has been expressly held that the mere levy of an execution on land is

not a trespass for which an action will lie, and no facts are alleged in the petition in this case which show any damage to appellants by reason of said levy. *Miksha v. Blum*, 63 Tex. 44; *Trawick v. Martin-Brown Co.*, 79 Tex. 460, 14 S. W. 564; *Girard v. Moore*, 86 Tex. 675, 26 S. W. 945; *Ellis v. Harrison*, 24 Tex. Civ. App. 13, 20, 56 S. W. 592, 57 S. W. 984, affirmed in 93 Tex. 637, no op., 94 Tex. 690, no op. See post, "Levy on Land," XXIV, B, 3.

An execution being based upon a subsisting valid judgment, protects both the officer and the person procuring it, while a writ of attachment, being based upon a mere affidavit, can not be invoked as a protection for the party procuring its issuance. *Cahn Bros. & Co. v. Bonnett*, 62 Tex. 674.

T. SECOND LEVY.

A valid levy must be disposed of before other property can be taken. *Bryan v. Bridge*, 6 Tex. 137.

XVII. Return of Writ.

A. STATUTORY PROVISION.

In the case of *Howard v. North*, 5 Tex. 290, it was said the act of 1842 does not direct the manner in which the return of the officer shall be made, or what facts shall be stated. *Miller v. Alexander*, 13 Tex. 497, 503.

B. NECESSITY FOR.

To Give Constructive Notice of Levy.—Knowledge that an execution had been levied and claim made to the property under the statute was not imputable to the execution plaintiff until the execution had been returned into the court. *Betterton, Irvine & Co. v. Buck*, 2 Willson, Civ. Cas. Ct. App. § 199.

To Pass Title to Purchaser.—The making of a return is not essential to the purchaser's title. *Willis v. Smith*, 66 Tex. 31, 17 S. W. 247.

The execution purchaser is not prejudiced by a deficient or incorrect return or by the absence of any return. *Grandjean v. Story*, 2 Posey 520, 523.

It is a well-established principle in the civil law that "in whatever way a party binds himself he shall remain bound." Therefore, where a purchaser at a sheriff's sale gave a bond for the payment of the purchase money at 12 months, the civil law being then in force in the republic, the obligor could not object that the sheriff had not made any return in writing on the original execution. *Cayce v. Curtis*, Dall. Dig. 403; *Same v. Horton*, Id. 405.

Where a bond is given for payment of the purchase price of property sold under execution, the fact that the bond on which the execution issued was not under seal, and that the sheriff had made no return on the original execution under which the property was sold, and for which the bond sued on was given, was immaterial, and will not authorize a dismissal of the suit. *Cayce v. Curtis*, 1 Dall. Dig. 403.

To Preserve Judgment Lien.—See the title JUDGMENTS AND DECREES.

C. TIME OF MAKING—RETURN DAY.

An original *fiery facias* at common law bore test the term at which the judgment was obtained and ran from term to term; that is to say, it issued from one term and had to be returned to the succeeding term. *Bennett v. Gamble*, 1 Tex. 124, 133.

Our execution laws have been repeatedly construed by our courts as fixing by their own phraseology the return day of the writ. *Bennett v. Gamble*, 1 Tex. 124, 134; *Towns v. Harris*, 13 Tex. 507; *Hester v. Duprey*, 46 Tex. 625, 626; *Cain v. Woodward*, 74 Tex. 549, 553, 12 S. W. 319.

Under Rev. St. art. 2282, providing that an execution shall be returnable to the first day of the next term of the court, or in 30, 60, or 90 days if so directed by plaintiff, if no return day is specified in the execution it is returnable on the first day of the next term.

Tillman v. McDonough, 2 Willson, Civ. Cas. Ct. App. § 52; *Holloway v. McIlhenny Co.*, 77 Tex. 657, 661, 14 S. W. 240.

Under Laws 1873, p. 209 (Pasch. Dig. art. 3775), requiring all executions to be made returnable on or before the first day of the next term of court, the clerk can not, by an indorsement "returnable in sixty days," make the writ returnable after the expiration of the statutory limit. *Cain v. Woodward*, 74 Tex. 549, 12 S. W. 319.

Execution from Justices' Courts.

Under the law in force in 1851, executions from justice courts were required to be returned in sixty days, and a sale made by virtue of such execution after the return day must be held a nullity. *French v. McGinnis*, 10 Tex. Civ. App. 7, 29 S. W. 656.

Making Return after Return Day.

It is competent for the sheriff to make his official return on the execution after the return day has passed, and after a motion against the sheriff for failure to make the return. *Vaughan v. Warnell*, 28 Tex. 119.

The fact that the return of a sheriff is made after the filing of a motion against him, affects merely the credibility of the return and not its competency. *Vaughan v. Warnell*, 28 Tex. 119, 122; *Thomas v. Browder*, 33 Tex. 783, 785.

"A sheriff, it has been held, may be permitted, by order of court, to make a return upon an execution, or to amend it according to the truth of the case, at any time after the return day; and where no return has been made, parol evidence is admissible to show that such writ was levied." *Coffee v. Silvan*, 15 Tex. 354, 359.

Liability of Officer.—At common law if the sheriff did not return the writ, at return day, he was liable to a rule or to a suit. *Lockridge v. Baldwin*, 20 Tex. 303, 308.

D. MANNER OF MAKING.

The law does not require the sheriff

of another county, to whom an execution is issued, to return it either in person or by deputy. If he deposits it in the post office, properly directed, in time to reach the clerk of the court from which it issued by the return day, it is sufficient. *Underwood v. Russell*, 4 Tex. 175.

E. FORM AND REQUISITES.

Conformity to Pleadings.—A sheriff's return which differs slightly in the description of certain land from the answer and original execution is admissible in evidence. *Freeman v. Brundage*, 57 Tex. 253, 255.

Signing.—A defendant moving to set aside a sheriff's return and alleging the sale of certain land under an execution, can not contend that, as the return was not signed, there did not appear to be any purchaser entitled to notice. *McKinney v. Jones*, 7 Tex. 598, 600.

The deputy sheriff being an officer known to the law, the signing of his name to a return, with the addition of his proper official designation is sufficient, without the name of the high sheriff. *Miller v. Alexander*, 13 Tex. 497; *Towns v. Harris*, 13 Tex. 307.

The signing of the return is a sufficient signing of the levy. *Miller v. Alexander*, 13 Tex. 497, 503.

Writing.—The statute does not require the sheriff to make a written return on original execution. *Cayce v. Curtis*, Dallam 403, 406; *Cayce v. Horton*, Dallam 406.

F. CONTENTS.

1. Description of Property.

See ante, "Description of Property," XVI, K, 1, a; "On Personality," XVI, K, 2.

In an action of trespass to try title, the return of the execution under which the sale was had was held inadmissible for failure to sufficiently describe the property purported to be conveyed. *Stipe v. Shirley*, 27 Tex. Civ. App. 97, 64 S. W. 1012, affirmed in 97 Tex. 647, no op.

2. Value of Property.

Where property seized under an execution is claimed by a third person, it is immaterial whether its value is properly estimated in the return, if it is properly assessed on the claimant's bond. *Carney v. Marsalis*, 77 Tex. 62, 13 S. W. 636.

Under Rev. St. 1895, arts. 5293-5295, requiring the officer, when property levied on is claimed by a third person and a bond given, to indorse on the bond the value of the property assessed by him, and return the bond to the proper court having jurisdiction of the amount, where the officer omits to assess the value of a part of the property the court is not bound to determine its jurisdiction by an assessment, but can hear evidence of value. *Cullers v. Gray* (Civ. App.), 57 S. W. 305.

3. Lien of Prior Executions.

Where several executions against defendant are levied on his property, the sheriff should show by his returns on the subsequent executions that the levies made under them are subject to the priority of those having precedence of them, although a failure of the sheriff to make such showing could not affect the respective rights of the several plaintiffs in execution. *Garner's Adm'r v. Cutler's Adm'r*, 28 Tex. 175.

When two or more executions against the same party reach the officer's hands at the same time, he is required to number them in their order of precedence. An execution numbered 2 was levied without reference in the levy to any other execution, but the return stated that the property levied on had been "sold under execution No. 1" in favor of another plaintiff, and that No. 2 was unsatisfied. Held, that the return showed that the second execution was neither satisfied in fact nor should have been from the proceeds of the levy. *Garner's Adm'r v. Cutler's Adm'r*, 28 Tex. 175.

4. Alleging Levy.

Time of Levy.—A clerical error in

the return to an execution issued June 9th, reciting a levy on June 1st, did not vitiate a sale thereunder, the levy having actually been made on July 1st. *Davidson v. Chandler*, 65 S. W. 1080, 27 Tex. Civ. App. 418.

Manner of Making.—The return on an execution against the interest of a partner in firm property is not insufficient for failure to show the manner in which the levy was made, the statute (Rev. St. art. 2352) providing how the levy must be made, but not requiring the return to show how it was made; the presumption being that the officer did his duty, and made the levy in the manner prescribed by law. *Jones v. Meyer Bros. Drug Co.*, 61 S. W. 553, 25 Tex. Civ. App. 234.

Conceding a notice of levy on a partner's interest in a stock of firm merchandise to be a part of the return to which it was attached, and controlling as to the description, its omission of the fixtures shown by the return to have been levied on did not affect the validity of the levy as to the other property seized. *Jones v. Meyer Bros. Drug Co.*, 61 S. W. 553, 25 Tex. Civ. App. 234.

Same—Taking of Possession.—A return of a levy "upon a certain number of cattle, more or less, as they run, branded in part with a gudgeon, and in part R. C., and known as the Portis and Cummins's stock," is defective, as not showing an actual taking of possession. *Portis v. Parker*, 8 Tex. 23.

Same—Pointing Out.—An execution sale is not invalidated by the fact that the return on the execution does not show that the debtor was called upon to point out, or who pointed out, the property levied upon, or that notices of sale were posted as required by law. *Crabtree v. Whiteselle*, 65 Tex. 111.

I. Alleging Sale.

Notice.—An execution sale is not invalid because the return of sale does not show that notices of sale were posted as required by law. *Crabtree v. Whiteselle*, 65 Tex. 111.

Appraisement.—Since one claiming land under a sheriff's deed need show only a valid judgment, execution, and sheriff's deed, advantage can not be taken, in trespass to try title, of an irregularity in the sheriff's return, consisting in his failure to append the appraisement to his return. *Bludworth v. Poole*, 53 S. W. 717, 21 Tex. Civ. App. 551.

Manner of Sale.—In the absence of any claim that property sold on execution was sacrificed, it is immaterial that the return fails to show that lots were sold separately. *Wilson v. Swasey* (Sup.), 20 S. W. 48.

The purpose of Rev. St. art. 2283, in requiring the officer to indorse on an execution the time of receiving it, being to fix the time at which the lien and the liability of the officer attached, an execution sale may be valid as against the judgment debtor, though the execution was not so indorsed. *Wilson v. Swasey* (Sup.), 20 S. W. 48.

G. DUTY AND LIABILITY OF OFFICER.

See the title SHERIFFS, CONSTABLES AND MARSHALS.

"It is the duty of the sheriff to return an execution with his action on it." *Vaughan v. Warnell*, 28 Tex. 119.

Where Claim Bond Given.—"Where an officer receives a claim affidavit and bond it is his duty to return the same forthwith to the court." *Betterton, Irvine & Co. v. Buck*, 2 Willson, Civ. Cas. Ct. App. § 199.

H. AMENDMENT.

As a general proposition every court may allow amendments of returns upon its process, and the statute affirms the general principle. *Hart. Dig.*, art. 681. *Messner v. Lewis*, 20 Tex. 221, 222.

Leave to a sheriff to amend his return on an execution is not a matter of right, but within the discretion of the court. *Schiffer v. Fort*, 1 Posey Unrep. Cas. 198.

A motion to allow a sheriff to cor-

rect his return on an execution is determinable by the court without a jury. *Morrill v. Fitzgerald*, 36 Tex. 275.

An officer who makes an erroneous return of an execution will be allowed to correct the same on application to the court. *Thomas v. Browder*, 33 Tex. 783.

The return to an execution may be amended after the return day. *Coffee v. Silvan*, 15 Tex. 354, 359.

"The sheriff had a right to amend his return, and the amendment being made, after motion to amerce him, only affected the credibility of the return, not its competency." *Thomas v. Browder*, 33 Tex. 783, 785. See *Vaughan v. Warnell*, 28 Tex. 119, and *Haley v. Greenwood & Co.*, 28 Tex. 680.

On a trial of the right of property in certain horses, levied on as the property of the execution debtor, it appeared that the levy was made without actual seizure, by giving notice to one B., "in charge and controlling said horses." Held, under Rev. St. arts. 4838, 4839, providing that in such trials, if the property was taken from the possession of a claimant, the burden of proof shall be on plaintiff, and that the burden shall otherwise be on the claimant, that it was error for the court to permit the sheriff's return on the execution to be amended so as to show that B. had charge of the horses as the claimant's agent, solely on B.'s declaration made at the time of the levy, refusing to hear other evidence, and rule that the burden was on the execution plaintiff. *Panhandle Nat. Bank v. Foster*, 74 Tex. 514, 12 S. W. 223.

I. QUASHING AND SETTING ASIDE.

The district court has power to quash the return of the sheriff in proper cases, as where the levy and returns made are not in accordance with law, or where facts are stated which show there was no levy. *Bryan v. Bridge*, 6 Tex. 137.

Where motion is made to set aside a sheriff's return of a sale under execution, notice thereof must be given to the plaintiff in the execution and to the purchaser at the sale. *McKinney v. Jones*, 7 Tex. 598.

A judgment creditor is entitled to have a sheriff's return on an execution and the entry of satisfaction of the judgment set aside, when the execution is levied on property which is not in fact the property of the judgment debtor as such levy did not satisfy the debt. *Massie v. McKee* (Civ. App.), 56 S. W. 119.

J. PROOF OF RETURN.

Parol evidence is admissible to show what was done with an execution, and why it was returned, where its issuance is shown by the execution docket, and the papers of the cause, including the execution, are lost. *Davis v. Beall*, 21 Tex. Civ. App. 183, 50 S. W. 1086.

A finding that an execution was issued is supported by the uncontradicted testimony of the attorneys for plaintiff, that about ten days after the recovery of the judgment he procured an execution, and with the constable went to defendant's place of business to make a levy, and that the execution was returned "no property found," there being no objection to the testimony on the ground that it was not the best evidence of the facts. *Warren v. Kohr*, 26 Tex. Civ. App. 331, 64 S. W. 62, affirmed in 95 Tex. 689, no op.

K. EFFECT OF RETURN.

1. Conclusiveness.

A sheriff's return of an execution is to be regarded as true and correct until the contrary is made to appear. *Garner's Adm'r v. Cutler's Adm'r*, 28 Tex. 175.

In a motion against a sheriff for failing to pay over money, the plaintiff may show that the sheriff's return is false. *Hamilton v. Ward*, 4 Tex. 356.

As to Officer.—In *Ayres v. Duprey*, 27 Tex. 593, 599, the court says: "As a general rule, in the absence of fraud or mistake, it certainly can not be maintained that the official return of the sheriff can be varied or contradicted by his parol testimony." See *Garner v. Cutler*, 28 Tex. 175; *King v. Russell*, 40 Tex. 124, 131; *Holmes v. Buckner*, 67 Tex. 107, 2 S. W. 452; *Flaniken v. Neal*, 67 Tex. 629, 632, 4 S. W. 212.

A mistake of the officer in estimating the quantity of property levied upon, should not preclude him from explaining his mistake. *Cravans v. Wilson*, 35 Tex. 52, 57.

In an action against a sheriff for conversion of cotton sold under execution, the sheriff's return indorsed on the execution, showing a levy upon the cotton, precludes him from denying the legality of such levy. *Cox v. Patten* (Civ. App.), 66 S. W. 64.

The return of an officer on an execution is only prima facie evidence against him. *McKee v. Le Gette*, 1 App. Civ. Cases, §§ 1144, 1146.

"When the sheriff makes an official return, it can be used to that extent in his own behalf." *Vaughan v. Warrnell*, 28 Tex. 119, 122.

As to Parties.—"It is well settled that a return of the proper officer on an execution is conclusive upon the parties to that proceeding. It can not be attacked by such parties in a collateral proceeding; but to vary or contradict it, a direct proceeding must be had for that purpose by a party to that proceeding." *Holt v. Hunt*, 18 Tex. Civ. App. 363, 44 S. W. 889, citing *O'Conner v. Silver*, 26 Tex. 606, 610; *Flaniken v. Neal*, 67 Tex. 629, 631, 4 S. W. 212; *Schneider v. Ferguson*, 77 Tex. 572, 14 S. W. 154.

A sheriff's return of a levy upon personal property does not estop the execution creditor from proving that the amount of the property, as actually seized and applied to his execution, was less than that returned in

the levy. *Cravans v. Wilson*, 35 Tex. 52.

To a suit upon a judgment the defendants pleaded payment and satisfaction, to establish which they introduced a return made upon an execution issued from such judgment: Held, that the plaintiff could not introduce evidence contradicting the return, unless he had laid a foundation in his petition for the introduction of such evidence. A general averment in the petition that the judgment remains unsatisfied and undischarged is not a sufficient foundation for such proof. The petition should disclose the grounds upon which the return is assailed, so as to give notice to the defendants enabling them to contest them; and the matters averred should be such as would entitle the plaintiff to have the return set aside; otherwise evidence falsifying the return is not admissible. *O'Conner v. Silver*, 26 Tex. 606.

As to Strangers.—"As to strangers to the proceeding in which it was issued, however, a different rule prevails. Not being parties to the original proceeding, they can not institute a direct proceeding to change the return of the officer. We are of opinion that the great weight of authority is to the effect that the return of an execution is not conclusive as to strangers." *Holt v. Hunt*, 18 Tex. Civ. App. 363, 365, 44 S. W. 889.

"In the case of *King v. Russell*, 40 Tex. 124, 132, the litigation was between the purchaser under execution and a stranger to the writ—a grantee of the defendant in the writ before any lien had attached. Parol testimony was permitted to show that the recital in the sheriff's return was a mistake." *Holt v. Hunt*, 18 Tex. Civ. App. 363, 365, 44 S. W. 889.

"In *Holmes v. Buckner*, 67 Tex. 107, 2 S. W. 452, the purchaser of land under execution was permitted to vary the sheriff's return." *Holt v. Hunt*, 18 Tex. Civ. App. 363, 366, 44 S. W. 889.

Whatever may be the consequence and effect of a return of satisfaction of execution as between the sheriff and the plaintiff in the executions, the assignee of the judgment, if notice of the assignment is given previous to the receipt of the money by the sheriff, is certainly neither bound or affected by it. *McClane v. Rogers*, 42 Tex. 214, 220.

In an action by a purchaser at a sheriff's sale upon execution to recover the value from the execution defendant, on the ground that the sale was invalid and his title had thereby failed, and that the money paid had discharged the defendant's debt pro tanto, there being no evidence whether the plaintiff paid the fair value of the property, and no evidence that the sheriff had paid over the money, other than the sheriff's return that the plaintiff had bid off the property and that the execution was satisfied, the defendant must have judgment. *Brown v. Lane*, 19 Tex. 203.

In a suit for the recovery of land claimed by virtue of a purchaser at sheriff's sale and sheriff's deed, where the sheriff's return is not in accordance with the deed, parol evidence is admissible to explain and correct the sheriff's return on the execution. The purchaser has no control over the officer, and therefore is not prejudiced by a deficient or incorrect return, nor by the entire absence of any return whatever. *Holmes v. Buckner*, 67 Tex. 107, 110, 2 S. W. 452.

A mistake in a sheriff's return on an execution can be shown by parol in behalf of a stranger to the writ. *Holt v. Hunt*, 18 Tex. Civ. App. 363, 366, 44 S. W. 889.

Parol evidence is admissible to show a clerical error in the return to an execution reciting the levy thereunder as made prior to the date of its issuance. *Davidson v. Chandler*, 65 S. W. 1080, 27 Tex. Civ. App. 418.

After Lapse of Time.—After a lapse

of eight years it is too late to contradict by parol evidence a return made upon an execution. *O'Conner v. Silver*, 26 Tex. 606.

On Collateral Attack.—"It seems to be well settled that it is inadmissible in a subsequent suit between the same parties to attack the return of the officers upon process executed in the prior suit, the remedy of the party aggrieved by an incorrect or false return being confined to a direct proceeding in the original suit to have it amended or to a separate action against the officer for a false return." *Schneider v. Ferguson*, 77 Tex. 572, 14 S. W. 154; *Texas, etc., Coal Co. v. Lawson*, 10 Tex. Civ. App. 491, 31 S. W. 843, and cases there cited; *Sparks v. McHugh*, 21 Tex. Civ. App. 265, 266, 51 S. W. 873.

The return of the sheriff on execution can not be collaterally attacked by the judgment debtor, as against a purchaser at the sheriff's sale. *Rutledge v. Mayfield* (Civ. App.), 26 S. W. 910.

"It is sought in a collateral proceeding to prove aliunde that the interests of all the defendants in the execution in the land in controversy were sold, instead of that of one of them, as shown by both the sheriff's return and his deed. In such a case the return should be deemed conclusive until set aside by a direct proceeding brought for the purpose of amending it." *Flaniken v. Neal*, 67 Tex. 629, 631, 4 S. W. 212.

Where a sheriff has sold real property under execution, and by mistake has returned that he sold only the interest therein of one of the judgment defendants, L., who owned but a fraction thereof, in an action for partition of lands involving the title to this land, the parties claiming under the execution sale can not contradict the return. Their remedy is to procure a reformation by the court of the return in the proceeding in which the return was made. *Flaniken v. Neal*, 67 Tex. 629, 4 S. W. 212.

Where it is sought to be shown that the interests of all the defendants in execution in the land in controversy were sold, at a sheriff's sale, instead of that of one of them, as shown by both the sheriff's return and his deed, such return should be deemed conclusive until set aside by a direct proceeding brought for the purpose of amending it, and reforming the deed. *Flaniken v. Neal*, 67 Tex. 629, 632, 4 S. W. 212.

In a subsequent suit between the same parties, plaintiff can not defeat defendant's title to property acquired at a sale under execution on a judgment in the prior suit by claiming that the levy was defective, since that would be a collateral attack on the officer's return, which could only be set aside by direct proceeding in the prior suit. *Sparks v. McHugh*, 51 S. W. 873, 21 Tex. Civ. App. 265.

Where a constable's return on an order of sale in chattel mortgage foreclosure shows that cattle seized were the ones described in the order of sale, the parties to that suit can not collaterally attack the return in an action against the constable and his sureties for seizing the wrong cattle. *Houssels v. Pitts* (Civ. App.), 52 S. W. 588.

2. On Purchaser.

"The purchaser's title, under a valid judgment, execution and sale, becomes perfect upon the execution of the deed. The return of the sheriff is made afterward, and if it be incorrect and in contradiction of the deed, it can not affect the purchaser's title already perfected." *Holmes v. Buckner*, 61 Tex. 107, 110, 2 S. W. 452.

The rights of a purchaser at an execution sale can not be affected by defects or informalities in the return. *King v. Duke* (Civ. App.), 31 S. W. 335.

Where a sheriff's deed contains a correct description of the property, the title of an innocent purchaser at

an execution sale is not invalidated by an irregularity in the return. *House v. Robertson* (Civ. App.), 34 S. W. 640, reversed in 89 Tex. 681, 36 S. W. 251.

3. As Evidence.

A sheriff's return can not be properly regarded as evidence of transactions between the defendant in execution and the plaintiff's attorney, with which transactions he has no connections, and about which he has no information, except such as he may have derived from subsequent statements of the attorney. *Portis v. Ennis*, 27 Tex. 574.

When an officer is sued for wrongful levy of a writ, his return thereon is a mere admission, and only prima facie evidence against him. *McKee v. Le Gette*, 1 White & W. Civ. Cas. Ct. App. § 1145.

4. As Constructive Notice.

After the lapse of the 60 days within which an execution from a justice's court is made returnable, a plaintiff in such execution is chargeable with notice of the return and of the matter stated therein. *Betterton v. Buck*, 2 Willson, Civ. Cas. Ct. App. § 198.

5. Of Return without Sale.

The plaintiff in execution neither lost nor abandoned his rights by a return without sale. *Boyce v. Woods*, 37 Tex. 245, 247.

XVIII. Entry of Levy and Return.

A. ON WRIT.

"In practice, in this state, the entry of the levy upon the execution is a mere memorandum made by the officer, often with very little care, merely to show the fact of a levy. It ought, undoubtedly, to contain sufficient certainty of description to show on what the levy was made." *Coffee v. Silvan*, 15 Tex. 354, 358.

"It is objected that the last entry is in a different handwriting, with different ink, and is without date. The

signature to the entry appears to be in the same handwriting as that which precedes it. The difference in the ink renders it probable merely that it was made at a different time; and it is evident from the manner of the entry that it was made subsequent to the first entry, as it is natural to suppose it would be if intended as an amendment of it. There is, therefore, nothing of a suspicious character in these circumstances." *Miller v. Alexander*, 13 Tex. 497, 503.

Amendment of Entry.—"The mere omission of a date to an amendment of the entry of the levy, which there was no reason to suppose was not made in proper time, was not sufficient to warrant its rejection on the assumption that it was fraudulently made." *Miller v. Alexander*, 13 Tex. 497, 504.

Presumption of Verity.—"The entry in question was the act of a public officer in the performance of his duty, and the presumption until the contrary appears must be that it was made in proper time. To require the plaintiff to prove that it was so made would be to require him to prove that the officer had not deviated from the line of his duty; which the law presumes without proof." *Miller v. Alexander*, 13 Tex. 497, 503.

Effect of Defective Entry on Title of Purchaser.—The title of a purchaser at a sheriff's sale will not be defeated by mere defects in the entry of the levy and return appearing upon the execution. *Fitch v. Boyer*, 51 Tex. 336; *Coffee v. Silvan*, 15 Tex. 354, 358; *Riddle v. Bush*, 27 Tex. 675, 677; *Cavanaugh v. Peterson*, 47 Tex. 197, 205; *Holmes v. Buckner*, 67 Tex. 107, 110, 2 S. W. 452; *Davidson v. Chandler*, 27 Tex. Civ. App. 418, 65 S. W. 1080.

A defective entry of a levy does not vitiate a sale of land (there being a valid judgment, execution, and sheriff's deed) when the purchaser had no notice of, and did not participate in any fraud in making the levy. *Cavanaugh v. Peterson*, 47 Tex. 197.

The title of a purchaser under a sheriff's deed, not only does not rest upon the entry of the levy, or the return on the execution; but, under the statute, it is not affected by any mere want of certainty in the return of the officer. All the purchaser is bound to show, is a valid judgment, execution and sheriff's deed. *Coffee v. Silvan*, 15 Tex. 354.

B. ON DOCKET.

The return should be entered by the clerk in the execution docket. *Vaughan v. Warnell*, 28 Tex. 119.

An attorney for the plaintiff, who made entries of receipts in the execution docket, may explain that they were made from memory, and the dates need not be exact. *De Witt v. Jones*, 17 Tex. 620, 624.

It seems that the entry of the sheriff's return on the clerk of court's execution docket is the proper original evidence thereof. *Portis v. Ennis*, 27 Tex. 574, 578.

Entries in an execution docket are, under the Rev. Stat. (art. 2332), a record; certified copies thereof are admissible in evidence. *Schleicher v. Markward*, 61 Tex. 99; *Mitchusson v. Wadsworth*, 1 App. Civ. Cases § 976.

"Certified copies of such entries were held proper evidence before the passage of the Rev. Stat., at a time when the law did not expressly provide that they should be considered a record. *Pasch Dig.*, art. 3773." *Schleicher v. Markward*, 61 Tex. 99, 102; *Portis v. Ennis*, 27 Tex. 574, 578.

XIX. Lien and Priorities.

A. LIEN.

1. Commencement.

a. From Date of Issuance.

"The plaintiff has a lien on all the property of the defendant in ordinary cases at the time he issues his execution." *Cloud v. Smith*, 1 Tex. 611, 620.

An execution is not a lien upon personal property from the date of issu-

ance under the act of 1842. *Mercein v. Burton*, 17 Tex. 206, 210.

b. From Date of Levy.

See ante, "As Creation of Lien," XVI, S. 3.

A plaintiff in execution acquires a fixed and certain interest in the land upon which his execution is levied, from the date of the levy. *Simpson v. Chapman*, 45 Tex. 560, 564; *Borden v. McRae*, 46 Tex. 396; *McAfee v. Wheelis*, 1 Posey 65, 72.

Levy in Another County.—It would seem that the levy of an execution on land in a county other than that in which the judgment is rendered, during the lifetime of the defendant in execution, creates a lien which, if not lost by laches, will be enforced in the probate court, under the act of 1848, after the defendant's decease. *Hart. Dig.*, art. 1168. *McMiller v. Butler*, 20 Tex. 402, 403; *Green v. Rugely*, 23 Tex. 539.

c. From Date of Indorsement.

From the time of making the indorsement must be dated the lien acquired upon the property. *Sanger Bros. v. Trammell & Co.*, 66 Tex. 361, 1 S. W. 378; *Riordan v. Britton*, 69 Tex. 198, 204, 7 S. W. 50; *Redlick v. Williams* (Sup.), 5 S. W. 375, 376. See ante, "Indorsement of Levy," XVI, L.

2 Termination.

a. At Return Day.

See the title SHERIFFS' SALES.

b. By Death of Party.

See the titles EXECUTORS AND ADMINISTRATORS; SHERIFFS' SALES; VENDITIONI EXPONAS.

An execution levied on land during the lifetime of the defendant subsists as a lien after his death. *Burdett v. Chandler*, 22 Tex. 14. But see the more recent cases in the titles referred to.

c. By Return without Sale.

In cases of conflicting liens, a plaintiff, by ordering or consenting to the return of his execution without a sale,

may well be held to have lost the benefit of his levy. *Riddle v. Bush*, 27 Tex. 675.

d. By Replevin.

"It may be well questioned if any such lien exists after the property has been replevied." *Cloud v. Smith*, 1 Tex. 611, 620.

e. By Delivery Bond.

Where the bond given by an execution defendant as authorized by Sayles' Ann. Civ. St. 1897, art. 2357, to obtain possession of the chattels levied on under an execution, has been forfeited for the nondelivery of the chattels according to the terms of the bond, and nonpayment of the value thereof, the levy by virtue of the execution does not operate as a lien on the chattels, for whatever lien was created by the levy was released by the acceptance of the delivery bond, unless the chattels were thereafter voluntarily delivered by the execution defendant into the custody of the officer to be sold under the original levy. *Webb v. Caldwell* (Civ. App.), 112 S. W. 97.

f. By Act of Defendant.

The plaintiff in an execution acquires an interest in the land upon which an execution is levied from the date of the levy which can not be defeated by the defendant or those claiming under him subsequent to execution. *Borden v. McRae*, 46 Tex. 396, 400.

g. By Removal of Property.

A valid levy on cattle on a range is not lost, in favor of a mortgagee, by the removal of cattle to other counties by the owner, where the owners were acting for the mortgagee in such removal. *Brown v. Hudson*, 38 S. W. 653, 14 Tex. Civ. App. 605.

h. By Postponement of Levy.

"The postponing the levy until an effort has been made to sell other property to satisfy the execution does not release it." *Cloud v. Smith*, 1 Tex. 611, 620.

i. By Reversal of Judgment.

Where there is a writ of error sued out without a supersedeas the lien of the execution expires on reversal of the judgment. *Mosely v. Gainer*, 10 Tex. 393, 396; *Castro v. Illies*, 22 Tex. 479.

Where there was a trial of the right of property which resulted in favor of the creditor but in the meantime his judgment was reversed, whereupon having obtained another judgment he levied on the same property, the first execution having remained with the property in the hands of the sheriff during all the time but the claimant who, in the first instance, claimed by mortgage now claimed by bill of sale made after the reversal of the first judgment and before issuance of the execution upon the last, the lien of the first execution would not continue until the last was placed in the hands of the sheriff. *Mosely v. Gainer*, 10 Tex. 393.

j. By Existence of War.

A levy in 1861 under a judgment from a federal court created a lien until issuance of another execution in May, 1867, as the War of Secession did not close officially until August 20, 1866. *Hargrove v. De Lisle*, 32 Tex. 170.

B. PRIORITIES.**1. Between Different Executions.**

When two or more executions against a defendant come to the hands of a sheriff, he is required by law to number them in their order of precedence; and, in accordance with such orders, they are entitled to satisfaction out of the property of the defendant. In such case, it is of no importance under which execution a levy and sale are made; the first execution is entitled to the first satisfaction, although the levy and sale be made under a subsequent execution. *Pas. Dig.*, art. 3780, note 871. *Garner v. Cutler*, 28 Tex. 175.

If all the executions be levied on the defendant's property, the sheriff, for the sake of greater accuracy, should show by his returns upon the subsequent executions that the levies made under them are subject to the priority of those having precedence of them; but a failure of the sheriff to make such showing could not affect the respective rights of the several plaintiffs in execution. *Garner v. Cutler*, 28 Tex. 175.

The first execution coming to the hands of the sheriff must be levied, and the money arising on a sale under such levy go to the discharge of such execution. But a prior judgment creditor may still subject the land to the satisfaction of his judgment, if the lien has not been lost. *Walker v. Anderson*, 31 Tex. 646; *Garner v. Cutler*, 28 Tex. 175, 181.

The recording and indexing of this judgment can give the judgment creditor no rights superior to a subsequent purchase under previous levy under an execution in favor of another creditor. *Bracenridge v. Cobb*, 85 Tex. 448, 449, 21 S. W. 1034, affirming 2 Tex. Civ. App. 161, 21 S. W. 614.

Nor is a purchaser at said sale required to place his sheriff's deed upon record as against the rights of the original parties to the recorded judgment. *Bracenridge v. Cobb*, 85 Tex. 448, 21 S. W. 1034, affirming 2 Tex. Civ. App. 161, 21 S. W. 614.

Of two judgments in the same county and against the same defendant, rendered while the act of February 14th, 1860, was in force, the younger one, if recorded so as to create and preserve a lien, would, to the exclusion of the elder and unrecorded one, be entitled to the proceeds of real estate within the county, sold as the property of the defendant, notwithstanding that execution from the elder judgment was sued out and levied before the issuance and levy of execution from the younger one. *Scogin v. Perry*, 32 Tex. 21.

Determined by Priority of Delivery.

—Where a sheriff levies two executions on the goods of the defendant the proceeds of sale should be applied to the full satisfaction of the execution first in his hands. *McMahan v. Hall*, 36 Tex. 59, 60.

Determined by Priority of Levy.

In trespass to try title, where the controversy turns on the priority of the judgment and execution liens under which the parties deraign title from the common source, and where the judgment liens are both excluded from consideration, the rights of the parties must be determined by the execution sales, and the purchaser claiming under the first levy and sale has priority. *First Nat. Bank v. Cloud*, 2 Tex. Civ. App. 627, 21 S. W. 770.

Waiver of Priority.—Where there are conflicting liens, a plaintiff consenting to the return of his execution without a sale loses the benefit of his levy. *Riddle v. Bush*, 27 Tex. 675, 677.

1 Between Executions and Other Liens.**1 Execution and Conveyance.**

Where a deed by a purchaser at execution sale by its terms passes the legal title, and is recorded, the title given is, as against one claiming under a subsequent deed from the execution debtor, valid, though the grantee of the execution purchaser actually makes no claim to the land. *Williamson v. Gore* (Civ. App.), 73 S. W. 563.

Unrecorded Conveyance.—By force of our registration laws, a lien acquired by a judgment or the levy of an execution on the real estate of the debtor is superior to the legal title which had been, previous to the date of the lien, conveyed by him by deed to a third party, but which deed had not been recorded, and of which the creditor, at the date his lien was fixed, did not have actual notice; and further, that his superiority was not affected by the fact that actual notice of the unrecorded deed may have been given

at or before the day of sale. *Ayres v. Duprey*, 27 Tex. 593, 594; *Borden v. Tillman*, 39 Tex. 262; *Grace v. Wade*, 45 Tex. 522, 528; *Borden v. McRae*, 45 Tex. 396; *Grimes v. Hobson*, 46 Tex. 416; *Wallace v. Campbell*, 54 Tex. 87, 90; *Senter & Co. v. Lambeth*, 59 Tex. 259, 262; *Parker v. Coop*, 60 Tex. 111; *McKamey v. Thorp*, 61 Tex. 648, 651; *Central City Trust Co. v. Waco Bldg. Ass'n*, 95 Tex. 48, 64 S. W. 998, affirming 63 S. W. 1133; *Hamilton-Brown Shoe Co. v. Lewis*, 7 Tex. Civ. App. 509, 513, 28 S. W. 101, affirmed in 93 Tex. 730, no op.; *Brooks v. Hibbard, etc., Co.*, 44 Tex. Civ. App. 610, 99 S. W. 718, affirmed in 102 Tex. 578, no op.; *Shepard v. Hunsacker*, 1 Posey 578.

"In the case of *Senter & Co. v. Lambeth*, 59 Tex. 259, 263, the court after reviewing the line of decisions referred to in the above case, says: 'These decisions only apply to cases where the third party to be affected by the unrecorded conveyance acquired thereby the legal title.'" *Hamilton-Brown Shoe Co. v. Lewis*, 7 Tex. Civ. App. 509, 514, 28 S. W. 101, affirmed in 93 Tex. 730, no op.

The owner of a headright certificate for 640 acres sold an undivided 160-acre interest in it. Afterwards 160 acres were surveyed for the original owner, and were sold, on execution against him, to an innocent purchaser, before the conveyance of the 160-acre interest had been recorded. Held, that such purchaser took title to the entire 160 acres. *West v. Loeb*, 42 S. W. 612, 16 Tex. Civ. App. 399.

Under Pasch. Dig. art. 4988, providing that all conveyances of land shall be void as to all creditors and subsequent purchasers without notice unless they shall be acknowledged or proven and lodged with the clerk to be recorded according to law, and section 4994, providing that such instruments shall take effect and be valid as to all subsequent purchasers for a valuable

consideration, without notice, and as to all creditors, from the time that such instrument shall be so acknowledged and delivered to such clerk to be recorded, and from that time only, the lien acquired by a creditor of a landowner by the levy of an execution on the land is paramount to the rights of the grantee under a prior unregistered deed, and is not affected by recording the deed between the date of the levy and of the sale thereunder. *Ramney v. Hogan*, 1 Posey Unrep. Cas. 253.

The purchaser at a sheriff's sale acquires a title superior to that of the grantee in an unrecorded conveyance from the judgment debtor, though the assignee of the judgment by whom the sheriff's sale was procured took the assignment for the purpose of setting off the judgment against a claim owing by him to the judgment debtor. *Burnett v. Cockshatt*, 2 Tex. Civ. App. 304, 21 S. W. 950.

Where Purchaser Has Notice.—The defect in the original deed having been removed by a second deed, executed after the levy of an execution against the grantor on the land, and its purchase thereunder by the creditor with notice of the mistake in the deed, the correction was as effective between the parties as though the deed had been reformed by a decree in equity. *Milby v. Regan*, 41 S. W. 372, 16 Tex. Civ. App. 352.

Same—Time of.—The title acquired by a purchaser of land sold at an execution sale is not affected by notice, after the levy of the execution and before the sale, of the existence of an unrecorded deed. *Borden v. McRae*, 46 Tex. 396; *Whitaker v. Farris*, 45 Tex. Civ. App. 378, 101 S. W. 456, affirmed in 102 Tex. 597, no op.

Under the operation of the registration laws, when an execution lien attaches by levy, without notice of an unrecorded conveyance previously made, the purchaser acquires title as

against such former purchaser or creditor, though he may have had notice afterwards at the time of his purchase at execution sale. Citing *Parker v. Coop*, 60 Tex. 111; *McKamey v. Thorp*, 61 Tex. 648.

Where an execution creditor is ignorant, at the time of levy, of a prior unrecorded deed of the real estate levied on, a purchaser at sale under such execution, though knowing of the deed at the time of purchase, is not affected thereby, and need not show that he is a purchaser for value. *Blum v. Schwartz* (Sup.), 20 S. W. 54.

The transferee of a judgment acquires the lien incident to the judgment and a subsequent sale of land of the judgment debtor under the judgment vests the title to the land in the purchaser at the sale as against an unrecorded deed, though the assignee of the judgment knew of such deed at the time he took the assignment and at the time of the judicial sale of the land and though he advanced no new consideration for the assignment. *Burnett v. Cockshatt*, 2 Tex. Civ. App. 304, 21 S. W. 950.

A judgment lien attaches to lands held by tenants of the judgment debtor, and which had been conveyed by deed not recorded, as against the vendee in such deed. Notice by a vendee holding under an unrecorded deed, and given on the day of sale, will not affect the purchaser. The lien having attached by the judgment in favor of the plaintiff in execution, is not affected by subsequent notice. *Mainwarring v. Templeman*, 51 Tex. 203.

Since an unrecorded conveyance of land is void as to a creditor who acquires a lien thereon without notice, a purchaser of land at execution sale by a judgment creditor who levied his execution without notice of an unrecorded contract to sell is protected through the rights of the creditor, though he had knowledge of the facts at the time of the purchase. *Linn v. Le Compte*, 47 Tex. 440.

Same—From Possession.—The possession by a party claiming, under an unrecorded deed, one of several tracts of land covered by his deed, is not sufficient, except as to the tract in his actual possession, to charge a judgment creditor, who caused a levy to be made upon the land under an execution, with notice of his rights therein. *Brooks v. Hibbard, Spencer, Bartlett & Co.*, 44 Tex. Civ. App. 610, 99 S. W. 718.

Same—Burden of Proof of.—The burden is upon one claiming under a prior unrecorded deed to prove that the plaintiff in an execution under which the land is sold as the grantor's had notice of such deed when execution was levied thereon. *Whitaker v. Farris*, 45 Tex. Civ. App. 378, 101 S. W. 456.

Where Execution Creditors Purchase.—The levy of an execution on land does not create a lien superior to that of a prior purchaser of the land by an unrecorded deed, where the execution creditors, who were the purchasers thereunder, had notice of such deed prior to the levy. *Holt v. Hunt*, 18 Tex. Civ. App. 363, 44 S. W. 889.

Judgment creditors having a lien on realty, who purchase at the execution sale thereof on the faith of the legal and apparent equitable title of their debtor, stand on an equal footing with bona fide purchasers, and will not be postponed to a prior purchaser from the debtor under an unrecorded deed. *Sanger Bros. v. Collum* (Civ. App.), 78 S. W. 401, reversed *Collum v. Sanger Bros.*, 82 S. W. 459, 98 Tex. 162; *Id.*, 83 S. W. 184, 98 Tex. 162.

Five heirs having inherited realty in common, two of them conveyed their interests, by unrecorded deed, to the third, and the fourth sold to the fifth. The third and fifth took possession of their respective portions, and made an oral partition, setting up stone corners and building a partition fence. A judgment creditor of the first heir

levied on his supposed undivided interest, and became the purchaser at the execution sale, having no notice of the third heir's rights, except such as was derived from her possession. Held, that such possession would be referred to her record title as co-tenant with all of the heirs, and not to her title under the unrecorded deed and oral partition; and hence the execution purchaser acquired a good title to the interest bought. *Sanger Bros. v. Collum* (Civ. App.), 78 S. W. 401, reversed *Collum v. Sanger Bros.*, 82 S. W. 459, 98 Tex. 162; *Id.*, 83 S. W. 184, 98 Tex. 162.

The fact that the record did not disclose the cotenancy of the heirs, but terminated with the ancestor's title, did not affect the case, as the heirs would be deemed to hold the ancestor's record title. *Sanger Bros. v. Collum* (Civ. App.), 78 S. W. 401, reversed *Collum v. Sanger Bros.*, 82 S. W. 459, 98 Tex. 162; *Id.*, 83 S. W. 184, 98 Tex. 162.

Where Execution Directed to Another County.—An unrecorded deed is void against a creditor who has acquired a specific lien on the land in controversy by the levy of an execution under a judgment in a different county from that in which the land is situated, although the judgment has not been recorded in such county. *Grimes v. Hobson*, 46 Tex. 416.

Since a judgment creditor who levied on land under an execution directed to another county than that in which the land lies without notice of an unrecorded deed of the land given by the debtor acquires a lien by his levy superior to the holder of the unrecorded deed, the purchaser under the execution acquires a superior title, though he had notice of the deed; for the purchaser acquires the title of the execution plaintiff. *Grace v. Wade*, 45 Tex. 522.

Where Date of Levy Not Shown.—Where judgment was recovered in

justice's court in 1892, but neither the date of lien by record of judgment, nor date of levy, is shown, the constable's deed made in November, 1893, does not pass title to land sold as against the purchaser from the judgment defendant in August prior thereto. *Dwyer v. Foley* (Civ. App.), 35 S. W. 820.

Where Judgment Lien Lost.—In a contest between a purchaser from the judgment debtor and a subsequent purchaser at an execution sale, the former may, in defense of his title, urge loss of the judgment lien relied upon by the latter. *Adams v. Crosby*, 84 Tex. 99, 102, 19 S. W. 355.

b. Execution and Mortgage.

Where an execution was levied on land under a judgment rendered subsequently to the making of a deed of trust thereof, it was held that the purchaser at the execution sale became the owner, subject to the deed of trust, and had all the reserved rights of the grantors thereof. *James v. Jacques*, 26 Tex. 320.

A member of an insolvent firm bought out his copartner, and gave his father a mortgage to protect the latter as surety on certain notes given by the mortgagor to his copartner in payment for the copartner's interest in the business, and afterwards conveyed the land to his father in satisfaction of the mortgage. Held, that the title acquired under such mortgage and conveyance is superior to that acquired by virtue of an execution sale on a judgment against the firm, which became a lien after the mortgage, but before the conveyance. *Willis v. Heath* (Sup.), 18 S. W. 801.

The levy of an execution on the surplus of the proceeds of a sale remaining in the sheriff's hands after the satisfaction of a mortgage prevails against a subsequent assignment of the surplus by the mortgagor. *Milmo Nat. Bank v. Rich*, 40 S. W. 1032, 16 Tex. Civ. App. 363.

Recorded Mortgage.—A purchaser at sheriff's sale takes subject to recorded mortgages in favor of the original vendor of the land. *Fisher v. Foote*, 25 Tex. Supp. 311.

Same—Time of.—In 1856 defendant in execution executed a mortgage to his wife, which was not recorded until the day of which the land was sold, in 1868, under execution against the husband issued on a judgment rendered in 1865. Held, that a person purchasing the land held subject to the lien of the mortgage where the wife attended the sale and gave public notice of the existence of the mortgage. *Price v. Cole*, 35 Tex. 461.

In 1856 P. executed to his wife his note and mortgage for her separate money loaned him by her. The mortgage was not recorded until the sale day, October, 1868, on which day the land mortgaged was sold under execution against P. on a judgment rendered in 1865. The mortgage was filed for record before the hour of sale, and the wife of P. attended the sale, and gave public notice of the existence, recorded and nature of her mortgage. Held, that a person purchasing the land with such notice held it subject to the lien of the mortgage. *Price v. Cole*, 35 Tex. 461.

Unrecorded Mortgage.—A purchaser at execution sale, knowing of an unrecorded mortgage, can avail himself of the equities of the creditor not having knowledge of the same at the time of the levy of the execution. *Barnett v. Squyres* (Civ. App.), 52 S. W. 612, reversed 54 S. W. 241, 93 Tex. 193.

An unregistered chattel mortgage, the property remaining in the possession of the mortgagor, is void as against a creditor of the mortgagor levying an execution on the property. *Rev. Stat.*, art. 3328. *Williams v. Farmers' Nat. Bank*, 22 Tex. Civ. App. 581, 56 S. W. 261. See the title **CHATTEL MORTGAGES**, vol. 4, p. 88.

Where Mortgagee Has Notice.—A purchaser of land at sheriff's sale, which was sold under a judgment for the purchase money due to one of several joint vendors, on an executory contract for the sale of the land purchased (the other joint vendors having been paid), takes title to the whole property, as against one having notice and claiming under a mortgage executed by the original vendee. *Turner v. Phelps*, 46 Tex. 251.

Where Error in Mortgage.—Where a lot intended to be conveyed is by mistake omitted from a mortgage, but public notice of the mistake and of the mortgagee's claim is given, the mortgagee's claim on the omitted lot is superior to that of a subsequent purchaser under execution against the mortgagor. *Ilse v. Seinsheimer*, 76 Tex. 459, 13 S. W. 329.

Under provisions that all deeds shall be recorded in the county where the land, "or a part thereof," is situated (Rev. St. art. 4333), and that any conveyance delivered to be recorded shall take effect, as to all subsequent purchasers and as to all creditors, from the time of delivery (article 4334), a deed of trust describing the land as being in one county, when a part of it is actually in another county, if recorded in the former county, gives sufficient notice to creditors levying execution on the land outside such county. *Brown v. Lazarus*, 5 Tex. Civ. App. 81, 25 S. W. 71.

c. Execution and Contract to Convey.

Under Pasch. Dig. arts. 4988, 4989, 4994, declaring unrecorded conveyances of land void as to creditors, an unrecorded contract to convey lands is void as against a purchaser of the land at sale under execution levied thereon by a judgment creditor without notice of such contract, and before possession was taken thereunder, since the lien of the creditor attached at the time of the levy, and the purchaser succeeded to his rights. *Simpson v. Chapman*, 45 Tex. 560.

d. Execution and Contract to Reconvey.

Under Rev. St. art. 4332, which provides that all deeds of trust and mortgages shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice, unless recorded as required by law, a written agreement by a grantee of land to reconvey on certain conditions, which agreement was not filed for record, does not affect a lien acquired by levy, by a judgment creditor against the holder of the legal title without notice of such agreement; and, where the creditor purchases at the sheriff's sale made under the levy, he will take title as against the persons entitled to the reconveyance, though he had notice of the agreement before the sheriff's certificate was issued. *Stephens v. Keating* (Sup.), 17 S. W. 37.

e. Execution and Purchase Money Note.

When a recorded deed shows the execution of notes for the purchase money of the land, and the maker of the notes is in possession, one purchasing the land at execution sale has full constructive notice of the lien, though the notes are not recorded. *Brother-ton v. Anderson*, 66 S. W. 682, 27 Tex. Civ. App. 587.

f. Execution and Distress Warrant.

On January 24th, 1871, a landlord sued out a distress warrant against his tenants for rent due for the year 1870, and had the warrant levied on certain corn, cotton, and other articles found on the rented premises, and belonging to the tenants. Prior to the issuance of the distress warrant, judgment creditors of the tenants had caused the same property to be levied upon by their executions. To prevent a sale under the executions, landlord sued out injunction against the judgment creditors and the officer who levied their executions. Held, that it was error to dissolve the injunction

and dismiss the suit. *Click v. Stewart*, 36 Tex. 280.

g. Execution and Equitable Lien.

A resulting trust is not within the statutes of registration, and an execution lien is not protected against the claim of the owner of such equitable estate. *Brown Hardware Co. v. Marwitz*, 10 Tex. Civ. App. 458, 32 S. W. 78.

A creditor claiming a mere statutory lien by the record of a judgment, or the levy of an execution against the husband, in whom the apparent title is vested, can not be protected by reason of such lien against a resulting trust in favor of the wife, though he have no notice, at the time, of the execution of such a trust, and the purchaser of such property at a subsequent execution sale will take nothing as against the wife's equity, if he had notice of the same before making the purchase. *Yoe v. Montgomery*, 68 Tex. 338, 4 S. W. 622.

The title to certain land appeared by the records to be in the judgment debtor at the time the judgment was fixed as a lien on the land. The judgment creditor had no notice until the execution sale of the rights of plaintiff, who had advanced to the debtor the money to purchase the land, with the understanding that the profits of a resale should be divided between the parties after plaintiff should be reimbursed for his advance with interest. Prior to the fixing of the judgment lien the land had been conveyed to plaintiff by an unrecorded deed. Held that, though the unrecorded deed was void as against the execution purchaser, yet plaintiff's equity as cestui que trust is superior to the rights of the execution purchaser. *John B. Hood Camp Confederate Veterans v. De Cordova*, 47 S. W. 522, 92 Tex. 202.

Where Purchaser Has Notice.—

Where an attaching creditor had knowledge that land levied on had been paid for by another, and was

therefore held by the debtor subject to a resulting trust, at the time such creditor purchased it at the execution sale, he acquires no title, as against the cestui que trust. *Caldwell v. Bryan's Ex'r*, 49 S. W. 240, 20 Tex. Civ. App. 168.

h. Execution and Landlord's Lien.

A landlord, by virtue of his lien, has no right of possession as against the tenant, and a levy on a tenant's interest in a crop, where the crop is not removed from the premises, is valid. *Groesbeck v. Evans*, 88 S. W. 889, 40 Tex. Civ. App. 216, overruled in *Evans v. Groesbeck*, 42 Tex. Civ. App. 43, 93 S. W. 1005.

A landlord, by virtue of his lien, has not such possessory rights in the crop of his tenant as entitles him to prevent the removal of the crop from the premises by the tenant's creditor under an execution and to maintain an action for the trial of the right of property in order to have the same, if removed, returned to the premises. *Evans v. Groesbeck*, 93 S. W. 1005, 42 Tex. Civ. App. 43, overruling *Groesbeck v. Evans*, 40 Tex. Civ. App. 216, 88 S. W. 889. See *Pace v. Sparks*, 1 Posey 402, 407. And see the title RIGHT OF PROPERTY. TRIAL OF.

Where a suit to foreclose a landlord's lien was instituted before the tenant's property was removed from the leased premises, it was subject to the lien, though it had been sold under execution to satisfy a judgment against the tenant before the rendition of the foreclosure judgment. *Irwin v. Bexar County*, 63 S. W. 550, 26 Tex. Civ. App. 527.

Lien for Advances.—Act April, 1874, entitled "An act concerning rents and advances," cotton raised on rented premises is not subject to seizure and sale under execution until the landlord has received his rent and advances made to the tenant. *Eason v. Killough*, 1 White & W. Civ. Cas. Ct. App. § 603.

A., a judgment creditor of D., levied upon a quantity of seed cotton belonging to D., and found on the premises of W., the landlord of D. The cotton was removed from the premises, made into two bales, and sold under the execution to A. for \$44.44, subject to the landlord's lien of W. for advances made. Immediately upon the removal, W. brought suit against D. in justice's court, and obtained judgment with foreclosure against the two bales. On suit between W. and A. it was shown that the cotton was worth \$60; also that there was sufficient property of D. outside the cotton, left on the premises, and subject to the landlord's lien, to satisfy the claim of W. Held, that under the statute W. had a preference lien on all the property mentioned, which could not be defeated by the removal of any portion of it, either by the tenant or his creditors, and that W. could recover from A. the full value of the cotton removed. *Wilkes v. Adler*, 68 Tex. 689, 5 S. W. 497.

Under Verbal Contract.—Where a landlord has taken possession of growing crops under a verbal contract giving him a lien for advancements, he has priority over a levy thereon made by an execution creditor. *Jones v. Avant*, 41 Tex. 650.

XX. Satisfaction and Discharge.

A. WHAT AMOUNTS TO SATISFACTION.

1. Payment.

a. In General.

Payment made to prevent a sale of the defendant's property under an execution is not considered voluntary though the judgment was erroneous, and upon reversal it may be recovered with interest. *Cleveland v. Tufts*, 69 Tex. 580, 583, 7 S. W. 72.

A defendant who has, by mistake, overpaid execution to the plaintiff's attorney, has a right of action against the attorney. *Croft v. Hicks*, 26 Tex. 383, 384. See the title ATTORNEY AND CLIENT, vol. 2, p. 567.

b. In Money.

The sheriff has no right to receive payment of an execution in anything but money, without the consent of the plaintiff in execution. *Harris, etc., Co. v. Ellis*, 30 Tex. 4, 7.

Confederate Money.—A payment of Confederate money on an execution in the hands of a sheriff is no payment at all, unless plaintiff in execution authorized its receipt by the sheriff. *Thomas v. Browder*, 23 Tex. 783; *Buie v. Crouch*, 37 Tex. 53.

A credit made by a sheriff on an execution of a payment received by him in Confederate notes is unauthorized. *Morrill v. Fitzgerald*, 36 Tex. 275.

c. In Draft.

When a sheriff has an execution in his hands he has no right to receive payment in a draft on a third person but only money, and the payment in a draft would be no discharge of an execution in his hands. *Harris v. Ellis*, 30 Tex. 4.

d. To Attorney.

See the title ATTORNEY AND CLIENT, vol. 2, p. 567.

e. After Return Day.

The sureties of a sheriff are not liable for money paid to him by a judgment debtor after the return day of the execution held by the sheriff. *Thomas v. Browder*, 33 Tex. 783; *Hamilton v. Ward*, 4 Tex. 356, cited by the court.

2. Receipt of Creditor.

Where the defendant in execution produced to the sheriff receipts from the judgment creditor acknowledging full satisfaction of the judgment, but specifying the receipt of a sum several dollars less than the judgment, and specifying also that the party giving the receipt would pay all costs, the officer was justified in declining to pass upon the genuineness and validity of the receipts, and in proceeding to make a levy. *Tierney v. Frazier*, 57 Tex. 437.

3. Levy.

See ante, "As Satisfaction of Judgment," XVI, S. 2.

If a levy be valid and was on property sufficient to satisfy the execution so far as the defendant in the execution is concerned, it would be satisfaction. *Bryan v. Bridge*, 10 Tex. 149, 151.

The presumption that personal property levied upon and not returned to the possession of the debtor has been applied to execution is rebuttable. *Cravans v. Wilson*, 35 Tex. 52, 57.

A presumption of satisfaction of an execution levied on personalty does not arise where possession remains with the defendant. *Cravens v. Wilson*, 48 Tex. 324, 339.

4. Replevin.

Where a delivery bond was given for the surrender of property levied on under execution, and the bond was returned forfeited, and execution was issued against the principal and sureties and returned "No property," the implied judgment on the forfeited bond did not operate as a satisfaction of the levy under the original execution, but amounted merely to an additional security, and did not prevent the judgment creditor from reviving and enforcing the original judgment. *Cole v. Robertson*, 6 Tex. 356.

5. Sale.

Where land is bid in at an execution sale by the execution plaintiff's attorney for himself but the bid not being complied with, the land is again sold and the sheriff's deed made to another, the judgment is not satisfied but the execution is entitled to the amount paid by the last purchaser. *Samuelson v. Bridges*, 6 Tex. Civ. App. 425, 428, 25 S. W. 639.

6. Payment on Judgment.

If there is evidence of payments on a judgment brought to the knowledge of the clerk of the district court, he must credit them upon the execution, and also the damages awarded upon

the sum so paid, if the payments were made before the appeal or the suing out of the error. *Yale v. Heard*, 26 Tex. 639.

B. TO WHOM MADE.

The sheriff is the agent of the plaintiff to receive payment of a judgment as long as the execution is in his hands and return day has not arrived. *Harris, etc., Co., v. Ellis*, 30 Tex. 4, 6.

C. ENTRY OF SATISFACTION.

A motion to set aside the entry of satisfaction of an execution must be served on the defendant in the execution. *De Witt v. Monroe*, 20 Tex. 289.

D. PROOF OF SATISFACTION.

A team of mules was levied on under an execution, and a third party set up that he had purchased them from the execution debtor. Held, that the claimant might prove that the execution debtor had paid off and satisfied the debt due the execution creditor. *England v. Brinson*, 1 White & W. Civ. Cas. Ct. App. § 320.

Judgment was obtained in 1840, and execution issued immediately. In 1842 an alias was issued, and subsequently several others, upon the last of which, in 1850, defendant obtained an injunction. On the trial the sheriff, who received the alias, testified without objection that plaintiff's attorney was present at most, if not at all, of a conversation between the debtor, defendant's attorney, and the sheriff who had received the first execution, though he did not remember that plaintiff's attorney took any part therein, in which it was understood among them, though he did not recollect the precise words used, that the execution had been satisfied in the hands of the first sheriff, who admitted that the amount had been settled with him. Held, that it was competent for the jury to infer from this evidence the fact of a legal payment and satisfaction of the execution, when in the hands of the sheriff. *Beardsley v. Hall*, 9 Tex. 119.

It is immaterial in our practice whether the present be regarded as a proceeding to enjoin execution or to obtain an entry of satisfaction of the judgment, there being a prayer for general relief. *Beardsley v. Hall*, 9 Tex. 119.

E. SETTING ASIDE SATISFACTION.

Where land was sold under execution and purchased by the judgment creditor and the execution returned satisfied and the judgment debtor sued for and recovered the land in the United States district court because of a defect in the levy and sale the judgment creditor could sustain an action on the judgment in the county where the defendant resided other than that in which the judgment was obtained and was not put to a motion in the latter county to set aside the satisfaction of the execution as his only remedy. *Townsend v. Smith*, 20 Tex. 465.

XXI. Supplementary Proceedings.

Whether equity will assist a creditor to reach the choses in action of his debtor, not tangible by legal process, examined, and authorities discussed, but left undecided. *Taylor v. Gillelan*, 23 Tex. 508.

"The question of the power of courts of equity to aid the infirmity of the law, and reach personal property, not subject to execution at law, has been much discussed. In England the doctrine seemed formerly to have been, that a chose in action could not be taken under an execution at law, nor by process of attachment from a court of equity." *Price v. Brady*, 21 Tex. 614, 619.

"The laws giving these summary proceedings have not been liberally construed." *Price v. Brady*, 21 Tex. 614, 620.

Equitable interests, not subject to execution, may be reached by an equitable proceeding. *Chase v. York County*

Sav. Bank, 89 Tex. 316, 323, 36 S. W. 406.

Accounting as by bill in equity to ascertain the residue after payment of the partnership debts, suggested as means of realizing upon such levy. *Middlebrook & Bros. v. Zapp*, 79 Tex. 321, 15 S. W. 258.

XXII. Sale.

See the title SHERIFFS' SALES.

XXIII. Claims of Third Persons.

A. WHO MAY ASSERT.

A defendant in execution being in possession of slaves in trust for others, if they are levied on, he is bound to assert the claim of the beneficiaries and the exemption of the property from execution. *Parker v. Portis*, 14 Tex. 166.

B. PROCEDURE.

When property owned by one man is seized on an execution against another the owner may either interpose his claim under the statute, or he may resort to his common-law right and sue the sheriff, or the plaintiff, if the plaintiff had caused the seizure to be made, and although it would be more summary and less expensive to proceed under the statute, it would not always be in the power of the owner to proceed in that way. *Bennett v. Gamble*, 1 Tex. 124; *Vickery v. Ward*, 2 Tex. 212; *Moore v. Gammel*, 13 Tex. 120, 122.

But he can not pursue both remedies. *Moore v. Gammel*, 13 Tex. 120, 122.

The statutory mode provided by the act of February 5, 1840, for trying the right to property levied upon by execution, is more simple and less expensive than an ordinary suit by petition to try title brought by the claimant of the property against the plaintiff in execution; and an exception to such a suit would be well taken, and sustained by the court. But if the defendant fails to except, and answers to the action, it will be considered as

a waiver of the benefit of the statute. "But no exception was taken by the defendant, and his appearing and answering to the action may be considered as waiver of the benefit of the statute." *Vickery v. Ward*, 2 Tex. 212, 215, citing *Bennett v. Gamble*, 1 Tex. 124.

"When the right to personal property levied upon is involved, it is, as a general rule, the proper practice to require parties to be confined to the more simple and less expensive mode of trial of right of property provided by statute." *Whitman v. Willis & Bro.*, 51 Tex. 421, 426.

Quære, whether it is necessary for the plaintiff, in a common-law action for the seizure of his property under an execution against another, to show any reason why he did not pursue the statutory remedy by trial of the right of property. *Hardy v. Broaddus*, 35 Tex. 668.

As to statutory proceeding for trial of right of property, see the title RIGHT OF PROPERTY, TRIAL OF.

XXIV. Wrongful Execution.

A. RIGHTS AND LIABILITIES.

1. Rights.

The owner of the property although he purchases at the sale may sue. *Muester v. Fields*, 89 Tex. 102, 33 S. W. 852, affirming 32 S. W. 417, 11 Tex. Civ. App. 341; *Casey v. Chaytor*, 5 Tex. Civ. App. 385, 23 S. W. 1114.

Purchase from Debtor.—Where creditors make an excessive levy upon property purchased by another from their debtor, if such purchaser paid value therefor, he may recover of them the excess above their debts, although such sale was fraudulent as to creditors. *Eaves v. Williams*, 10 Tex. Civ. App. 423, 31 S. W. 86.

2. Liabilities.

One whose attorneys in charge of the collection of a judgment obtained by them have instructed the sheriff to make a wrongful levy, is bound by the

sheriff's acts. *Richardson v. Jankofsky* (Civ. App.), 23 S. W. 815.

A judgment creditor is not liable for goods seized by the sheriff unless he instigated the levy and the judgment debtor had no interest in the goods. *Longcope v. Bruce*, 44 Tex. 434, 438.

An execution plaintiff is not liable for the manner in which the officer executes the writ unless he directed it to be so executed and participated in the wrongful execution. *Patton v. Collier*, 13 Tex. Civ. App. 544, 546, 38 S. W. 53, following *Morris v. Hastings*, 70 Tex. 26, 7 S. W. 649.

A plaintiff in execution is answerable for every act of the officer which he either directed or ratified. *Molette v. Hodges*, 1 White & W. Civ. Cas. Ct. App. § 400.

Where the separate property of a wife is levied on, under an execution against her husband, she can not recover damages for "abuse to her private rooms, furniture, bedding," etc., from the execution creditors, who were not present and did not authorize or sanction the abuse. *Ainsa v. Moses* (Civ. App.), 100 S. W. 791.

If, after judgment for defendant, on a trial de novo on appeal from a justice, plaintiff causes execution to be issued by the justice, and the goods of a surety to be levied on and sold, or if the execution issues without any prompting from plaintiff, and he accepts the proceeds of the sale, he is liable to the surety for the value of the goods. *McKay v. Irion*, 4 Willson, Civ. Cas. Ct. App. § 184, 15 S. W. 123.

A tract of land, with a factory and machinery located thereon, was sold under execution, and purchased by the plaintiffs in execution; they continued to operate the factory through defendants in execution as their employees and agents until it was destroyed by fire. Defendants in execution, claiming the property as exempt from

forced sale, sued for the land and the value of the factory, etc. Held, that unless the destruction was caused directly and immediately by their acts, or was the result of a series of causes and effects, proceeding one from the other, and not speculatively inferred, but established by evidence, as other facts are required to be proved, plaintiffs in execution were not liable for the loss sustained. *Willis & Bro. v. Morris*, 66 Tex. 628, 1 S. W. 799.

B. GROUNDS OF ACTION.

1. In General.

To make a judgment creditor liable for an illegal levy, it must appear that no interest in the goods belonged to the execution defendant and that the creditor ordered or instigated the levy. *Longcope v. Bruce*, 44 Tex. 434.

2. Necessity for Levy.

In an action for wrongful levy of an execution, a charge calculated to induce the jury to allow damages in respect to plaintiff's crops, when the same had not in fact been levied on, requires reversal. *Baughn v. Allen* (Civ. App.), 68 S. W. 207.

3. Levy on Land.

A statutory levy on land does not authorize a recovery, in the absence of a showing of special damages therefrom. *Adoue v. Wettermark*, 82 S. W. 797, 36 Tex. Civ. App. 585; *Mikeska v. Blum*, 63 Tex. 44; *Trawick v. Martin-Brown Co.*, 79 Tex. 460, 14 S. W. 564; *Girard v. Moore*, 86 Tex. 675, 26 S. W. 945; *Ellis v. Harrison*, 24 Tex. Civ. App. 13, 20, 56 S. W. 592, 57 S. W. 984, affirmed in 93 Tex. 637, no op., 94 Tex. 690, no op.

The mere levy of a writ on land not subject to such levy, there being no disturbance of the use and possession, nor other special damage proven, is no ground for recovery of damages. *Conrad v. Bywaters* (Civ. App.), 24 S. W. 661.

4. Levy on Property of Third Person.

Whether a writ of execution is valid or void, party levying on property belonging to a person other than the execution defendant is liable to the owner and even though the property levied on was lost to the plaintiff by reason of the execution of a claimant's bond by another. *Pinkard v. Willis & Bro.*, 24 Tex. Civ. App. 69, 72, 57 S. W. 891, affirmed in 94 Tex. 692, no op.

An action will not lie by the true owner, for damages for making a levy on land which does not belong to the defendant in execution, without allegation of special acts of trespass on the property. *Howeth v. Mills*, 19 Tex. 295.

5. Levy on Interests of Partnership.

Query whether levy on the interests of one partner by notice to the partnership, there being no seizure of partnership property or interruption of partnership business and no damages save loss of credit, will furnish ground for an action for damages. *Wettermark v. Campbell*, 93 Tex. 517, 56 S. W. 331.

Since Rev. St. art. 2295, provides that a partner's interest in the firm property shall be levied on by leaving a notice with one of the partners, individual creditors of a partner, who seize and sell the partnership property on an execution against him, are liable in damages to the members of the firm. *Currie v. Stuart* (Civ. App.), 26 S. W. 147.

If the mode of levying an execution upon the interest of a partner for his individual debt is not pursued, an unwarranted trespass is committed, for which the wrongdoers are answerable in damages to the owner of the goods. *Middlebrook Bros. v. Zapp*, 73 Tex. 29, 31, 10 S. W. 732.

Where a married woman conducts a mercantile business with two other persons as partners, and an execution

issues against her husband alone, in a cause to which the members of the firm were not made parties, such two persons and the husband, as the representative of community interest of himself and wife, would have a cause of action for a wrongful seizure of the goods under such an execution. *Middlebrook Bros. v. Zapp*, 73 Tex. 29, 31, 10 S. W. 732.

Where a married woman conducts a mercantile partnership with others, and a part of the firm goods have been seized upon an execution against her husband alone, and the wife brings a suit, with her partners, her husband joining pro forma, to recover damages for such wrongful seizure, there can be no recovery where the only damages claimed are for an injury to her separate estate. *Middlebrook Bros. v. Zapp*, 73 Tex. 29, 31, 10 S. W. 732.

6. Levy on Property of Decedent.

A plaintiff in execution, who seizes property of the estate of a decedent under execution upon a judgment against the administrator personally, is liable to the estate for the value thereof. *Pinkard v. Willis & Bros.* (on rehearing), 24 Tex. Civ. App. 69, 57 S. W. 891, affirmed in 94 Tex. 692, no op.

7. Levy on Property in Custody of Law.

See the title **EXECUTORS AND ADMINISTRATORS**.

The mere fact that goods are under the custody of an assignee for the benefit of creditors is not sufficient to sustain an action for damages for the levy and sale of such goods under an execution. *Loeb v. Blum*, 2 Posey Unrep. Cas. 445.

8. Levy on Exempt Property.

The unauthorized seizure and sale of exempt property with notice of its character and against the protest of the owner was a trespass entitling the owner to recover, at least, nominal damages and costs. *McGaughey v. Meeks*, 1 White & W. Civ. Cas. Ct. App. § 1197.

9. Dependent upon Who Receives Proceeds.

A judgment creditor is liable for the seizure and sale of the debtor's property, without regard to who received the proceeds of the sale, where he caused the order of sale to issue, and then, having settled the judgment, failed to recall the order, though knowing that it was in the hands of the officer. *Sanders v. Brock* (Civ. App.), 31 S. W. 311.

C. DAMAGES.

See the title **RIGHT OF PROPERTY, TRIAL OF**.

1. Elements.

a. Injury to Business.

Damages may be recovered for injury to the plaintiff's business. *Middlebrook v. Zapp*, 79 Tex. 321, 15 S. W. 258; *Deleshaw v. Edelen*, 31 Tex. Civ. App. 416, 72 S. W. 413, affirmed in 97 Tex. 631, no op.

In a suit for damages for the wrongful seizure of certain mill machinery under an execution while it was being set up, the plaintiff may recover the value of the mill for the period during which its operation was delayed by such seizure. *Halcomb v. Stubblefield*, 76 Tex. 310, 312, 13 S. W. 231.

b. Loss of Credit.

Loss of credit can not be considered as element of damage. *Neese v. Radford*, 83 Tex. 585, 19 S. W. 141.

c. Interest.

Where crops growing on a homestead are levied upon under an execution before harvest the homesteader is entitled to recover interest by way of damages at eight per cent from the date of levy. *Bailey v. Oliver* (Sup.), 9 S. W. 606.

d. Attorney's Fees.

Where, in an action for wrongful execution, plaintiff had been compelled to employ attorneys, and had employed two firms, and made four trips from one town to another in looking after the case, an allowance of \$50 for at-

torney's fees as a part of punitive damages was not erroneous. *Deleshaw v. Edelen*, 72 S. W. 413, 31 Tex. Civ. App. 416. See, also, *Neese v. Radford*, 83 Tex. 585, 19 S. W. 141.

e. Mental Suffering.

Damages for mental suffering, physical pain, and sickness are not recoverable in an action by a wife for wrongful levy on her property by her husband's execution creditors. *Ainsa v. Moses* (Civ. App.), 100 S. W. 791.

f. Consequential Damages.

In a suit for damages against a constable and his sureties for the seizure and sale of certain tools of a stonemason, by execution, claimed to be exempt from forced sale, there can be no recovery of unforeseen damages, such as those growing out of a contract of which such constable had no notice. *McKnight Bros. v. Carmichael*, 7 Tex. Civ. App. 270, 272, 27 S. W. 150 (see 93 Tex. 646, no op.).

In an action for wrongful levy of an execution, the time lost and expense incurred in trying after levy to find buyers are too remote to form elements of damage. *Fatheree v. Williams*, 13 Tex. Civ. App. 430, 434, 35 S. W. 324.

Where corporate stock, separate property of a wife, was sold under execution against the husband, and purchased by the judgment creditor, damages suffered by her from failure to sell it to a third person as she had prior to the levy contracted to do were not too remote. *First Nat. Bank v. Thomas* (Civ. App.), 118 S. W. 321.

2. Measure of.

a. In General.

Just and reasonable compensation is the correct measure of actual damages for unlawful seizure and sale of property under execution. *Field v. Munster*, 11 Tex. Civ. App. 341, 348, 32 S. W. 417, affirmed in 89 Tex. 102.

b. Value of Property.

The measure of damages for the

wrongful seizure and sale of property is the value of the property at the time of the seizure and the reasonable value of its use during the time plaintiff had been deprived thereof. *Yancy v. Felker*, 3 Willson, Civ. Cas. Ct. App. § 249; *Currie v. Gunter*, 77 Tex. 490, 491, 14 S. W. 127.

The measure of damages for the wrongful seizure of mules levied on as the property of a third person is their value at the time of the seizure, with interest thereon. *Nelson v. Ashmore* (Civ. App.), 56 S. W. 938.

For seizing plaintiff's property under execution against a third person, the measure of damages is the market value of the property at the time and place of the levy, with 8 per cent. interest thereon. *Richardson v. Jankofsky* (Civ. App.), 23 S. W. 815.

In an action to recover for an alleged wrongful levy of an execution on the ground that the defendant in execution was denied the right to point out the property to be levied on, the measure of damages is the value of the goods seized at the time of the levy, less the amount of the judgment. *Avindino's Heirs v. Fr. Beck & Co.* (Civ. App.), 73 S. W. 539.

In an action for wrongful levy on a stock of goods under a judgment for \$665.51, there was evidence that the goods were worth from \$2,500 to \$3,000. The sheriff testified that, in fixing the value at \$1,978.35, he based his estimate on the cost price of the goods in the wholesale markets, with 10 per cent. added to cover freight. Other witnesses testified that the goods were worth from 40 to 50 cents on the dollar. The goods were sold under the execution for \$530, and the purchaser immediately resold them for the same amount. Held, that a finding in favor of plaintiff for \$250 was not erroneous, as inadequate. *Avindino's Heirs v. Fr. Beck & Co.* (Civ. App.), 73 S. W. 539.

Less Amount of Incumbrance.—In

a suit by the purchaser of encumbered property at execution sale against the sheriff for conversion in refusing to deliver the property, the measure of damages is the excess of its value over the lien, with interest. *Brooks v. Lewis*, 83 Tex. 335, 338, 18 S. W. 614.

Less Amount of Judgment.—In an action for an alleged wrongful levy, the measure of damages was held to be the value of the goods seized, less the amount of the judgment. *Avindino v. Beck & Co.* (Civ. App.), 73 S. W. 539.

Where Owner Purchases at Sale.—Where property is wrongfully seized and sold under execution, and at such sale the owner becomes the purchaser at a less price than its market value, the measure of damages in an action by him for the conversion of the property is not its market value at the time of its seizure, with interest, but he is entitled to recover interest on the value of the property from the time of its seizure to the time of such sale, the amount paid by him at the sale, with interest thereon from that date, and whatever amount, if any, the property may have depreciated in value while it was withheld from him. *Schoolher, etc., Co. v. Hutchins*, 66 Tex. 324, 1 S. W. 266, distinguished; *Casey v. Chaytor*, 5 Tex. Civ. App. 385, 23 S. W. 1114; *Field v. Munster*, 11 Tex. Civ. App. 341, 32 S. W. 417, affirmed in 89 Tex. 102.

c. Where Levy on Exempt Property.

See post, "Exemplary," XXIV, C, 3.

In an action for conversion of horses seized under an execution and which are claimed as exempt property, the true test as to the proper measure of damages is the amount which would compensate the plaintiff for the actual, direct, natural, and proximate loss sustained by him by reason of such seizure and conversion. *Yancy v. Felker*, 3 App. Civ. Cases, § 249.

In an action for seizure under an execution and conversion of horses claimed to be exempt property, the market value of the horses at the time

of seizure and the reasonable value of their use during such time he has been deprived of them, would be the proper measure of damages. *Yancy v. Felker*, 3 App. Civ. Cases, § 249.

In an action for damages by levy of an execution on certain exempt horses, the measure of recovery is the value of their hire unless the plaintiff could procure no other means of cultivating his crop, when the damage to crop must be considered. *Steel v. Metcalf*, 4 Tex. Civ. App. 313, 315, 23 S. W. 474.

In an action for damages caused by a levy on two horses which were exempt property, it was error to submit to the jury as the measure of the damages both the value of the horses' hire during the time of their detention, and also the loss to the crop on account of plaintiff being deprived of their use. See the opinion for the correct measure of damages in such case. *Steel v. Metcalf*, 4 Tex. Civ. App. 313, 23 S. W. 474.

The measure of damages for a levy on exempt crops is, so far as the mere conversion of the crops is concerned, the value thereof. *Moore v. Graham*, 29 Tex. Civ. App. 235, 69 S. W. 200.

Homestead Not Claimed.—Where lots levied on under execution were not the residence of plaintiff, but were detached, and plaintiff had not claimed them as a homestead when adjudged a bankrupt a year before the levy, and they had not been set aside as a homestead in the bankruptcy proceedings, though they were really such, a verdict for \$250 as damages for a wrongful levy thereon was excessive. *Chadwick v. Meredith*, 40 Tex. 380.

3. Exemplary.

A deputy United States marshal, who also was agent for a land company, levied upon the cattle under an execution for costs against the parties under whom plaintiff claimed. There was some evidence tending to support a claim for exemplary damages against

the deputy. There was no evidence that the land company either directed the levy or subsequently approved it. Held, that a judgment for exemplary damages against the land company was not supported by the evidence, and was error. *Rankin v. Bell*, 85 Tex. 28, 19 S. W. 874.

Where, in an action for wrongful execution, the plaintiff had been compelled to employ attorneys, and had employed two firms, and made four trips from one town to another in looking after the case, an allowance of fifty dollars for attorney's fees as a part of the punitive damages was not erroneous. *Deleshaw v. Edelen*, 31 Tex. Civ. App. 416, 72 S. W. 413, affirmed in 97 Tex. 631, no op.

Exemplary damages will not be allowed for levy of execution in ignorance of the filing of a supersedeas bond, after the perfection of an appeal by the execution of a cost bond only. *Neesse v. Radford*, 83 Tex. 585, 19 S. W. 141.

A plaintiff is entitled to recover, for a wrongful seizure of property under execution, the actual damages sustained by him, and exemplary damages, under the rules of law applicable to other actions for damages. *McGaughey v. Meeks*, 1 White & W. Civ. Cas. Ct. App. § 1197.

Necessity for Actual Damages.—Exemplary damages are not recoverable for a levy on land in the absence of actual damages. *Adoue v. Wettermark*, 82 S. W. 797, 36 Tex. Civ. App. 585.

Necessity for Malice, etc.—Vindictive damages can not be recovered for a wrongful levy on property, in the absence of evidence showing bad faith, oppression, or wantonness. *Willis v. Chowning*, 18 Tex. Civ. App. 625, 46 S. W. 45, affirmed in 93 Tex. 677, no op.; *Anderson v. Larremore*, 1 App. Civ. Cases, § 947; *Clifford v. Lee* (Civ. App.), 23 S. W. 843, 844.

It is error to give judgment against

execution plaintiffs for exemplary damages on account of the seizure and sale of corn exempt from execution, which they caused to be made under the honest belief that the corn was subject to their debt, and under circumstances repelling any inference of improper motive or oppressive conduct. *Burris v. Booth* (Tex. Civ. App.), 40 S. W. 186.

Exemplary damages for a levy of execution are not authorized, there being no evidence of fraud or conspiracy to injure, or that the levy was oppressive, or that the procuring of it was actuated by malice, but the evidence showing that the execution plaintiff, in procuring it, acted in good faith; believing, under the advice of his counsel, based on a mistake in construction, that a judgment in his favor authorized execution against the execution defendant for the full amount of the judgment. *Adoue v. Wettermark*, 82 S. W. 797, 36 Tex. Civ. App. 585.

Where, in an action for damages for the wrongful levy of an execution, plaintiff claimed that the judgment was satisfied before the execution thereon was issued, and defendant claimed that it was to be settled only on condition that the other defendants in the judgment also settled their parts thereof, though plaintiff claimed that the settlement as to him was without condition, and each side introduced evidence to support its contention, an instruction that if, after the settlement was effected, defendants had the execution issued, and directed the levy thereof, such acts were wrongful and authorized a recovery for exemplary damages, was erroneous, since to warrant a recovery for such damages there must be some bad motive, or such reckless conduct, either intentional or grossly negligent, as shows a conscious disregard of the rights of another. *First Bank of Mertens v. Steffens* (Civ. App.), 111 S. W. 782.

Levy on Exempt Property.—When

officer willfully sells exempt property under execution, he is liable for exemplary damages. *Cone v. Lewis*, 64 Tex. 331, 332.

Where judgment creditors levied on goods in possession of the assignee of the judgment debtor, and the property was held not liable to execution because in custodia legis, in an action by the assignee, he was not entitled to recover exemplary damages. *La Gierse v. Pierce*, 2 Willson, Civ. Cas. Ct. App. § 90.

Where, in an action against a husband and wife, exempt property in the apartments of the wife was levied upon, the constable turning the wife out of the apartments and locking the door and retaining the key, in an action against the constable for levying on exempt goods and acting maliciously and oppressively, plaintiffs were entitled to recover exemplary damages. *Faroux v. Cornwell*, 40 Tex. Civ. App. 529, 90 S. W. 537.

4. Mitigation.

In an action for an unlawful entry into the plaintiff's dwelling, and the seizure and sale of a piano therein, under an order of sale, it was held proper to show what amount of the proceeds of the sale of the piano had been credited on the judgment in mitigation of the plaintiff's damages. *Hillman v. Edwards* (Civ. App.), 74 S. W. 787.

Where the plaintiff's dwelling was unlawfully entered, and a piano therein seized and sold, under an order of sale, it was held, that the plaintiff, suing for damages, was not responsible for the expense of the levy and sale. *Hillman v. Edwards* (Civ. App.), 74 S. W. 787.

D. PROCEDURE.

1. Prerequisites to Action.

Corporate stock, claimed by a wife as separate property, stood in name of the husband who pledged it to secure a note. The note was not paid, and a judgment creditor of the hus-

band bought it and levied on the stock, and became the purchaser at the sale. Held, that she could sue for conversion thereof without paying the note or tendering the amount thereof. *First Nat. Bank v. Thomas* (Civ. App.), 118 S. W. 221.

2. Election of Remedies.

Where a levy has been made on land and on goods, and a third person claims the property taken in execution, and executes a bond under the statute to try the right thereto, he has waived a right to a distinct action for damages as to the personal property. *Howeth v. Mills*, 19 Tex. 295.

3. Joinder of Causes of Action.

Where a sheriff levied an execution on certain range horses, and on the same day also levied on certain plow horses, and the plow horses were replevied, and a suit was brought for damages for levy on range horses, held that separate actions for damages were properly brought. *Millikin v. Smoot*, 71 Tex. 759, 760, 12 S. W. 59.

4. Parties.

Where the husband dies pending a suit brought by him for damages caused by a levy on exempt property, such suit may be prosecuted by the wife alone, without the joinder of children of her deceased husband. *Steel v. Metcalf*, 4 Tex. Civ. App. 313, 23 S. W. 474.

Where a married woman, as trustee for her children, invested their funds in horses, and upon wrongful execution thereon, her husband, in her right, sued for the trespass, the children were neither necessary or proper parties. *Millikin v. Smoot*, 71 Tex. 759, 760, 12 S. W. 59.

He who accepts benefit under an illegal levy upon the property of another after knowledge of the illegal act, will be deemed to have ratified the same, and will be responsible equally with the officer for such damage as is the natural and proximate result of

the illegal act. *Brown v. Bridges*, 70 Tex. 661, 8 S. W. 502.

5. Jurisdiction.

See the title COURTS, vol. 5, p. 161.

6. Venue.

In such suit the venue as to all the defendants is in the county of the seizure and conversion. *Willis & Bro. v. Hudson*, 72 Tex. 598, 10 S. W. 713.

An action for damages caused by the levy of an execution may be maintained against the plaintiff in execution alone in the county where levied, as for a trespass there committed, where plaintiff, through his attorneys, directed the levy in question to be made. *Wettermark v. Campbell*, 93 Tex. 517, 56 S. W. 331.

7. Complaint.

In an action against the execution plaintiff for wrongfully taking a stock of goods under execution, the petition should set out the quantity and value of each of the several articles of property; a general description of the articles and their total value being insufficient. *Beck v. Avondino*, 82 Tex. 314, 18 S. W. 690.

Averment in the petition in an action for wrongful execution that the levy on plaintiff's saloon had injured his business and trade was sufficient, in the absence of exception, to justify a charge submitting the profits lost as the measure of damages. *Deleshaw v. Edelen*, 72 S. W. 413, 31 Tex. Civ. App. 416.

A complaint for wrongful execution, alleging that the amount of property seized was far beyond the amount reasonably necessary to satisfy the execution, that such excessive levy was knowingly made, and that the execution was for \$66, and that the property levied on was worth \$500, and praying exemplary damages, sufficiently states a cause of action for an excessive levy, at least as against a general de-

murrer. *Allen v. Ashburn*, 65 S. W. 45, 27 Tex. Civ. App. 239, citing *Cornelius v. Burford*, 28 Tex. 202, 209.

Under a statute requiring the sheriff to call on the debtor to designate the property to be levied on and to levy on that first, a petition alleging that the plaintiff requested the defendant, the sheriff, to levy on certain property which would have been pointed out to him if the defendant had not refused, states a cause of action against the sheriff for a wrongful levy. *Fatherce v. Williams*, 13 Tex. Civ. App. 430, 434, 35 S. W. 324.

In an action by a landlord to recover from a third person the value of cotton on which the landlord held a lien, an allegation that since the third person had levied on the cotton in question the landlord had received the proceeds of two bales of cotton, and that deducting from the value of the two bales moneys advanced to the tenant to buy supplies and to pick and gin the two bales left a balance which was credited on the account filed, was sufficient, without itemizing the subsequent claim to which the proceeds of the two bales were applied. *Cadenhead v. Rogers & Bro.* (Civ. App.), 96 S. W. 952.

8. General Denial.

In an action for unlawful seizure of goods, defendant may show under a general denial that the goods did not belong to plaintiff. *Willis & Bro. v. Hudson*, 63 Tex. 678.

In a suit by a son to recover cotton sold under an execution against his father, under a plea of general denial, the defendants could prove that the father had placed it in his son's name without an intention to pass title. *Hoffman v. Cleburne Bldg., etc., Ass'n*, 2 Tex. Civ. App. 688, 690, 22 S. W. 155.

In an action for the value of cattle levied on, an assertion in the allegation in the answer that no damage was done said plaintiff or either of them by said levy had the same effect as a

general denial. *McKee v. Le Gette*, 1 White & W. Civ. Cas. Ct. App. § 1146.

9. Special Plea.

Where the plaintiff held the goods under a purchase, valid as between himself and his vendor, but void for fraud as against the defendant and all others the fraud should be specially pleaded. *Willis & Bro. v. Hudson*, 63 Tex. 678.

In an action by a son for the value of cotton sold under execution against his father, the defense that the father transferred the title to his son to defraud the creditors must be specially pleaded. *Hoffman v. Cleburne Bldg.*, etc., Ass'n, 2 Tex. Civ. App. 688, 691, 22 S. W. 155, following *Willis & Bro. v. Hudson*, 63 Tex. 678.

10. Burden of Proof.

In an action against execution creditors for trespass in seizing plaintiff's goods under an execution against a third person, the burden of proving the ownership, seizure, conversion, and value of the goods is on plaintiff, as is also that of proving any circumstances of oppression or malice attending the levy, as a basis for exemplary damages. *Willis v. Hudson*, 72 Tex. 598, 10 S. W. 713.

Plaintiff was a minor, residing with his father, who was insolvent, and defendants seized certain cattle on an execution against the father, to recover the value of which plaintiff, claiming title, brought suit. Defendants claimed that the title was placed in plaintiff for the purpose of defrauding the father's creditors, and the father testified that the cattle in controversy consisted of the increase of the two cows and calves given the son in 1891 in payment of a debt due by reason of a conversion of the increase of a calf branded for the son in 1881, and that at the time of such gift the son was emancipated by agreement between them. Held error to charge that the burden of proof was on defendants to show that the father

as the real beneficial owner of the cattle, and that they were kept in plaintiff's name to conceal them from creditors of the father, since the burden was on plaintiff to show that he owned the cattle for the value of which he sued. *Love v. Hudson*, 59 S. W. 1127, 24 Tex. Civ. App. 377.

11. Evidence.

Admissibility.—It is incompetent to admit the opinion of witnesses as to the probable effect the seizure under execution of the goods of a mercantile firm, with closing of their business, would have. Such fact of injury, if it existed, could be proved directly. *Middlebrook & Co. v. Zapp*, 79 Tex. 321, 15 S. W. 258.

In a suit by purchasers from an insolvent debtor against the sheriff for levying upon the property conveyed to them, where there is an issue of fraudulent confederation between the plaintiffs and the debtor, evidence is competent of confidential business relations between them. *Blum v. Jones*, 86 Tex. 492, 494, 25 S. W. 694, reversing 23 S. W. 844.

In a suit for the wrongful levy of an execution upon certain sheep, and on the question as to whether the mortgagee was in possession of the sheep at time of the seizure which could not be unless the person who held them was in some manner his agent, the declaration of the person in charge, made just before the seizure, that he was in the employ of the mortgagor, is admissible. *Jones v. Hess* (Civ. App.), 48 S. W. 46.

Where, in an action for damages for the wrongful levy of an execution, plaintiff claimed that the judgment had been settled before the execution was issued, it was not error to admit in evidence the officer's return on a prior execution, reciting: "This levy released and this release and the writ returned without any money being collected"—the officer having testified that, after the levy, the parties com-

promised, and that the levy was released under instructions from defendant, and the court having charged that the return should not be considered in determining whether there was an agreement for a settlement of the judgment. *First Bank of Mertens v. Stefens* (Civ. App.), 111 S. W. 762.

In a suit to recover for wrongful seizure under color of legal process, the petition alleged that one of the defendants pretending to act as sheriff assessed the goods by virtue of an execution which he pretended to hold. The defendant after general denial set up a judgment but failed to set out fully the execution and levy under it but were permitted to show on the trial without objection a valid judgment, execution, levy and sale. Held that the pleadings taken together authorized the admission of the evidence. *Friend v. Miller*, 62 Tex. 177.

In an action for an unlawful seizure of goods under execution in which defendant set up the judgment by way of justification for the seizure, plaintiff was entitled to introduce evidence of a parol agreement antecedent to the judgment by virtue of which the judgment was rendered and such evidence is not inadmissible on the ground that it contradicts or varies or qualifies the judgment. *Ward v. Gibbs*, 10 Tex. Civ. App. 287, 30 S. W. 1125.

Weight and Sufficiency.—The taking of plaintiff's property, and conversion by defendants are proved by showing that it was seized and sold by a constable under direction of their attorney, by virtue of process issued in their favor against persons other than plaintiff. *Allen v. Tyson-Jones Buggy Co.* (Civ. App.), 40 S. W. 740.

In an action for damages for loss of crop by reason of the wrongful levy thereon by defendants, evidence that the levy prevented plaintiff from hiring hands to care for the crop before it was destroyed by rain is sufficient to support verdict for plaintiff for both

actual and nominal damages. *Parker v. Hale*, 78 S. W. 555, 34 Tex. Civ. App. 12.

Where, in an action for unlawfully levying upon and selling plaintiff's cotton, there was no specific or affirmative testimony as to the market value of the cotton on November 5th, the precise date of the levy, but there was testimony, tending to show such value on October 20th, when the cotton was purchased by plaintiff, and on November 16th when it was sold under the levy, there was sufficient to warrant a finding as to the market value on the date of levy, there being no evidence that it was less at that date. *Sparks v. Ponder*, 24 Tex. Civ. App. 431, 94 S. W. 428.

Testimony of the owner of goods seized under execution against his vendor that the stock at the time of his purchase, which was only a short time before the seizure, was worth a certain amount, and that the total of his sales since his purchase was a certain sum, is sufficient to sustain, as to the value of the goods, a verdict for 10 per cent. less than the difference between the value at the time of the purchase and the amount of the sales. *Rahl v. Ferguson* (Civ. App.), 33 S. W. 296.

12. Instructions.

In an action for damages arising from the wrongful issuance of an execution, it is error to charge that malice is to be inferred from the want of probable cause. *Clifford v. Lee* (Civ. App.), 23 S. W. 843, 844.

In an action for wrongful levy of execution, a charge calculated to induce the jury to allow damages in respect to plaintiff's crops, when the same had not in fact been levied on, requires reversal. *Baughn v. Allen* (Civ. App.), 68 S. W. 207.

An instruction in an action for the wrongful seizure of property, where fraud is in issue, that fraud can not be presumed unless the facts and circum-

stances from which it is claimed to be found are so clear and strong as to reasonably satisfy the jury that it exists, is erroneous, as requiring too great a degree of proof. *Nelson v. Ashmore* (Civ. App.), 56 S. W. 938.

In an action to recover the value of a stock of millinery sold under a void execution, where the court merely charged to find for defendants if the owners bought back the goods from the purchaser at the sale for an amount less than the judgment, it was error to refuse a requested charge to find for the defendants if the goods were put back in the possession of the owners, who got the benefit of the same, and paid for them, in the future, the price for which they were sold on execution; there being evidence upon which the jury might have found that there had been such a conditional sale. *Beck v. Avindino*, 68 S. W. 827, 29 Tex. Civ. App. 500.

In an action for damages for the levy of an execution, plaintiff claimed that the property was exempt, and that the judgment was satisfied prior to the issuance of the execution. The court instructed specially that part of the property was exempt, and that, if defendants willfully caused the execution to be levied thereon for the purpose of injuring, etc., plaintiff, he was entitled, in addition to the value of the property, to exemplary damages, etc., and also charged that if an agreement of settlement was made between plaintiff and defendant of a judgment against plaintiff and others, and that after such settlement defendant directed the levy of the execution, such acts were wrongful, and entitled plaintiff to recover exemplary damages, in addition to the value of the property levied on. Held, that such charges were erroneous, as unduly emphasizing the issue of exemplary damages, and as calculated to impress the jury with the belief that, in the opinion of the court, plaintiff was entitled to re-

cover therefor. *First Bank of Mertens v. Steffens* (Civ. App.), 111 S. W. 782.

In an action against execution creditors for trespass in seizing plaintiff's goods under an execution against H. & Co., the defense was that the goods were not in fact plaintiff's but were held by him for H. & Co. Defendants introduced a bill of sale of goods by H. & Co. to plaintiff, with evidence as to the consideration paid by plaintiff, it being contended that at least part of the goods seized were included in the bill of sale. The court charged that, if the goods were delivered pursuant to said bill of sale, it would vest the title in plaintiff, unless it was the intention of the parties that they should merely be put under the cover of a different name, while they were to remain the property of H. & Co. Held, that the charge was not a charge on the weight of the evidence. *Willis v. Hudson*, 72 Tex. 598, 10 S. W. 713.

13. Submission to Jury.

In an action by a trustee and the beneficiaries against a sheriff and execution plaintiff for the value of certain horses converted by sale under such execution, the uncontradicted testimony was that a tenant owned an interest in the horses. Held, that a submission of the case as though the trustee could recover for the value of all the horses was error. *Herring & Kelly v. Patten*, 18 Tex. Civ. App. 147, 44 S. W. 50.

14. Verdict.

In a suit by one partner for damages for a wrongful levy on firm goods, where the petition alleged that the goods were worth \$1,384.31, and plaintiff's interest was less than half, a verdict for \$800 was excessive. *Houghton v. Puryear* (Civ. App.), 41 S. W. 371.

Where, in an action for damages for the levy of an execution, plaintiff claimed that the judgment was satisfied prior to the issuance of the exe-

cution, and the court charged that, if the jury found that the judgment has been so satisfied, they might find for plaintiff the value of the property, a general verdict for plaintiff embraced a finding that the judgment was satisfied. *First Bank of Mertens v. Steffens* (Civ. App.), 111 S. W. 782.

In a suit against the sheriff and the execution creditor for the seizure of goods in which the sheriff and the creditor impleaded each other on the bonds of indemnity, a general verdict for the plaintiff will not authorize judg-

ment in favor of the sheriff against the creditor. *Longcope v. Bruce*, 44 Tex. 434, 436.

Directing Verdict.—It was error in an action for the wrongful seizure of property under an execution to direct a verdict for the plaintiff on the ground that two horses seized by the defendant were exempt, it appearing that four horses belonged to plaintiff's family, and evidence being conflicting as to truth of his claim that the other two belonged to his children. *Pardue v. Recer* (Civ. App.), 46 S. W. 112.

Execution Sales.

See the title SHERIFFS' SALES.

Executive.

See cross references under GOVERNOR.

Executive Department.

See the titles ATTORNEY GENERAL, vol. 2, p. 608; MANDAMUS; STATE AND REPUBLIC; UNITED STATES. As to separation of departments, see the title CONSTITUTIONAL LAW, vol. 4, p. 405, et seq.

Executive Officers.

See references under EXECUTIVE DEPARTMENT. See, also, the title SHERIFFS, CONSTABLES AND MARSHALS. See, also, generally, the title PUBLIC OFFICERS.

Executor De Son Tort.

See the title EXECUTORS AND ADMINISTRATORS.

EXECUTORS AND ADMINISTRATORS.

BY THE EDITORIAL STAFF.

I. General Consideration, 390.

- A. Definitions, 390.
 - B. Status of Personal Representative as Trustee, 391.
 - C. Laws Governing, 391.
 - D. Jurisdiction of Administration, 392.
 - 1. In General, 392.
 - 2. Transfer of Administration to New County, 394.
 - 3. Removal to District Court, 394.
 - E. Necessity for and Object of Administration, 394.
 - 1. In General, 394.
 - 2. Indebted Estates, 395.
 - a. In General, 395.
 - b. Debts Which Necessitate Administration, 396.
 - c. Estates Free from Indebtedness, 398.
 - (1) In General, 398.
 - (2) Necessity for Recovering Claim in Favor of Decedent, 398.
 - (3) Condition Precedent to Sale, 398.
 - (4) For Partition, Recovery of Legacies, Devises or Distributive Shares, 399.
 - (5) Husband's and Wife's Estates, 399.
 - (6) Community Property, 399.
 - (7) Infant's Estate, 399.
 - (8) Estates of Deceased Soldiers, 399.
 - (9) Estates Liable to Be Escheated, 400.
 - 3. Withdrawal or Withholding Estate from Administration, 400.
 - a. Withdrawal by Heirs, Distributees, Devisees and Legatees, 400.
 - (1) Mode, 400.
 - (2) Bond Required of Party Withdrawing, 401.
 - (3) Persons to Whom Delivery Made, 402.
 - (4) Partition, 402.
 - (5) Remedies of Creditors, 402.
 - b. Death of Widows as Divesting Administration of Community Property, 403.
 - c. Independent Executorship, 403.
- F. Executorship Free from Control of Court, 403.
 - 1. In General, 403.
 - 2. Requisites of Will, 404.
 - 3. Assent of Heirs, 405.
 - 4. Effect of Death, Resignation or Failure to Qualify of Person Named in Will, 405.
 - a. In General, 405.
 - b. Qualification of One of Several Joint Independent Executors, 405.
 - 5. Operation and Effect, 405.
 - a. In General, 405.
 - b. Jurisdiction of Court, 406.

- c. Powers of Executor, 406.
- d. Collateral Attack, 406.
- 6. Remedies of Creditors, 406.
- G. Joint Administration of Community Estate of Deceased Husband and Wife, 407.

II. Appointment, Qualification and Tenure of Office, 407.

A. Appointment, 407.

1. Executor, 407.

- a. Persons Who May Be Appointed, 407.
- b. Terms of Will by Which Appointment Made, 407.
- c. Renunciation of Appointment, 407.
 - (1) Right to Renounce, 407.
 - (2) Effect, 408.
 - (a) Renunciation by Sole Executor, 408.
 - (b) Renunciation by One or More Coexecutors, 408.
- d. Forfeiture of Right to Letters, 409.
- e. Death before Qualification of Coexecutor, 409.

2. Administrator, 409.

- a. Persons Who May Be Appointed, 409.
 - (1) In General, 409.
 - (2) Aliens and Nonresidents, 409.
 - (3) Married Women, 409.
 - (4) Creditors, 410.
 - (5) Surviving Partners, 410.
 - (6) Persons Intermeddling with the Estate—Executors De Son Tort, 410.
 - (7) Guardian of Deceased Infant, 410.
 - (8) Persons Claiming Adverse to Heirs, 410.
 - (9) Persons of Unsound Mind, 410.
 - (10) Probate Judge, 410.
 - (11) Attorney for Creditor, 411.
- b. Right to Appointment, 411.
 - (1) Discretion of Court, 411.
 - (2) Good Character of Applicant—Ability to Procure Bond, 411.
 - (3) Order of Appointment, 411.
 - (a) Next of Kin, Principal Devisee and Legatee, 411.
 - aa. In General, 411.
 - bb. Estates of Deceased Soldiers, 411.
 - (b) Surviving Spouse, 412.
 - (c) Creditors, 413.
 - (4) Waiver of Right to Administer, 413.

B. Grant of Letters, 413.

- 1. Probate of Will, 413.
- 2. Jurisdiction and Venue, 413.
 - a. Conditions Precedent, 413.
 - (1) In General, 413.
 - (2) Death of Person on Whose Estate Administration Asked, 413.
 - (3) Existence of Debts, 414.
 - (4) Existence and Sufficiency of Estate or Assets, 415.

- (5) Domicile of Decedent and Situs of Estate, 415.
 - (a) In General, 415.
 - (b) County of Residence, 416.
 - (c) County of Domicile or Lex Rei Siti, 416.
 - (d) Estate of Nonresidents, 416.
 - (e) County Where Death Occurred, 416.
 - (f) Situs of Assets, 416.
- b. Jurisdiction of Particular Courts, 417.
- c. Transfer of Administration to New County, 417.
- d. Exclusive, Concurrent and Conflicting Jurisdiction, 417.
- 3. Time within Which Application May Be Made, 418.
 - a. In Absence of Statute, 418.
 - b. Under the Statutes, 421.
- 4. Parties, 422.
 - a. Parties Who May Apply, 422.
 - b. Parties Contestant or Defendant, 422.
- 5. Petition or Application, 422.
 - a. Application for Administration on More than One Estate, 422.
 - b. Averments, 422.
 - (1) Necessary Averments, 422.
 - (2) Sufficiency of Averments, 423.
- 6. Objections to Appointment, 423.
- 7. Intervention, 423.
- 8. Hearing, 423.
- 9. Order or Decree, 424.
- 10. Review, Appeal, Certiorari, 424.
 - a. Abatement by Death of Party, 424.
 - b. Review of Proceedings of County Court, 424.
 - c. Review of Proceedings of District Court, 425.
- 11. Costs, 425.
- C. Qualification, 425.
 - 1. Necessity and Effect of Failure to Qualify, 425.
 - 2. Time and Manner, 426.
 - a. Time, 426.
 - b. Oath, 426.
 - c. Bond, 426.
 - d. Independent Executor, 426.
 - 3. Proof, 426.
- D. Necessity for, Validity and Effect of Issuance of Letters, 426.
 - 1. Necessity, 426.
 - 2. Validity, Operation and Effect of Grant of Letters, 427.
 - a. Validity, 427.
 - (1) In General, 427.
 - (2) Irregularities and Omissions, 427.
 - (3) Publication of Notice of Appointment, 427.
 - (4) Effect of Unwise Execution, 427.
 - b. Operation and Effect, 427.
 - (1) Operation as Evidence, 427.
 - (a) Probate of Will, 427.
 - (b) Proof of Appointment and Authority, 427.
 - (c) As Proof of Death, 428.

- (2) As Terminating Wife's Representation of Husband's Estate as Survivor, 429.
 - (3) Conclusiveness of Decision, 429.
 - (a) Collateral Attack, 429.
 - aa. In General, 429.
 - bb. Matters Concluded, 429.
 - cc. Person Concluded, 429.
 - dd. Grounds of Attack, 430.
 - (aa) Want of Jurisdiction, 430.
 - aaa. In General, 430.
 - bbb. Where Record Affirmatively Shows Want of Jurisdiction, 430.
 - ccc. Presumptions as to Jurisdiction, 430.
 - ddd. Irregularities or Error in Exercise of Jurisdiction, 432.
 - eee. Showing and Determination of Jurisdiction, 433.
 - (bb) Effect of Lapse of Time and Intervention of Rights of Third Persons, 433.
 - (cc) Appointment Secured by Fraud or Collusion or for a Fraudulent Purpose, 434.
 - (b) Vacating or Setting Aside, 434.
- E. Suspension of Power, 435.
- F. Duration and Termination, 435.
 - 1. Term of Administration, 435.
 - a. In General, 435.
 - b. Extension, 435.
 - 2. Temporary Administrator, 437.
 - 3. Revocation or Removal, 437.
 - a. Grounds, 437.
 - b. Jurisdiction, 438.
 - c. Time of Application, 438.
 - d. Petition, 438.
 - e. Effect of Bringing Suit, 438.
 - f. Order, 439.
 - g. Review of Order, 439.
 - h. Restraining Removal, 439.
 - i. Effect of Removal, 439.
 - j. Delivery of Papers Belonging to Estate, 440.
 - k. Proceedings to Set Aside Removal, 440.
 - l. Presumption That Order of Removal Set Aside, 440.
 - m. Cost, 440.
 - 4. Resignation, 440.
 - 5. Death, 441.
 - 6. Presumption That Order of Discharge or Removal Revoked, 441.
 - 7. Effect of Termination, 441.
- G. Closing Succession and Discharge, 441.
 - 1. Necessity and What Constitutes, 441.
 - 2. Objections to Discharge, 442.
 - 3. Presumption That Administration Closed Vel Non, 442.

4. Proof of Closing, 443.

5. Effect of Closing, 443.

H. Reopening, 443.

III. Bond, 444.

A. Necessity for Executing, 444.

B. Purpose of Bond, 444.

C. Form and Requisites, 444.

1. In General, 444.

2. By Whom Executed, 445.

3. Amount, 445.

4. Voluntary Bond, 445.

D. Operation and Effect, 445.

E. Breach of Bond, 446.

F. Rights and Liabilities of Sureties, 447.

1. In General, 447.

2. Liability of Different Sets of Sureties, 447.

3. Extent of Indemnity, 448.

4. Discharge of Sureties, 448.

5. Right to Question Distribution of Assets, 449.

6. Curator or Administrator of Vacant Succession, 449.

G. Requiring New or Additional Bond, 449.

1. In General, 449.

2. Effect of Notice to File New Bond, 449.

H. Action on Bond, 450.

1. Nature and Form of Action, 450.

2. Right of Action and Conditions Precedent, 450.

a. Demand, 450.

b. Fixing Devastavit, 450.

c. Settlement of Account and Discharge, 450.

3. Jurisdiction, 451.

4. Venue, 452.

5. Accrual of Cause of Action and Limitations, 452.

6. Process, 453.

7. Parties, 453.

a. Parties Who May Sue, 453.

(1) In General, 453.

(2) Heirs and Distributees, 453.

(3) Creditors, 453.

(4) Administrator De Bonis Non, 454.

b. Parties Defendant, 454.

8. Petition, 455.

9. Plea, 456.

10. Set-Off, 456.

11. Evidence, 456.

a. Presumptions and Burden of Proof, 456.

b. Admissibility, 457.

12. Instructions, 457.

13. Judgment, 457.

14. Amount of Recovery, 458.

15. Appeal, 458.

IV. Inventory and Appraisal, 458.

- A. Necessity, 458.
- B. Requisites and Validity, 458.
- C. Property to Be Inventoried, 459.
- D. Operation and Effect, 459.
 - 1. As Evidence, 459.
 - a. As Evidence of Title, 459.
 - (1) Admissibility, 459.
 - (2) Weight and Sufficiency, 459.
 - b. As Evidence of Solvency, 462.
 - c. Evidence That Land Not Included in Partition, 462.
 - 2. Operation as Notice, 462.
- E. Failure to File, 462.
- F. Proof of Existence and Return, 463.
- G. Compelling Return, 463.
- H. Corrected Additional and Supplementary Inventories, 463.
 - 1. Right of Administrator to Make, 463.
 - 2. Proceedings to Compel Making, 463.
 - 3. Presumption as to Filing, 465.

V. Collection, Custody, Control and Preservation of Estate, 465.

- A. Laws Governing, 465.
- B. Control and Instruction of Court, 465.
 - 1. In General, 465.
 - 2. Jurisdiction of Court, 465.
 - a. District Court, 465.
 - b. County or Probate Court, 465.
 - 3. Control of Independent Executor, 466.
 - 4. Prevention of Fraud and Fraudulent Combinations, 466.
 - 5. Instruction and Guidance of Court, 467.
- C. Powers, Duties, Liabilities and Validity of Acts Generally, 467.
- D. Powers Conferred by Will, 467.
- E. Powers before Probate of Will and Qualification, 468.
- F. While Appeal from Appointment Pending, 468.
- G. After Notice to Give New Bond, 468.
- H. Degree of Care Required—Due Diligence, 468.
 - I. Delegation of Power, 469.
 - J. Estoppel and Admissions, 470.
 - K. Property Subject to Administration, 469.
 - 1. Title and Ownership, 470.
 - a. At Common Law and under the Civil Law, 470.
 - (1) At Common Law, 470.
 - (2) Under Civil Law, 471.
 - b. Under Statutes of Texas, 471.
 - (1) Personal Property, 471.
 - (a) In General, 471.
 - (b) Pledged and Mortgaged Personalty, 471.
 - (c) Personalty in Hands of Heir, etc., 471.
 - (d) Personalty Sold by Distributee, 471.
 - (2) Real Property, 472.
 - (a) In General, 472.

- (b) Title and Interest of Heirs and Distributees, Legatees and Devisees, 472.
 - aa. In General, 472.
 - bb. Sales and Conveyances by Heirs, etc., 473.
 - cc. Rights of Creditors of Heirs, 476.
 - (3) Community Property, 477.
 - (4) Partnership Assets Where Surviving Partner Administrator, 477.
 - (5) Interests in Public Lands, 477.
 - (a) In General, 477.
 - (b) Headright Certificates, 477.
 - (6) Contracts of Decedent, 478.
 - (a) General Rule, 478.
 - (b) Executory Personal Contracts, 478.
 - (c) Contracts Respecting Personalty, 478.
 - (d) Contracts Respecting Realty and Interests Therein, 478.
 - aa. Contracts for Location of Land, 478.
 - bb. Contract of Purchase of Land, 478.
 - cc. Sales by Decedent, 479.
 - dd. Lease, 480.
 - (e) Rescission and Cancellation, 480.
 - (f) Specific Performance, 480.
 - c. Under Will, 480.
 - 2. Possession and Use, 481.
 - a. In General, 481.
 - b. Rents and Profits, 481.
 - 3. Abandonment of Lands of Estate, 482.
 - a. Putting Another in Possession, 482.
 - b. Establishment of Boundary, 482.
 - 4. Power to Claim and Hold Adversely to Estate, 482.
 - L. Discovery and Collection, 482.
 - 1. Duty and Authority, 482.
 - a. In General, 482.
 - b. Duty to Collect by Suit, 483.
 - 2. Liability for Failure to Collect, 483.
 - a. General Rule, 483.
 - b. Degree of Care Required, 484.
 - c. Allowing Cause of Action to Be Barred, 484.
 - 3. Receiving Payment, 484.
 - a. Authority to Receive, 484.
 - b. Authority as to Medium or Mode, 484.
 - (1) General Rule, 484.
 - (2) Receiving Payment in Something Other than Money, 484.
 - (3) Payment in Confederate Money, 485.
 - (4) By Set-Off, 485.
 - c. Amount, 486.
 - d. Liability, 486.
 - 4. Arbitration and Compromise, 486.
 - M. Care, Management and Preservation, 486.
 - 1. Statutory Provisions, 486.
 - 2. Contracts, 486.

- a. Powers, 486.
- b. Requisites and Validity, 486.
 - (1) Consideration, 486.
 - (a) In General, 486.
 - (b) Obligations Payable in Confederate Money, 486.
 - (2) Fraud, 486.
- c. Personal Liability on Unauthorized Contract, 487.
- d. Particular Contracts, 487.
 - (1) Bills and Notes, 487.
 - (2) Agreement to Waive Right of Appeal, 487.
 - (3) Contracts for Services, Labor, etc., 487.
 - (a) In General, 487.
 - (b) Agent to Sell Real Estate, 487.
 - (c) Contract for Location of Land, 487.
 - (d) Employment of Attorney, 488.
 - (e) Contract to Pay Debts of Estate, 489.
 - (4) Contracts Respecting Real Estate, 489.
 - (a) Contracts for Repairs and Improvements, 489.
 - (b) Lease by Executor and Administrator, 489.
 - (c) Mortgage, 489.
 - (d) Sale, 491.
 - (5) Pledge of Personalty, 491.
 - (6) Suits, 491.
- 3. Continuing Business and Managing Plantation of Deceased, 491.
 - a. Under Power Conferred by Will, 491.
 - b. In Absence of Power under Will, 491.
 - (1) Prior to Statute of 1879, 491.
 - (2) Subsequent to Statute of 1879, 492.
 - (a) In General, 492.
 - (b) Power to Borrow Money and Execute Evidence of Debt, 492.
 - (c) Managing Plantation, 492.
 - (d) Mercantile Business, 493.
 - (e) Partnership Business, 494.
- 4. Investments and Loans, 495.
- 5. Individual Interest in Transaction or Contract, 495.
 - a. In General, 495.
 - b. Effect of Power of Sale Mortgage, 495.
 - c. Payment of Individual Indebtedness with Funds of Estate, 495.
 - d. Taking Property at Appraised Value, 496.
 - e. Purchase by Executor or Administrator at His Own Sale, 496.
 - f. Purchase from Heirs, 496.
 - g. Purchase from Decedent's Vendee, 496.
 - h. Purchase of Claims against Estate, 496.
 - i. Remedy, 496.
- 6. Advances by Executor or Administrator, 496.
- 7. Expenditures, 497.
 - a. General Rule, 497.
 - b. Attorney's Fees and Court Costs, 497.
 - c. Taxes, 498.
- 8. Misappropriation, Waste or Loss of Assets, 499.
 - a. General Rule, 499.

- b. Loss before Qualification, 499.
 - c. Recovery by Administrator d. b. n., 499.
- 9. Interest, 499.
- 10. Torts, 500.
 - a. In General, 500.
 - b. Fraud and Illegality, 500.
 - c. Conversion or Retention of Property of Third Person, 501.
 - (1) In General, 501.
 - (2) Actions, 501.
 - (a) Personal or Representative Capacity, 501.
 - (b) Form of Action, 501.
 - (c) Time to Sue and Limitations, 502.
 - (d) Parties, 502.
 - (e) Pleading, 502.
 - (f) Verdict, 502.
 - (g) Judgment, 502.
 - (h) Appeal, 503.
- N. Personal Liability, 503.
- O. Property Acquired by Executor or Administrator, 503.
 - 1. Conveyance in Individual Capacity, 503.
 - 2. Deed to Executor or Administrator as Such, 504.
 - 3. Property Purchased with Funds of Estate, 504.
 - 4. Purchase at Sale in Favor of Decedent's Estate, 504.
 - 5. Purchase from Heirs, Devisees, etc., 505.
 - 6. Purchase from Decedent's Vendee, 505.
 - 7. Purchase of Claims against Estate, 505.
- P. Coexecutors and Coadministrators, 505.
 - 1. Authority of Part to Act, 505.
 - 2. Effect of Death, Resignation or Refusal to Act, 506.
 - a. In General, 506.
 - b. Effect of Failure to Qualify, 506.
 - c. Surviving Coexecutor or Administrator, 507.
 - (1) Authority to Act, 507.
 - (2) When Powers Conferred by Will Survive, 507.
 - 3. Collection of Assets, 507.
 - 4. Liability, 508.
- Q. Subsequent Marriage of Executrix, 508.
- R. Trusts Collateral to Administration Confided to Executor, 508.
- S. Suits for Recovery of Assets and Preservation of Estate, 508.
 - 1. Jurisdiction and Venue, 508.
 - a. Probate Court, 508.
 - b. County Court, 509.
 - c. District Court, 509.
 - d. Venue, 510.
 - 2. Right of Action, 510.
 - a. In General, 510.
 - b. Capacity to Sue, 510.
 - (1) In General, 510.
 - (2) Personal or Representative Capacity, 510.
 - c. Defenses, 511.
 - 3. Form of Action or Remedy, 511.

- a. Cancellation or Rescission, 511.
- b. Summary Remedy for Failure of Attorney to Pay over Money, 511.
- c. Injunction, 511.
- d. Trespass to Try Title, 512.
- 4. Limitation of Action, 512.
 - a. Persons for and against Whom Limitations Run, 512.
 - b. Period, 512.
 - c. Suspension, 512.
- 5. Parties, 513.
 - a. Proper Parties, 513.
 - (1) Parties Plaintiff, 513.
 - (a) General Rule, 513.
 - (b) Heirs, Distributees, Legatees and Devisees, 513.
 - aa. General Rule, 513.
 - bb. Exceptions to Rule, 515.
 - (aa) Where Representative Can Not or Will Not Sue, 515.
 - (bb) Interest of Administrator Antagonistic to Estate, 516.
 - (cc) Suits Necessary to Preserve Estates, 516.
 - (dd) Where There Is No Administration and No Necessity Therefor, 517.
 - (ee) Where Administration Closed or Administrator Discharged, 519.
 - (ff) Suits to Cancel Conveyance or Vacate Will, 519.
 - (gg) Partition Including Property Sued for, 519.
 - (hh) Allegation and Proof of Conditions Precedent, 519.
 - (ii) Objections to Capacity to Sue, 521.
 - (jj) Right of Personal Representative to Intervene, 521.
 - (c) Creditors, 521.
 - (2) Parties Defendant, 522.
 - b. Necessary Parties, 522.
 - (1) Heirs, Devisees and Legatees, 522.
 - (2) Suit to Set Aside Fraudulent Conveyance, 523.
 - c. Intervention, 523.
 - (1) Third Persons in Suits by Executor or Administrator, 523.
 - (2) Executor or Administrator in Actions by Others, 523.
- 6. Pleading, 523.
 - a. Petition, 523.
 - b. Plea or Answer, 524.
- 7. Issues and Proof, 524.
- 8. Evidence, 524.
- 9. Questions for Jury, 525.
- 10. Adjustment of Liens, 525.
- 11. Set-Off and Counterclaim, 525.
 - a. Debts and Claims Which May Be Pleaded as Set-Offs, 525.
 - b. Requisites of Plea or Answer, 528.
 - c. Recovery of Excess of Set-Off over Debt, 529.

- d. Evidence, 529.
- 12. Judgment, 529.
 - a. Form and Requisites, 529.
 - b. Operation and Effect, 529.
- 13. Review, 530.
- 14. Injunction against Enforcement of Claim, 530.

VI. Allowance to Surviving Spouse and Children and in Lieu of Exemptions, 530.

- A. Statutory Provisions, 530.
- B. Right to Allowance and Exemptions, 530.
 - 1. In General, 530.
 - 2. Allowance in Lieu of Exempt Property, 530.
 - 3. Testamentary Provisions and Effect of Will on Right, 531.
 - 4. Additional Allowance, 531.
 - 5. Persons Entitled to Allowance, 531.
 - 6. Allowance for Maintenance and Support, 532.
- C. Property Subject, 532.
- D. Allowance by Court and Proceedings Therefor, 533.
 - 1. Duty to Set Apart Allowance, 533.
 - 2. Jurisdiction, 534.
 - 3. Parties, 535.
 - 4. Pleading, 535.
 - 5. Hearing, 535.
 - 6. Order or Decree and Review, 535.
- E. Amount, 536.
- F. Apportionment between Wife and Children, 538.
- G. Waiver or Bar, 538.
- H. Priority as to Other Claims, 539.
 - 1. In General, 539.
 - 2. Mortgages and Liens, 540.
 - a. In General, 540.
 - b. Landlord's Lien, 540.
 - c. Vendor's Lien, 541.
 - d. Mortgage, 542.
- I. Effect of Setting Apart Allowance, 542.
- J. Rights of Heirs, Widow, Children and Creditors, 542.

VII. Claims against Decedent's Estate, 544.

- A. Assignability, 544.
- B. What Constitutes Debts of Estate, 544.
 - 1. Medical Bills, 544.
 - 2. Funeral Expenses, 544.
 - 3. Allowance in Lieu of Homestead and Exempt Property, 544.
 - 4. Expenditures by Executor or Administrator, 544.
 - 5. Attorney's Fees and Costs of Litigation, 544.
 - 6. Claims Arising after Death of Decedent, 545.
 - 7. Claims Barred by Statute of Limitations, 545.
 - 8. Claims Based on Contracts of Decedent, 546.
 - a. Personal Contracts, 546.
 - b. Joint Contracts, 546.
 - c. Partnership Contracts, 547.

- d. Contracts of Suretyship, 547.
- e. Covenants and Warranties, 547.
- f. Agreements to Make Will, 547.
- g. Failure of Consideration, 548.
- h. Note for Community Indebtedness, 548.
- i. Note from Husband to Wife, 548.
- 9. Claim by Heirs for Rent of Community Property, 548.
- 10. Claims of Executor or Administrator, 548.
- 11. Claim for Trust Fund, 548.
- 12. Contingent Claims, 549.
- 13. Debts Contracted by Surviving Partner, 549.
- 14. Debts Created by Executor or Administrator, 549.
- 15. Improvements, 549.
- 16. Judgments, 549.
- 17. Legacies Charged on Land, 550.
- 18. Loans or Advances to Estate, 550.
- 19. Note from Husband to Wife, 550.
- 20. Obligations Payable in Confederate Money, 550.
- 21. Taxes, 550.
- C. Assets or Property Subject to Payment of Debts, 551.
 - 1. General Rule, 551.
 - 2. Real Property, 551.
 - 3. Primary Fund, 552.
 - a. At Common Law, 552.
 - b. In Texas, 552.
 - (1) In General, 552.
 - (2) Incumbrances on Land, 553.
 - 4. Property in Hands of, or Distributed Among Heirs, 554.
 - 5. Community Property, 554.
 - 6. Land Conveyed to Estate of Deceased, His Heirs and Assigns, 554.
 - 7. Lands Conveyed to Grantees as Heirs of Deceased, 554.
 - 8. Bounty Warrants, Donation Certificates, Gratuities, etc., 555.
 - a. Bounty and Pension Warrants, 555.
 - b. Donation Certificates and Gratuities, 555.
 - c. Headright Certificates and Grants to Heirs, 556.
 - 9. Homestead and Exempt Property, 558.
 - 10. Crops and Products of Land, 559.
 - 11. Rents and Revenues Reserved to Decedent in Fraudulent Conveyance, 559.
 - 12. Interest of Mortgagor, 559.
 - 13. Equity of Redemption, 559.
 - 14. Interest of Vendee, 560.
 - 15. Debts Payable to Decedent, 560.
 - 16. Damages Recovered for Injury to Estate, 560.
 - 17. Claims for Death by Wrongful Act, 560.
 - 18. Insurance Moneys, 560.
 - 19. Legacies and Devises, 560.
 - 20. Partnership Assets, 560.
 - 21. Slaves and Their Hire, 561.
 - 22. Ownership at Time of Death, 561.
 - a. Property Disposed of by Decedent, 561.
 - (1) In General, 561.

- (2) Gifts by Decedent in Lifetime, 561.
- (3) Property Assigned for Benefit of Creditors, 561.
- (4) Property Fraudulently or Voluntarily Conveyed by Decedent, 561.
- b. Evidence of Ownership, 563.
23. Foreign Assets, 563.
- D. Persons Liable for Debts of Intestate and Incumbrances on Property, 563.
 1. Nature and Grounds of Liability of Heirs and Distributees, 563.
 - a. In General, 563.
 - b. By Accepting Succession under Civil Law, 563.
 - c. Where No Administration Necessary, 564.
 - d. Estate Withdrawn from Administration, 564.
 - e. Where There Can Be No Administration, 565.
 - f. Where Will Provides for Administration Out of Court, 565.
 2. What Law Governs, 565.
 3. Liabilities on Distribution or Descent of Property, 565.
 - a. In General, 565.
 - b. In Absence of Administration, 566.
 - c. On Descent at Common Law, 566.
 - d. Debts Enforcible, 566.
 - e. Extent of Liability, 567.
 - f. Right to Assume Debts upon Descent of Homestead, 567.
 4. Liability on Ancestor's Warranty, 567.
 5. Allowance for Debts Paid by Heirs before Administration, 568.
 6. Contribution from Coheirs, 568.
- E. Presentation and Authentication of Claims, 568.
 1. Presentation, 568.
 - a. Object, 568.
 - b. Necessity, 568.
 - (1) General Rule, 568.
 - (2) Claims Which Must Be Presented, 569.
 - (a) In General, 569.
 - (b) Claims Incurred by Administrator, 569.
 - (c) Claims Enforced against Independent Executor, 569.
 - (d) Judgments, 570.
 - (e) Mortgages and Other Secured Claims, 571.
 - (f) Claims Uncertain, Unliquidated, and Not Yet Due, 573.
 - (g) Miscellaneous Claims, 574.
 - c. Form and Requisites, 577.
 - d. Who May Present Claims, 577.
 - e. Time of Presentation, 577.
 - (1) In General, 577.
 - (2) Effect of Not Presenting within Statutory Time, 578.
 - (a) Under Law of 1840, 578.
 - (b) Under Present Law, 579.
 - (c) Presentation to Foreign Executor or Administrator, 580.
 - (3) Excuse for Failure to Present in Time, 580.
 - f. Construction, Operation and Effect of Presentation, 581.
 - g. Proof of Presentation, 582.
 - h. Objections to Presentation, 582.

- i. Presentation of Part of Claim, 582.
- j. Second Presentation, 582.
- 2. Authentication, 583.
 - a. Object, 583.
 - b. Necessity, 583.
 - (1) General Rule, 583.
 - (3) Claims Incapable of Proof by Affidavit, 584.
 - (a) Money Claims, 583.
 - (b) Mortgage, 583.
 - (c) Claim of Personal Representative against Estate, 583.
 - (d) Claims Enforced against Independent Executor, 583.
 - (e) Uncertain Claims, 584.
 - (3) Claims Incapable of Proof by Affidavit, 584.
 - c. Form, Requisites and Sufficiency of Affidavit, 584.
 - (1) Form, 584.
 - (2) Requisites and Sufficiency, 584.
 - (a) In General, 584.
 - (b) Must Be in Writing, 585.
 - (c) Signature, 585.
 - (d) Contents of Affidavit, 585.
 - d. Who May Authenticate Claims, 587.
 - e. Before Whom Authentication May Be Made, 588.
 - f. Operation and Effect, 588.
 - g. Defects and Objections, 588.
- F. Allowance and Disallowance, 589.
 - 1. Necessity, 589.
 - 2. Allowance or Rejection by Executor or Administrator, 589.
 - a. Necessity for Allowance, 589.
 - b. Authority of Executor or Administrator, 589.
 - (1) In General, 589.
 - (2) Administrator Who Resigned but Whose Successor Not Qualified, 589.
 - (3) Administrator Pro Tem. Whose Powers Suspended, 589.
 - (4) Independent Executor, 589.
 - c. Claims Which May Be Allowed, 589.
 - (1) In General, 589.
 - (2) Mortgage of Estate Property for Debt Other than of Estate, 589.
 - (3) Claims Owned by Executor or Administrator, 589.
 - (4) Credit on Claims Due Estate, 590.
 - d. Acts Constituting Allowance, 590.
 - e. Acts Constituting Rejection, 590.
 - (1) Refusal to Indorse Allowance or Rejection on Claim, 590.
 - (2) Rejection by Part of Several Executors or Administrators, 590.
 - f. Form and Proof of Rejection, 590.
 - g. Grounds of Rejection, 590.
 - h. Operation and Effect, 591.
 - (1) In General, 591.
 - (2) On Right to Sue, 591.
 - (a) Effect of Acceptance, 591.

- aa. In General, 591.
 - bb. Application of Allowed Claims as Set-Off, 591.
- (b) Effect of Rejection, 591.
- (3) Fraudulent Claim, 591.
- (4) Administrator's Filing Objection to Allowed Claim, 591.
- 3. Approval or Disallowance by Court, 591.
 - a. Necessity, 591.
 - (1) Allowance, 591.
 - (2) Disallowance, 592.
 - b. Jurisdiction, 592.
 - c. Time, 592.
 - (1) In General, 592.
 - (2) More than Year after Publication of Notice, 592.
 - d. Form and Proof, 592.
 - (1) Approval, 592.
 - (a) Entry on Record, 592.
 - (b) Proof When Not Indorsed on Claim, 592.
 - (2) Entry of Disallowance, 593.
 - e. Grounds for Disapproval, 593.
 - f. Operation and Effect, 593.
 - (1) In General, 593.
 - (2) Effect of Approval as Judgment, 593.
 - (3) Where Approval Unnecessary, 594.
 - (4) Executorship Free from Control of Court, 594.
 - (5) Effect upon Negotiability of Note, 594.
 - (6) Joint Note of Husband and Wife for Community Debt, 594.
 - (7) Effect on Claims Secured by Specific Liens, 594.
 - (8) Effect on Judgment against an Estate, 595.
 - (9) Claims Payable in Confederate Money, 595.
 - (10) Claims Apparently Barred by Limitations, 595.
 - (11) Claims Allowed without Authentication, 595.
 - (12) Whether Deed a Mortgage, 595.
 - (13) Allowance of Part of Claim, 596.
 - (14) Effect as Suspending Statute of Limitations, 596.
 - g. Review, 596.
 - h. Collateral Attack, 597.
 - i. Setting Aside Allowance or Disallowance, 599.
 - (1) During Term, 599.
 - (2) After Term, 599.
 - (a) By Probate Court, 599.
 - (b) By District Court, 599.
 - aa. General Rule, 599.
 - bb. Grounds, 599.
 - (aa) In General, 599.
 - (bb) Fraud, Accident or Mistake, 599.
 - (cc) Claims Barred by Statute or Satisfied When Allowed, 601.
 - (dd) Invalidity in General, 603.
 - (ee) Claims Payable in Confederate Money, 603.
 - (ff) Contracts within Statute of Frauds, 603.
 - (gg) Defective Authentication, 603.

- cc. Jurisdiction, 603.
- dd. Time to Sue, 604.
- ee. Persons Who May Have Allowance Set Aside, 604.
- ff. Pleading and Proof, 605.
 - (aa) Burden of Allegation and Proof, 605.
 - (bb) Petition, 605.
 - (cc) Pleas, 605.
 - (dd) Weight and Sufficiency of Evidence, 605.
- gg. Instructions, 605.
- hh. Judgment, 605.
- ii. Review, 606.
- 4. Partial Allowance and Rejection, 606.
- 5. Contested or Disputed Claims, 606.
 - a. Persons Who May Contest, 606.
 - (1) Administrator, 606.
 - (a) In General, 606.
 - (b) Estoppel to Dispute, 607.
 - (2) Heirs, 607.
 - b. Objections and Exceptions, 607.
 - (1) Time of Making, 607.
 - (2) Objection to Affidavit, 607.
 - (3) Plea of Adverse Possession, 607.
 - (4) Form, 607.
 - (5) Answer to Exceptions, 607.
 - (6) Proceedings of Probate Court, 608.
 - (a) Jurisdiction, 608.
 - (b) Jury Trial, 608.
 - (c) Evidence, 609.
 - aa. Presumptions and Burden of Proof, 609.
 - bb. Admissibility, 609.
 - (d) Review, 609.
 - aa. Right, 609.
 - bb. Time, 609.
 - cc. Trial De Novo, 609.
- G. Arbitration and Compromise, 609.
- H. Payment, 610.
 - 1. Mode, 610.
 - a. By Retention of Funds Collected, 610.
 - b. By Set-Off, 610.
 - 2. Time, 610.
 - 3. Order of Payment, 610.
 - a. In General, 610.
 - b. Classification and Priority among Particular Claims, 610.
 - (1) Vendor's Lien, 610.
 - (2) Expenses of Illness, Burial Administration, Allowance, etc., 610.
 - (3) Costs and Attorney's Fees, 611.
 - (4) Liens, 612.
 - (a) In General, 612.
 - (b) Judgment Liens, 613.
 - (c) Vendor's Liens, 613.

- (d) Landlord's Lien, 614.
 - (5) Secured and Unsecured Claims, 614.
 - (6) Claims of Executor or Administrator, 614.
 - (7) Other Claims, 615.
 - c. How Priority Affected, 615.
 - d. Proceedings to Determine Classification, 615.
- 4. Payment without Order of Court, 616.
- 5. Erroneous or Improper Payment, 617.
- 6. Failure to Make Payment, 617.
- 7. Interest, 617.
- 8. Penalty, 617.
- 9. Effect of Payment, 617.
- 10. Deficiency of Assets—Reservation of Funds, 618.
- 11. Subrogation, 618.
- I. Collection and Enforcement, 618.
 - 1. Mode, 618.
 - a. In General, 618.
 - b. Resort to County or Probate Court, 619.
 - (1) In General, 619.
 - (2) Executorship Free from Control of Court, 619.
 - (3) Claims Secured by Specific Liens, 620.
 - 2. Allowed and Approved Claims, 620.
 - a. In General, 620.
 - b. Order to Pay Allowed Claims, 621.
 - (1) Necessity and Power of Court, 621.
 - (2) Time of Order, 621.
 - (3) Effect of Order, Conclusiveness, Collateral Attack, 621.
 - c. Suit against Administrator for Refusal to Pay Allowed Claim, 622.
 - 3. Claims Incurred by Executor or Administrator, 622.
 - a. In General, 622.
 - b. Jurisdiction, 622.
 - c. Limitation, 622.
 - d. Parties, 622.
 - e. Petition, 623.
 - 4. Rejected Claims, 623.
- J. Actions on Rejected Claims, 623.
 - 1. Nature of Remedy, 623.
 - 2. Right of Action, 623.
 - 3. Conditions Precedent, 623.
 - a. Disallowance or Rejection, 623.
 - b. Application to Require Interested Parties to Give Bond, 624.
 - c. Property Subject to Payment of Debt, 624.
 - 4. Form of Action or Proceeding, 624.
 - 5. Joinder of Causes, 624.
 - 6. Jurisdiction, 625.
 - a. County or Probate Court, 625.
 - b. District Court, 625.
 - 7. Death of Executor or Administrator Pending Suit, 626.
 - 8. Time within Which Suit Prohibited and Limitations, 626.
 - a. Time within Which Suit Prohibited, 626.
 - b. Limitation of Actions, 627.

-
- (1) Construction, Operation and Effect of Statutes, 627.
 - (a) Construction, 627.
 - (b) Claims to Which Applicable, 627.
 - (c) Effect, 627.
 - (2) Periods of Limitation, 627.
 - (3) Time from Which Statute Runs, 628.
 - (4) Statute Requiring Suit within Three Months after Rejection of Claim, 628.
 - (a) In General, 628.
 - (b) Construction and Effect, 629.
 - (c) Notice of Rejection, 630.
 - (d) When Statutes Commences to Run and Computation of Time, 630.
 - aa. In General, 630.
 - bb. Excluding Day of Rejection, 630.
 - (5) Suspension of Statute, 630.
 - (a) Power of Executor or Administrator to Suspend, 630.
 - (b) How Suspended, 630.
 - aa. Absence of Executor or Administrator, 630.
 - bb. Allowance and Approval, 631.
 - cc. Application for Administration, 632.
 - dd. Commencement of Action, 632.
 - ee. For Year After Death of Decedent, 632.
 - ff. Provision in Will That Debts Be Paid, 632.
 - gg. War, 632.
 - (6) Pleading and Proof, 632.
9. Parties, 633.
- a. Necessary Parties, 633.
 - b. Proper Parties, 634.
 - c. Intervention, 635.
 - d. Interpleader, 635.
10. Citation or Process, 635.
11. Pleading, 635.
- a. Petition, 635.
 - (1) Invalid Claims Inserted with Valid Claims, 635.
 - (2) Averments, 635.
 - (a) In General, 635.
 - (b) Death, 635.
 - (c) Representative Capacity, 635.
 - (d) Demand and Refusal, 636.
 - (e) Presentation and Rejection of Claim, 636.
 - (f) Allegation Negating Necessity for Presentation, 636.
 - (g) Approval of Claim, 636.
 - (h) Existence of Assets, 636.
 - (i) Solvency or Insolvency, 637.
 - (j) Averments in Suits for Services Rendered Decedent, 637.
 - (k) That Legal Offsets, Payments and Credits Allowed, 637.
 - (l) Items in Action of Account—Bill of Particulars, 637.
 - (m) Terms of Will, 638.
 - (n) Privity of Contract in Creation of Trust, 638.

- (3) Prayer for Relief, 638.
- (4) Objections to Petition, 638.
- (5) Amendment, 638.
- b. Plea or Answer, 638.
 - (1) In General, 638.
 - (2) Form and Requisites, 638.
 - (a) Averments, 638.
 - (b) Non Est Factum, 638.
 - (c) Plea of Payment, 639.
 - (d) Verification, 639.
 - (3) Construction of Plea, 639.
 - (4) Operation and Effect, 639.
- 12. Issues, Proof and Variance, 640.
- 13. Evidence, 640.
 - a. Presumption and Burden of Proof, 640.
 - b. Admissibility, 641.
 - c. Weight and Sufficiency, 641.
- 14. Witnesses, 642.
- 15. Interrogatories, 642.
- 16. Set-Off, Reconvention, etc., 642.
- 17. Judgment, 643.
 - a. Confession of Judgment, 643.
 - b. Default Judgment, 643.
 - c. Rendition, Form and Requisites, 643.
 - (1) In General, 643.
 - (2) Funds Received by Testator, as Trustee, 643.
 - (3) Judgment against Independent Executor, 643.
 - (4) Judgment against Heirs, 643.
 - (5) Direction as to Payment in Due Course, 644.
 - (a) In General, 644.
 - (b) Judgment against Independent Executor, 644.
 - (6) Classification and Filing, 645.
 - (7) Amendments, 645.
 - d. Operation and Effect, 645.
 - (1) Persons Concluded, 645.
 - (2) Matters Concluded, 645.
 - (3) Lien of Judgment, 645.
 - (4) Collateral Attack, 645.
 - (5) Suit to Set Aside and Enjoin, 645.
 - e. Execution and Enforcement of Judgment, 646.
 - (1) Award of Execution, 646.
 - (2) Certification to County Court and Proceedings Thereon, 647.
 - (3) Independent Executorship, 647.
 - (4) Judgment against Administrator Personally, 650.
 - (5) Sales under Execution, 650.
- 18. Appeal and Error, 651.
- 19. Enforcement of Specific Liens, 651.
 - a. In General, 651.
 - b. Jurisdiction, 651.
 - c. Parties, 651.
 - d. Decree, 651.

- e. Particular Liens, 652.
 - (1) Mortgages or Deeds of Trust, 652.
 - (a) In General, 652.
 - (b) Execution of Power of Sale, 652.
 - aa. In General, 652.
 - bb. Injunction, 656.
 - (c) Actions, 656.
 - aa. Jurisdiction, 656.
 - bb. Parties, 657.
 - cc. Decree, 658.
 - (aa) Form and Requisites, 658.
 - aaa. In General, 658.
 - bbb. Certification to County Court, 658.
 - (bb) Operation and Effect, 659.
 - (cc) Enforcement, 659.
 - aaa. In General, 659.
 - bbb. Certification to County Court and Proceedings Thereon, 659.
 - ccc. Foreclosure Decree, 660.
 - (2) Vendor's Lien, 661.
 - (a) Conditions Precedent, 661.
 - (b) Jurisdiction, 661.
 - (c) Parties, 662.
 - (d) Decree, 662.
 - aa. Form and Requisites, 662.
 - bb. Enforcement, 663.
 - (3) Express Lien on Rents, 663.
 - (4) Execution Lien, 663.
 - (5) Judgment Lien, 663.
 - (a) In General, 663.
 - (b) Sale under Execution, 664.
 - aa. Validity, 664.
 - bb. Vacating and Setting Aside Sale, 665.
 - cc. Collateral Attack, 666.
- 20. Actions against Heirs or Distributees, 667.
 - a. Nature and Form of Action, 667.
 - b. Conditions Precedent, 667.
 - c. Limitations, 667.
 - d. Jurisdiction, 668.
 - e. Process, 668.
 - f. Parties, 668.
 - g. Pleading, 669.
 - (1) Petition, 669.
 - (2) Answer, 670.
 - h. Evidence, 670.
 - (1) Admissibility, 670.
 - (2) Presumptions and Burden of Proof, 670.
 - i. Judgment and Execution, 671.
 - j. Appeal, 672.
- 21. Specific Performance of Ancestor's Contracts to Buy or Sell Land, 672.
- 22. Costs and Attorney's Fees, 672.

VIII. Actions, 672.

- A. In General, 672.
- B. Right of Action, 673.
 - 1. In General, 673.
 - 2. Actions by Executor or Administrator, 673.
 - 3. Actions against Executor or Administrator, 673.
- C. Jurisdiction and Venue, 673.
 - 1. Jurisdiction, 673.
 - 2. Venue, 674.
- D. Parties, 674.
 - 1. In General, 674.
 - 2. Action to Try Title, 675.
- E. Process, 675.
- F. Appearance, 676.
- G. Time to Sue and Limitations, 676.
- H. Joinder of Causes of Action, 676.
- I. Cross Action and Counterclaim, 676.
- J. Pleading, 677.
 - 1. Petition, 677.
 - a. In General, 677.
 - b. Averments as to Capacity, 677.
 - c. Amendment, 678.
 - d. Profert, 678.
 - 2. Plea or Answer, 678.
 - a. Denial of Authority and Capacity to Sue, 678.
 - (1) Necessity for and Sufficiency of Plea, 678.
 - (2) Verification, 680.
 - (3) Time of Interposing, 680.
 - b. Plea of Not Guilty, 680.
 - c. Plea in Abatement upon Removal of Administrator Pending Suit, 680.
 - d. Time within Which Answer Required, 680.
 - 3. Inconsistencies between Pleadings of Administrator and Heirs, 680.
 - 4. Waiver of Objections, 680.
- K. Evidence, 681.
 - 1. Presumptions, 681.
 - 2. Admissibility and Sufficiency, 681.
 - a. In General, 681.
 - b. Proof of Appointment and Authority, 681.
 - c. Proof as to Assets, 682.
 - 3. Effect of Admissions, 682.
- L. Question of Law and Fact, 682.
- M. Judgment, 682.
 - 1. Capacity in Which Judgment Recovered, 682.
 - 2. Validity, 682.
 - a. In General, 682.
 - b. Judgment by Default and Decrees Pro Confesso, 683.
 - 3. Construction, 683.
 - 4. Operation and Effect, 683.
 - a. As Merger of Cause of Action, 683.
 - b. Conclusiveness, 683.
 - (1) In General, 683.

- (2) Persons Bound, 684.
 - c. Evidence of Capacity in Which Defendant Sued, 684.
- 5. Amendment, 684.
- 6. Revival, 684.
- N. Bill of Review, 685.
- O. Appeal, 685.
 - 1. Right of Appeal as Governed by Nature of Decision and Interest Therein, 685.
 - 2. Manner of Exercising Right, 685.
 - 3. Jurisdiction, 685.
 - 4. Time, 686.
 - 5. Notice of Appeal, 686.
 - 6. Waiver of Process by Appearance, 686.
 - 7. Bond, 686.
 - 8. Supersedeas, 686.
 - 9. Injunction against Administrator as Ground for Dismissal, 686.
 - 10. Scope of Review, 686.
 - 11. Trial De Novo in Appellate Court, 687.
 - 12. Judgment on Appeal, 687.
- P. Costs, 687.

IX. Accounting and Settlement, 688.

- A. Time of Rendering Account, 688.
- B. Stating and Settling Account, 688.
 - 1. Form and Requisites, 688.
 - 2. Character and Contents, 688.
 - a. Necessity for Itemized Account, 688.
 - b. Charges against Executor or Administrator, 688.
 - c. Credits, 689.
 - d. Necessity for Vouchers for Payment, 690.
 - e. Annual Report and Exhibit of Claims and Conditions of Estate, 690.
 - (1) Time of Filing, 690.
 - (2) Proceedings to Compel, 690.
 - 3. Proceedings in Settlement, 691.
 - a. Hearing and Reference, 691.
 - b. Evidence, 691.
 - c. Exceptions and Objections, 691.
 - d. Order or Decree of Confirmation or Rejection, 692.
 - 4. Conclusiveness and Effect of Settlement, 693.
- C. Reopening, Revising and Correcting Settlement, 695.
 - 1. Right to Reopen, 695.
 - 2. Power of Probate Court to Require Additional Inventory, 696.
 - 3. Grounds for Reopening or Setting Aside, 696.
 - 4. Effect of Lapse of Time, 696.
 - 5. Operation and Effect of Opening or Setting Aside, 696.
 - 6. Liability of Sureties, 697.
 - 7. Actions to Open or Set Aside Settlement, 697.
 - a. Nature and Scope of Remedy, 697.
 - b. Jurisdiction and Venue, 697.
 - c. Limitation of Actions, 698.
 - d. Parties, 698.

- (1) Parties Plaintiff, 698.
 - (a) Persons Who May Be Plaintiffs, 698.
 - (b) Joinder of Parties, 698.
- (2) Parties Defendant, 698.
 - e. Pleading, 699.
 - f. Order or Decree, 699.
- D. Review, 699.
 - 1. Nature and Form of Review, 699.
 - 2. Right of Review, 700.
 - 3. Scope of Review, 700.
 - 4. Presentation and Reservation in Trial Court, 700.
 - 5. Parties, 700.
 - 6. Perfecting Appeal, 701.
 - 7. Record—Proceedings Not in Record, 702.
 - 8. Operation and Effect of Appeal, 702.
- E. Proceedings to Compel Accounting and Settlement, 703.
 - 1. In General, 703.
 - 2. Jurisdiction, 703.
 - 3. Persons Entitled to Require Accounting, 704.
 - 4. Limitation and Laches, 705.
 - 5. Pleading, 706.
 - 6. Evidence, 707.
 - 7. Trial, 707.
 - 8. Costs, 708.
- F. Order to Pay Debts, 708.
- G. Final Discharge and Release, 708.
- H. Compensation, 709.
 - 1. Right to Compensation in General, 709.
 - 2. Commissions, 710.
 - 3. Additional or Extra Allowances, 711.
 - 4. Proceedings for Allowance, 712.
- I. Action to Surcharge and Falsify as for Devastavit, 712.
- X. Distribution, 713.**
 - A. Statutory Provisions, 713.
 - B. Authority of Executor or Administrator to Make and Duty of Court to Order, 713.
 - C. Priorities of Debts to Legacies, Distributive Shares, etc., 713.
 - D. Liabilities of Heirs, Legatees, Distributees, etc., 713.
 - 1. Liability to Estate, 713.
 - 2. Liability for Debts of Decedent, 714.
 - E. Time of Making, 714.
 - F. Place, 714.
 - G. Mode, 714.
 - 1. Will Declared Void, 714.
 - 2. Partition, 714.
 - H. Persons to Whom Made, 714.
 - I. Property Subject, 715.
 - J. Payment, 715.
 - 1. Medium and Sufficiency, 715.
 - 2. Primary Fund—Subrogation, Marshaling Assets, 716.
 - 3. Interest on Legacies and Distributive Shares, 716.

- 4. Payment of Annuities, 716.
- 5. Proof of Payment, 716.
- K. Overpayment, 716.
 - 1. In General, 716.
 - 2. Actions for Recovery, 717.
- L. Effect of Distribution or Payment, 717.
 - 1. In General, 717.
 - 2. Parties Not Brought in as Defendants, 717.
 - 3. Delivery to Devisees for Life, 717.
- M. Effect of Failure to Make, 717.
- N. Advances by Executor or Administrator, 717.
- O. Expenses and Compensation of Executor or Administrator, 717.
- P. Receipt or Release, 718.
- Q. Refunding or Indemnity Bond, 718.
 - 1. Necessity, 718.
 - 2. Persons Who May Require, 718.
 - 3. Form and Requisites, 719.
 - 4. Operation and Effect, 719.
 - 5. Action to Compel Execution, 719.
 - a. Who May Institute, 719.
 - b. Citation and Complaint, 719.
 - c. Review, 720.
 - 6. Actions in Bond, 720.
 - a. Right of Action, 720.
 - (1) In General, 720.
 - (2) Conditions Precedent, 720.
 - b. Jurisdiction and Venue, 720.
 - c. Demurrer, 721.
 - d. Judgment and Execution, 721.
- R. Contribution from Codistributees Where Title to Distributive Share Fails, 721.
- S. Actions to Compel Distribution, 721.
 - 1. Right of Action and Defenses, 721.
 - 2. Jurisdiction, 721.
 - a. County and Probate Courts, 721.
 - b. District Court, 722.
 - 3. Venue, 723.
 - 4. Time to Sue, 723.
 - 5. Citation, Notice or Process, 723.
 - 6. Filing Executor's or Administrator's Account and Sufficiency Thereof, 723.
 - 7. Parties, 723.
 - 8. Pleading, 724.
 - a. Petition, 724.
 - b. Answer, 724.
 - 9. Hearing, 724.
 - 10. Evidence, 725.
 - 11. Judgment or Decree, 726.
 - a. Form and Requisites, 726.
 - b. Operation and Effect, 726.
 - (1) Persons Concluded, 726.

(2) Collateral Attack, 726.

(3) Effect as Evidence of Recitals of Record of Probate Court, 727.

12. Costs, 728.

T. Setting Aside, 728.

XI. Temporary and Special Administrators, 728.

A. Appointment of Special or Temporary Administrator, 728.

1. In General, 728.

2. Power of Court and Grounds for Appointment, 728.

3. Designation, 729.

4. Proceedings for Appointment, 729.

5. Duration and Termination of Appointment, 729.

6. Review, 730.

B. Powers and Duties, 730.

1. Powers, 730.

2. Duties, 731.

XII. Administrator De Bonis Non and with the Will Annexed, 732.

A. Appointment, 732.

1. Power and Discretion of Court, 732.

a. In General, 732.

b. Estate Administered by Independent Executor Unpresented,
732.

2. Necessity and Grounds for Appointment, 733.

3. Jurisdiction and Proceeding, 735.

4. Operation and Effect, 737.

5. Collateral Attack of Appointment, 737.

a. In General, 737.

b. Presumptions, 737.

6. Revocation of Appointment, 739.

B. Discharge or Removal, 739.

C. Powers and Duties, 739.

1. Powers, 739.

2. Duties, 740.

3. Administrator with Independent Will Annexed, 741.

D. Property and Rights Passing to Administrator De Bonis Non, 742.

E. Actions—When Maintainable, 742.

1. In General, 742.

2. Suit against Former Administrator for Maladministration, 743.

3. Suit for Assets Unaccounted for, 744.

4. Suit to Prevent Misapplication of Estate, 744.

5. Suit to Set Aside Fraudulent Sale by Former Administrator, 744.

6. Right to Sue Independent Executor, 746.

7. Jurisdiction, 746.

8. Parties, 746.

9. Petition, 746.

10. Limitations, 747.

11. Reference to Auditor, 747.

12. Issue, Proof and Variance, 747.

13. Question of Law and Fact, 747.

XIII. Receivers, 747.

XIV. Executor De Son Tort, 748.**XV. Curators, 749.****XVI. Second or Additional Administration, 750.****XVII. Foreign Executors and Administrators, 751.**

A. Evidence of Appointment and Pendency of Administration, 751.

B. Powers, 751.

C. Actions, 753.

1. Capacity to Sue, 753.

2. Liability to Suit, 753.

3. Suit against Domiciliary Representative Based on Judgment against Foreign Administrator, 754.

4. Limitation of Suit, 754.

D. Ancillary Administration, 754.

XVIII. Insolvent Estates, 755.

A. Determination of Insolvency, 755.

B. Powers and Liabilities of Executors Thereof, 755.

C. Priority of Claims, 756.

D. Setting Aside Sale, 756.

XIX. Sales by Executors and Administrators, 757.**CROSS REFERENCES.**

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 1; ACCOUNTS AND ACCOUNTING, vol. 1, p. 55; ACTIONS, vol. 1, p. 113; ADVANCEMENTS, vol. 1, p. 159; AFFIDAVITS, vol. 1, p. 165; ALIENS, vol. 1, p. 174; APPEAL AND ERROR, vol. 1, p. 313; APPEARANCES, vol. 2, p. 1; ARBITRATION AND AWARD, vol. 2, p. 25; ASSIGNMENTS, vol. 2, p. 86; ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 2, p. 113; ASSUMPSIT, vol. 2, p. 282; ATTACHMENT, vol. 2, p. 296; ATTORNEY AND CLIENT, vol. 2, p. 567; BANKRUPTCY AND INSOLVENCY, vol. 2, p. 63; BILLS, NOTES AND CHECKS, vol. 2, p. 839; BONDS, vol. 3, p. 1; CERTIORARI, vol. 4, p. 35; CHARITIES, vol. 4, p. 82; COMMON AND CIVIL LAW, vol. 4, p. 197; COMPROMISE AND SETTLEMENT, vol. 4, p. 209; CONFLICT OF LAWS, vol. 4, p. 233; CONTRACTS, vol. 4, p. 546; CONTRIBUTION AND EXONERATION, vol. 4, p. 662; CONVERSION AND RECONVERSION, vol. 4, p. 678; COURTS, vol. 5, p. 161; COVENANTS, vol. 5, p. 442; CREDITORS' SUITS, vol. 5, p. 531; DAMAGES, vol. 5, p. 824; DEATH BY WRONGFUL ACT, vol. 5, p. 1084; DEBT, vol. 5, p. 1225; DECLARATIONS AND ADMISSIONS, vol. 6, p. 1; DEPOSITIONS AND INTERROGATORIES, vol. 6, p. 326; DESCENT AND DISTRIBUTION, vol. 6, p. 392; DISCOVERY, vol. 6, p. 431; DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 6, p. 433; DOCUMENTARY EVIDENCE, vol. 6, p. 531; DOMICILE, vol. 6, p. 739; DOWER, vol. 6, p. 750; EQUITY, vol. 6, p. 960; ESCHEAT, vol. 6, p. 973; ESTATES, vol. 6, p. 982; ESTOPPEL, vol. 6, p. 992; EVIDENCE, vol. 6, p. 1098; EXECUTIONS, ante, p. 229; EXECUTORS' AND ADMINISTRATORS' SALES; EXEMPTION FROM EXECUTION AND ATTACHMENT; FINAL JUDGMENTS AND DECREES; FRAUD AND DECEIT; FRAUDS, STATUTE OF; FRAUDULENT AND VOLUNTARY CONVEYANCES; GARNISHMENT; GIFTS; HEIR, HEIRS AND THE LIKE; HOMESTEAD EXEMPTIONS; HUS-

BAND AND WIFE; INSURANCE; JOINT TENANTS AND TENANTS IN COMMON; JUDGES; JUDGMENTS AND DECREES; JUDICIAL SALES; JURISDICTION; LANDLORD AND TENANT; LIMITATION OF ACTIONS AND ADVERSE POSSESSION; MARSHALING ASSETS AND SECURITIES; MORTGAGES AND DEEDS OF TRUST; NOTICE; NOVATION; PARCENARY, ESTATES IN; PAROL EVIDENCE; PAYMENT; PLEADING; PLEDGE AND COLLATERAL SECURITY; POWERS; PRINCIPAL AND AGENT; PUBLIC LANDS; RECEIPTS; RECEIVERS; RECORDING ACTS; RELEASE; RESCISSION, CANCELLATION AND REFORMATION; SALES; SET-OFF, RECOUPMENT, RECONVENTION AND COUNTERCLAIM; SHERIFFS' SALES; SPECIFIC PERFORMANCE; SPENDTHRIFTS AND SPENDTHRIFT TRUSTS; SUBROGATION; SUMMONS AND PROCESS; SUPPORT AND MAINTENANCE; TESTAMENTARY CAPACITY; TORTS; TRESPASS TO TRY TITLE AND EJECTMENT; TROVER AND CONVERSION; TRUSTS AND TRUSTEES; UNDUE INFLUENCE; VENDOR AND PURCHASER; VENDOR'S LIEN; VENUE; VERDICT; WAIVER AND ABANDONMENT; WARRANT; WASTE; WILLS; WITNESSES.

I. General Consideration.

A. DEFINITIONS.

"An administrator is the legal representative of the estate of an intestate." *Tucker v. Bryan*, 1 App. Civ. Cases, § 1157.

An administrator is an agent for the management of property belonging to others. *Richardson v. Pruitt*, 3 Tex. 223, 233.

A surviving wife who has qualified as survivor in community is not an administratrix. *Jones v. McRae*, 16 Tex. Civ. App. 308, 41 S. W. 403. See, also, *Mann v. Earnest*, 6 Tex. Civ. App. 606, 25 S. W. 1042, affirmed in 93 Tex. 667, no op. See the title HUSBAND AND WIFE.

The term "executors" as used in the statutes includes independent executors except in those articles which relate to acts to be done in settlement of an estate. *Roy v. Whitaker*, 92 Tex. 346, 48 S. W. 892, 49 S. W. 367; *Farmers, etc., Nat. Bank v. Bell*, 31 Tex. Civ. App. 124, 126, 71 S. W. 570, affirmed in 97 Tex. 632, no op.; *Roberts v. Connellee*, 71 Tex. 11, 8 S. W. 626.

So held as to "executor" as used in articles 1989, 1997, Rev. Stat. *Roy v. Whitaker*, 92 Tex. 346, 354, 48 S. W. 892, 49 S. W. 367, citing *Roberts v.*

Connellee, 71 Tex. 11, 8 S. W. 626; *Perkins v. Wood*, 63 Tex. 396.

"In *Prather v. McClelland*, 76 Tex. 574, 584, 13 S. W. 543, this court held that articles 1991-1994, inclusive, are applicable alike to wills administered by independent executors and others." *Roy v. Whitaker*, 92 Tex. 346, 354, 48 S. W. 892, 49 S. W. 367. See the title WILLS.

"The executor or administrator in his individual capacity is a stranger to the estate." *Clapp v. Engledow*, 72 Tex. 252, 255, 10 S. W. 462; *White v. Shepherd*, 16 Tex. 163, 173.

Personal Representatives.—Executors and administrators were the personal representatives as known to the common law. *Allen v. Stovall*, 94 Tex. 618, 627, 63 S. W. 863, 64 S. W. 777, reversing 62 S. W. 87.

"The word representative, in contemplation of law, frequently means the heir or the testamentary legatee." *Eastland v. Lester*, 15 Tex. 98, 101, distinguishing *Alexander v. Barfield*, 6 Tex. 400.

"A representative is one that stands in the place of another as heir or in the right of succeeding to an estate of inheritance; one who takes by representation. *Webst. Dic.* One who oc-

copies another's place and succeeds to his rights and liabilities. Executors and administrators represent, in all matters in which the personal estate is concerned, the person of the testator or intestate, as the heir does that of his ancestor. *Burrill's Law Dic.*; 2 *Steph. Com.* 428. Representatives of a deceased person are real or personal; the former being the heirs at law, and the latter, ordinarily, the executors or administrators. The term representative includes both classes. When the personal representatives alone are intended in a statute, they are so named." *Allen v. Stovall*, 94 Tex. 618, 628, 63 S. W. 863, 64 S. W. 777, reversing 62 S. W. 87.

The term legal representatives is not considered identical with executors and administrators, but often means heirs. *Grayson v. Winnie*, 13 Tex. 287, 288; *Allen v. Stovall*, 94 Tex. 618, 628, 63 S. W. 863, 64 S. W. 777, reversing 62 S. W. 87.

The word "representative," found in the act of 1840, § 5, p. 73, includes the heirs of the deceased. The signification of the word is broad enough to embrace both executors or administrators—the personal representatives as known to the common law—and also the heir, who, under that law, occupied the place of the ancestor as to the real estate and represented him as to such property. *Allen v. Stovall*, 94 Tex. 618, 627, 63 S. W. 863, 64 S. W. 777, reversing 62 S. W. 87.

The term legal representatives as used in (*Hart. Dig.* art. 697), providing a mode of reviving suits where one of the parties dies pending the suit, meant administrator or executor, and not the heir. *Eastland v. Lester*, 15 Tex. 98, 101, explaining *Alexander v. Barfield*, 6 Tex. 400.

Independent Executor.—See post, "Executorship Free from Control of Court," I, F.

"An Administration" and "Unadministered."—See post, "In General,"

I, F, 1; "In General," XII, A, 1; "Powers and Duties," XII, C.

Administration of Community Property.—See the title HUSBAND AND WIFE.

B. STATUS OF PERSONAL REPRESENTATIVE AS TRUSTEE.

See, generally, the title TRUSTS AND TRUSTEES.

An administrator is a trustee charged with the management of a trust estate under the rules of the probate court. *Main v. Brown*, 72 Tex. 505, 509, 10 S. W. 571. See, also, *Cochran v. Thompson*, 18 Tex. 652, 656. See contra *Erskine v. De La Baum*, 3 Tex. 406.

The office of attorney for a creditor in prosecuting a claim, and of administrator of the estate against which the claim is prosecuted, are inconsistent and their duties conflicting. *Jones v. Boulware*, 39 Tex. 367, 368.

Independent Executor.—See post, "Executorship Free from Control of Court," I, F.

C. LAWS GOVERNING.

"The Revised Statutes of the state, under the title of 'Estates of Deceaseds,' provides general rules to govern in the administration of estates of deceased persons, whether conducted by administrators or executors. Some of the provisions apply alone to administrators, others to administrators and executors alike, while some apply only to executors. Of the last-named class of provisions, some apply especially to independent executors, and others, although expressed in general terms, have been construed to embrace both classes of executors." *Roy v. Whitaker*, 92 Tex. 346, 354, 48 S. W. 892, 49 S. W. 367. See ante, "Definitions," I, A.

Decree No. 81, of January 22, 1836, provided that all proceedings relative to successions and matters of probate should be regulated and governed agreeably to the principles and laws in similar cases in the state of Louisi-

ana. *Houston v. Killough*, 80 Tex. 296, 16 S. W. 56.

Conflict of Laws.—Effect will be given to *lex domicilii* in administering personal estates whether administration has been granted in foreign state or not. *Green v. Rugely*, 23 Tex. 539, 552.

Administration of funds derived from the sale of property beyond the limits of state lawfully in hands of administrator, is governed by local laws. *Minter v. Burnett*, 90 Tex. 245, 254, 38 S. W. 350.

Where administration is granted upon property of one dying without the state, where the property is brought into the state after such death, the rights of the parties in interest as to such property will be controlled by the law of the place where the debtor died. *Green v. Rugely*, 23 Tex. 539.

Where the jurisdiction of a court other than that of the domicile of an intestate has been invoked in the administration of his estate, by the granting of letters for the administration of assets within the jurisdiction of such court, such administration is governed by the law of the state granting such letters, and the administration in such state can not be controlled by the law of the state of the intestate's domicile. *Simpson v. Knox*, 1 Posey Unrep. Cas. 569.

Proceedings Governed by Lex Fori.—When jurisdiction of court other than that of decedent's domicile has been invoked in administration, such administration is governed in its proceedings by the laws of the country granting letters of administration. *Simpson v. Knox*, 1 Posey 569, 576.

D. JURISDICTION OF ADMINISTRATION.

1. In General.

See the titles COURTS, vol. 5, pp. 186, 268, 301, 314, 332; JUDGMENTS AND DECREES; JURISDICTION. And see the title CONFLICT OF LAWS, vol. 4, p. 254.

County and Probate Court.—See the title COURTS, vol. 5, p. 314.

In all matters relating to the administration of estates of deceased persons, county courts of Texas are courts of general jurisdiction, and their orders and decrees in such matters, however erroneous they may be, are not void and can not be collaterally attacked. All presumptions will be indulged in favor of regularity of their proceedings. *Rogers v. Tompkins* (Civ. App.), 87 S. W. 379, 382, affirmed in 101 Tex. 654, no op.; *Brockenborough v. Melton*, 55 Tex. 493; *Ferguson v. Templeton* (Civ. App.), 32 S. W. 148, affirmed in 89 Tex. 47; *Stone v. Ellis* (Civ. App.), 40 S. W. 1077; *Paul v. Willis*, 69 Tex. 261, 7 S. W. 357; *Nelson v. Bridge*, 98 Tex. 523, 86 S. W. 7; *Lyne v. Sanford*, 82 Tex. 58, 19 S. W. 847; *Saul v. Frame*, 3 Tex. Civ. App. 596, 22 S. W. 984; *Flenner v. Walker*, 5 Tex. Civ. App. 145, 23 S. W. 1029; *Perry v. Blakey*, 5 Tex. Civ. App. 331, 336, 23 S. W. 804; *Grant v. Hill* (Civ. App.), 30 S. W. 952, 954; *Hill v. Grant* (Civ. App.), 44 S. W. 1016, 1019; *Templeton v. Ferguson*, 89 Tex. 47, 33 S. W. 329, affirming 32 S. W. 148; *Clayton v. Hurt*, 88 Tex. 595, 598, 32 S. W. 876; *Mills v. Herndon*, 60 Tex. 353, 360; *Alexander v. Maverick*, 18 Tex. 179; *Crawford v. McDonald*, 88 Tex. 626, 630, 33 S. W. 325, affirming 33 S. W. 325; *Fisk v. Norvel*, 9 Tex. 13; *Lewis v. Ames*, 44 Tex. 319, 334; *Williams v. Ball*, 52 Tex. 603; *Bumpus v. Fisher*, 21 Tex. 561, 567; *Guilford v. Love*, 49 Tex. 715, 716; *Giddings v. Steele*, 28 Tex. 732, 750; *Lynch v. Baxter*, 4 Tex. 431; *Murchison v. White*, 54 Tex. 78, 83; *Martin v. Robinson*, 67 Tex. 368, 374, 3 S. W. 550.

The administration of estates is valid in the probate courts and interference with their jurisdiction by other courts is not favored, and exceptions to its jurisdiction are cautiously allowed. *Schmidtke v. Miller*, 71 Tex. 103, 8 S. W. 638. See, also, *Runnels v. Kownslar*, 27 Tex. 528, 532.

"When an administration is properly opened in the probate court upon the estate of a deceased person, then the jurisdiction of the court attaches for the purposes of that administration, to the extent and within the scope and limits prescribed by the constitution and laws of the state. And whatever the court might do within these limits is entitled to and will be accorded the general presumption that the act was regularly done in accordance with law." *McNally v. Haynes*, 59 Tex. 583, 584; *Heath v. Lyne*, 62 Tex. 686, 691.

"In respect to such matters, the inquiry is not strictly one of jurisdiction as to the subject matter, but as to whether or not the court has exceeded its legal authority in dealing with a subject matter over which it has jurisdiction." *McNally v. Haynes*, 59 Tex. 583, 584; *Heath v. Lyne*, 62 Tex. 686, 691.

"Owing to the loose and irregular manner in which probate business was then (1836) conducted, and the manner in which the records of the same were kept, great liberality in presumptions will be indulged in support of such proceedings. *Robertson v. Johnson*, 57 Tex. 62, 66." *Delk v. Punchard*, 64 Tex. 360, 364.

Where Record Shows Jurisdiction Attached.—Where the record of the county court in the administration of an estate shows that the steps necessary to clothe it with power to act in a given case were taken, or if the record be silent on this subject, its judgment must be held conclusive in any other court when collaterally called in question. *Dickson v. Moore*, 9 Tex. Civ. App. 514, 30 S. W. 214, affirmed in 93 Tex. 728, no op.

"This question, in such a proceeding, must be tried by the recitals in the record itself and the presumptions arising therefrom." *Mills v. Herndon*, 60 Tex. 353, 360; *Murchison v. White*, 54 Tex. 78, 82.

Erroneous Exercise of Jurisdiction.

—Orders or judgments of a county court, made or rendered in the progress of a rightful administration, concerning matters upon which the court had the right to deliberate and decide, can not be collaterally impeached, except for want of jurisdiction, because however erroneous they may be, they are not void. *Withers v. Patterson*, 27 Tex. 491; *Murchison v. White*, 54 Tex. 78; *Wallace v. Turner* (Civ. App.), 89 S. W. 432, 434; *Guilford v. Love*, 49 Tex. 715, 719; *Perry v. Blakey*, 5 Tex. Civ. App. 331, 336, 23 S. W. 804; *Mills v. Herndon*, 60 Tex. 353; *Alexander v. Maverick*, 18 Tex. 179, 194.

Want of Jurisdiction.—But orders and judgments which a court has not the power, under any circumstances, to make or render, in the progress of as administration are, of course, null; and being null, their nullity may be asserted in any collateral proceeding where they are relied on in support of a claim of right. *Withers v. Patterson*, 27 Tex. 491.

Impeaching Jurisdiction by Parol Evidence.—Where it affirmatively appears in the record of the probate court in the administration of an estate that such court properly had jurisdiction by virtue of the existence of community debts, parol evidence will not be considered to impeach the conclusiveness of its judgment in such case. *Dickson v. Moore*, 9 Tex. Civ. App. 514, 30 S. W. 214, affirmed in 93 Tex. 728, no op.

District Court.—See the title **COURTS**, vol. 5, pp. 369, 372.

Jurisdiction of Chancery Court of England.—See *Rogers v. Kennard*, 54 Tex. 30, 40, citing *Dobbin v. Bryan*, 5 Tex. 276, and *Crain v. Crain*, 17 Tex. 80, 86.

Courts of Foreign State.—The courts of this state will take judicial notice that the courts of another state can not administer real estate situ-

ated in this state. *Heintz v. O'Donnell*, 17 Tex. Civ. App. 21, 42 S. W. 797.

Showing and Determination as to Jurisdiction.—See the title COURTS, vol. 5, p. 325.

2. Transfer of Administration to New County.

Where a new county is created, including territory where the deceased resided, upon petition of executor or majority of heirs, the county court should transfer administration, under the act of 1846. *Wilson v. Catchings*, 41 Tex. 587, 591.

It is the duty of the courts to transfer administrations to new counties, under the statute, and it is no evidence of fraud to make the transfer. *Giddings v. Steele*, 28 Tex. 732.

The act directing that all causes, criminal and civil, pending in Kaufman, be transferred to Rockwall county, in which the defendant resides, does not authorize the transfer of an administration, on application of one claiming the administration as widow, as against the administrator. *Wilson v. Catchings*, 41 Tex. 587.

It would seem that such application should be heard and determined by the court where letters had been granted. *Wilson v. Catchings*, 41 Tex. 587.

Correcting Proceedings.—The remedy provided by Probate Law 1870, transferring pending probate proceedings from the county to the district court, and providing (section 304) that proceedings in the county courts in an estate so transferred may be revised by motion in the district court, is not exclusive, and a mistake in a sale of a land certificate by the executor of an estate transferred by said act from the county to the district court may be corrected by an independent suit in the latter court. *Wood v. Mistretta*, 49 S. W. 236, 20 Tex. Civ. App. 236.

3. Removal to District Court.

A distributee of an estate moved to remove the administration to the district court, on the ground that the county judge, being a creditor of the estate on two small claims amounting to \$22.64, was disqualified. The motion being overruled, it was developed on appeal to the district court that the county judge had once been temporary administrator of the estate; that as such he had given bond for less than the appraised value of the estate, and had made no final settlement. Held, the fact that no final settlement had been made by the county judge constituted such disqualifying interest as authorized the removal of the administration to the district court. *Burks v. Bennett*, 55 Tex. 237.

E. NECESSITY FOR AND OBJECT OF ADMINISTRATION.

1. In General.

"The object of administration of estates is for the discharge of the testator's debts, and the distribution of the remainder of his effects among those to whom he has devised them, or who, in presumption of law, it was his wish should enjoy them." *Runnels v. Kownslar*, 27 Tex. 528, 532. See, to the same effect, *Houston v. Mayes*, 66 Tex. 299, 17 S. W. 729; *Fisk v. Norvel*, 9 Tex. 13; *Boyle v. Forbes*, 9 Tex. 35, 40; *Ryan v. Flint*, 30 Tex. 382.

"The appointment of administrator is merely a trust to pay the claims of creditors and then restore the remainder of the assets to the heirs." *Cochran v. Thompson*, 18 Tex. 652, 656. See ante, "Status of Personal Representative as Trustee," I, B.

Administration Unnecessary from Act of Heirs.—"Where, on account of the action of the heirs, no object is to be accomplished by administering, then administration as against them has also become unnecessary." *Patterson v. Allen*, 50 Tex. 23; *Solomon v. Skinner*, 82 Tex. 345, 347, 18 S. W. 698.

"And even before the lapse of four years, administration may become unnecessary by the action of the heirs. The policy or object of our probate laws, in requiring administration, is the protection of the estate and the rights and preferences of the widow, children, creditors, and heirs or distributees, but not to force administration, in all cases." *Patterson v. Allen*, 50 Tex. 23, 25; *Heard v. McKinney*, 1 Posey 83, 88.

Effect of Lapse of Time.—See post, "Time within Which Application May Be Made," II, B, 3; "Presumption That Administration Closed Vel Non," II, G, 3.

To Enable Guardian to Recover Property of Decedent.—Administration is unnecessary to enable a guardian of an heir to recover property of decedent. *McIntyre v. Chappell*, 4 Tex. 187.

A subsequent grant of administration to a party asserting a claim to the property inconsistent with the interest of the heir, can not affect the question. *McIntyre v. Chappell*, 4 Tex. 187, 192.

To Enforce Bond for Title.—It was unnecessary, in 1852, to have administration on the estate of a party who died in 1838, merely to enforce a bond for title to land; this might have been done by suit in the district court, against the heirs, whether known or unknown. *Wardrup v. Jones*, 23 Tex. 489.

2. Indebted Estates.

a. In General.

"Generally, there must be an executor or administrator representing an estate, to enable a creditor of a deceased debtor, to bring suit, and subject the property of the estate to the payment of the debt;" for in Texas a creditor must ordinarily proceed against the administrator, and not against the heirs for the collection of his debt. *Green v. Rugely*, 23 Tex. 539; *Montgomery v. Nash*, 23 Tex.

157; *Patterson v. Allen*, 50 Tex. 23, 25; *Ansley v. Baker*, 14 Tex. 607; *Cunningham v. Taylor*, 20 Tex. 126, 129; *Carroll v. Carroll*, 20 Tex. 731, 746; *McMiller v. Butler*, 20 Tex. 402; *Webster v. Willis*, 56 Tex. 468, 475; *Low v. Felton*, 84 Tex. 378, 385, 19 S. W. 693; *Tucker v. Bryan*, 1 App. Civ. Cases, § 1157; *Byrd v. Ellis* (Civ. App.), 35 S. W. 1070.

Exceptions to Rule.—"There are, however, exceptions to this rule, as, for instance, when administration can not be had, on account of the lapse of four years after the death of the debtor, or where the action of the heirs renders an administration unnecessary. *Low v. Felton*, 84 Tex. 378, 19 S. W. 693." *Byrd v. Ellis* (Civ. App.), 35 S. W. 1070, 1071. As to when creditor may sue heirs, see post, "Actions against Heirs or Distributees," VII, J, 20.

The fact that property, upon which the creditor has a lien, is in the possession of the widow, who has removed to this state, from that in which her husband died, since his death, and that there is no administration on the estate of the debtor, either here or elsewhere, does not present an exception to this general rule. *Green v. Rugely*, 23 Tex. 539.

Where the defendant dies pending suit it may be true that, where the plaintiff in such state of case can show that there is no necessity for administration, and he brings before the court proper parties under a prayer for relief which will operate upon the same cause of action as that on which his original suit rests, and to subject to his judgment the same estate, fund or property, such proceedings might be maintainable as not contravening rules of correct pleading and practice. *Tucker v. Bryan*, 1 App. Civ. Cases, § 1157.

Presumption as to Necessity.—The necessity for there being an executor or administrator representing an estate to enable a creditor to bring a

suit to subject the property of the estate to his debt must be presumed in every case, unless facts are shown making an exception to the general rule. *Green v. Rugely*, 23 Tex. 539; *Tucker v. Bryan*, 1 App. Civ. Cases, § 1157; *Webster v. Willis*, 56 Tex. 468, 474. See, also, *Ansley v. Baker*, 14 Tex. 607. See post, "Time within Which Application May Be Made," II, B, 3.

A will was probated in 1854; executors acted under it until 1860, and in 1871 an administrator with the will annexed joined in a deed with the surviving widow of the deceased, in a conveyance to one of the heirs of land belonging to the estate in satisfaction of a debt due from the testator, the deed reciting that it was made "by virtue of authority contained in the will." No order of court was shown. Held that though the land was located in Texas, no administration ever having been granted in this state, it will be presumed after so great a lapse of time that no necessity for it existed. *Frisby v. Withers*, 61 Tex. 134.

Effect of Statute Casting Descent.—The rule requiring that there must be an executor or administrator representing an estate, in order to enable a creditor to bring suit and subject the property of the estate to the payment of the debt, is not varied by the statute casting the descent of the estate, both real and personal, immediately on the heirs and distributees, subject to an administration. *Green v. Rugely*, 23 Tex. 539.

Community Estates.—An administration is only necessary in order to pay debts and in a case of a community estate, where one of the spouses survives, if debts exist, that fact will authorize such survivor to devote the community property to their payment and collect the assets for that purpose. *Western Union Tel. Co. v. Kerr*, 4 Tex. Civ. App. 280, 23 S. W. 564. See the title HUSBAND AND WIFE.

Decedent Having Made Assignment for Benefit of Creditors.—The death of one who has made a deed of assignment for benefit of creditors and in whom there was no title, could not have made it necessary to proceed against his estate, for he had, by his voluntary lawful act, placed the property beyond his own reach and that of all claiming under him, whether as representatives or heirs, in trust for the payment of his debts, and an administration on his estate would not have reached the title vested in the trustee. *Thaxton v. Smith*, 90 Tex. 589, 596, 40 S. W. 14, reversing 38 S. W. 820; *Caton v. Mosely*, 25 Tex. 374, 375; *Dwight v. Overton*, 35 Tex. 390; *Gurley v. Wood*, 37 Tex. 20, 21.

Estate Accepted with or without Benefit of Inventory.—Where an estate is accepted, without benefit of inventory, no administration would be necessary since the heirs would become liable, but, in ordinary cases, such administration would not be considered absolutely void. *Blair v. Cisneros*, 10 Tex. 34.

In 1839, all the property of a decedent vested immediately in his heirs; the heirs had the privilege of accepting the estate, with or without the benefit of inventory: if accepted without inventory, there was no necessity for the appointment of an administrator, for the heirs became unconditionally liable for the payment of the debts. *Fisk v. Norvel*, 9 Tex. 13.

b. Debts Which Necessitate Administration.

Fact That Indebtedness Small.—The jurisdiction of the probate court to appoint an administrator of a decedent is not defeated because decedent's indebtedness is small. *Rye v. J. M. Guffey Petroleum Co.*, 42 Tex. Civ. App. 185, 95 S. W. 622.

Funds Expended after Death of Decedent by His Mother.—In an action by plaintiffs to recover for defendant's breach of contract in sub-

stituting for the coffin purchased a pine box, which was too small to contain decedent's remains, but into which they were jammed, it was no defense that a portion of the funds used by plaintiffs to pay for the coffin purchased belonged to decedent's estate, which was taken possession of after his death by his mother, and paid to defendant without administration. *J. E. Dunn & Co. v. Smith* (Civ. App.), 74 S. W. 576.

Pledge of Note.—To secure the payment of a debt, L. delivered to W. a note on other parties for a larger amount, payable to bearer. Subsequently W. sent the note to L., to be placed in an attorney's hands for collection for their mutual benefit. Attorneys were retained by L., but the note was not delivered until after the death of L., when it was found by the widow and turned over by her to the attorneys, who collected the note. No administration was had upon L.'s estate. Held that, the relation between L. and W. being that of pledgor and pledgee, the latter should have caused the administration of L.'s estate, and should have authenticated his claim and presented it for allowance, in default of which he could not maintain action against the attorneys for the proceeds of the note. *Gurley v. Ward*, 37 Tex. 20, following *Robertson v. Paul*, 16 Tex. 472, and distinguishing *Locketts v. Townsend*, 3 Tex. 119. See post, "Claims Which Must Be Presented," VII, E, 1, b, (2).

Debts Barred by Limitations.—Where the claim of a creditor of a deceased person is barred by limitations, he has no standing in a proceeding to enforce administration of the estate. *Mott v. Riddell*, 2 Posey Unrep. Cas. 107; *Chandler v. Hudson*, 11 Tex. 32, 37.

Costs of Void Administration.—Costs of a void administration constitute no basis for a grant of administration. *Duncan v. Veal*, 49 Tex. 602.

Expense of Procuring Land Certificate to Which Heir Entitled.—A debt incurred for the expenses of procuring a land certificate to which heirs are entitled by law on death of their intestate is not a debt against the estate, nor ground for granting administration on the estate. *Summerlin v. Rabb*, 11 Tex. Civ. App. 53, 31 S. W. 711, citing *Stone Land, etc., Co. v. Boon*, 73 Tex. 548, 554, 11 S. W. 544; *Allen v. Peters*, 77 Tex. 59, 13 S. W. 767; *Paul v. Willis*, 69 Tex. 261, 7 S. W. 357; *Harwood v. Wylie*, 70 Tex. 538, 541, 7 S. W. 789; *Duncan v. Veal*, 49 Tex. 603; *Wardrup v. Jones*, 23 Tex. 489; *Withers v. Patterson*, 27 Tex. 491, 492; *Chinn v. Taylor*, 64 Tex. 385, 389, and distinguishing *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550.

Debts Adjustable in Partition.—Where the entire estate of a decedent, indebted only to his surviving wife, was in community, of which half, after paying the wife's claim, which was a charge on the community, belonged to her, and the other half to the only child of the parties, there was no necessity for the appointment of a permanent administratrix, the matter being adjustable in partition between the wife and child. *Goldstein v. Susholtz*, 46 Tex. Civ. App. 582, 105 S. W. 219; *Moore v. Moore* (Civ. App.), 31 S. W. 532, affirmed in 89 Tex. 29.

Debt a Charge upon Estate in Hand of Guardian.—Where a debt was a charge upon the estate in the hands of the guardian of the sole heir, it was held that the guardian might pay it by a sale under the order of the probate court, without administration. *Berry v. Young*, 15 Tex. 369.

Satisfaction of Debts by Guardian.—Where a ward is the only heir of a decedent, it seems that an administration on the estate would be unnecessary and that the debts could be satisfied in the guardianship proceeding. *Broom v. Pearson*, 98 Tex. 469, 474, 85 S. W. 790, 86 S. W. 733, af-

firming in part and reversing in part 81 S. W. 753, and citing *Berry v. Young*, 15 Tex. 369.

Though debts against a decedent, in the absence of administration on his estate, might have been satisfied in guardianship proceedings out of the inheritance, the sale by guardian of the interest of one of the heirs in property held in common with other heirs can not affect the title of such other heirs on the ground that there were debts chargeable against the whole property. *Broom v. Pearson*, 98 Tex. 469, 85 S. W. 790, 86 S. W. 733, affirming in part and reversing in part 81 S. W. 753. See the title **GUARDIAN AND WARD**.

Mortgage or Deed of Trust.—See post, "Mortgages and Other Secured Claims," VII, E, 1, b, (2), (c).

c. Estates Free from Indebtedness.

See post, "Existence of Debts," II, B, 2, a, (3).

(1) In General.

Grant of administration is not restricted to a case in which debts are due from decedent. *Ferguson v. Templeton* (Civ. App.), 32 S. W. 148.

No law or decision by the supreme court restricts the grant of administration to cases in which there are debts due from the decedent. "There are doubtless dicta which tend to support this assumption, but these dicta will be found in cases where the application for letters of administration was made so long a time after the death of the decedent that it was conclusively presumed that his estate had vested absolutely in his heirs, and was not, therefore, subject to administration for any purpose." *Ferguson v. Templeton* (Civ. App.), 32 S. W. 148, 150, affirmed in 89 Tex. 47. See as containing such dicta *Western Union Tel. Co. v. Kerr*, 4 Tex. Civ. App. 280, 23 S. W. 564; *Angier v. Jones*, 28 Tex. Civ. App. 402, 67 S. W. 449, affirmed in 95 Tex. 673, no op. See

post, "Time within Which Application May Be Made," II, B, 3.

Where there are no debts and no necessity for administration, property having vested in heirs, by acceptance, appointment of administrator is null. *Blair v. Cisneros*, 10 Tex. 34, 47. See, also, *Martin v. Robinson*, 67 Tex. 368, 376, 3 S. W. 550; *Kleinecke v. Woodward* 42 Tex. 311, 313.

Probate act of 1848 does not make authority of probate court to administer an estate dependent upon the existence of debts. *Kleinecke v. Woodward*, 42 Tex. 311, 313.

(2) Necessity for Recovering Claim in Favor of Decedent.

There is no necessity to obtain administration upon a decedent's estate to enforce his claim for pay due him from the government. The claim can be enforced by his heirs. *Templeton v. Falls Land, etc., Co.*, 77 Tex. 55, 57, 13 S. W. 964; *Fisk v. Norvel*, 9 Tex. 13, 17; *Blair v. Cisneros*, 10 Tex. 34. See post, "Heirs, Distributees, Legatees and Devisees," V, S, 5, a, (1), (b).

Where the heirs had agreed to accept the estate of a decedent, who left no debts, and a person was appointed by them to collect and pay over, an administration will not afterwards be granted. *Francis v. Hall*, 13 Tex. 189.

An application for administration of a decedent's estate by one not interested therein, which merely shows that there are debts due the estate, and does not show any creditors or heirs under disability, should be denied, since in such case the heirs may sue and make distribution. *Angier v. Jones*, 67 S. W. 449, 28 Tex. Civ. App. 402.

(3) Condition Precedent to Sale.

Where an estate has vested in the heirs subject only to such disposition of it as may be necessary to be made by the administrator under the orders of the court to pay debts, make partition and the like, if there is no admin-

istrator there can be no sale of the property until one is appointed. *Rose v. Newman*, 26 Tex. 131.

(4) For Partition, Recovery of Legacies, Devises or Distributive Shares.

There are cases in which a legatee or heir may maintain an action for the protection and maintenance of his rights, respecting personal property, bequeathed to him or to which he may be entitled by inheritance, although there has been no administration. *McIntyre v. Chappell*, 4 Tex. 187, 192; *Moore v. Moore*, 2 Tex. 400.

In the case of *Moore v. Moore*, 2 Tex. 400, the plaintiff there claimed as legatee of one G. The property which was claimed by him as a bequest from G. had been mortgaged by the latter to the defendant to secure the payment of a sum of money; and these facts appeared upon the petition, to which there was a demurrer. Here, then, it is clear that an administration was necessary, and that no action could be maintained to recover the property mortgaged until there should have been satisfaction of the debt and an extinguishment of the mortgage. *McIntyre v. Chappell*, 4 Tex. 187, 192.

Partition.—Under art. 5491, Pas. Dig., where there are no creditors, heirs may partition estate without administration. *Patterson v. Allen*, 50 Tex. 23, 26. See the title PARTITION.

A suit for the partition of land between heirs is maintainable where the estate was not indebted, all the heirs were of age, and there was no administration upon the estate, and none necessary. *Jordan v. Jordan*, 2 Willson, Civ. Cas. Ct. App. § 830.

(5) Husband's and Wife's Estates.

There is as much necessity to settle, by administration, the estate, both common and separate, of a deceased wife, as that of a deceased husband. *Wood v. Wheeler*, 7 Tex. 13.

Where the succession is composed of the separate property of the de-

ceased, a statutory provision would be required, to designate and exempt from execution, or administration a portion of the estate, for the sole use of the survivor. *Wood v. Wheeler*, 7 Tex. 13.

A husband and wife dying about the same time, and there being no evidence as to which died first, and administration having been taken out on the estate of the husband, and land sold by the administrator to pay debts, and it not appearing that the debts were not community debts, it was held that the wife's interest passed by the sale, and that there was no need of two administrations. *Soye v. McCallister*, 18 Tex. 80.

"There was no necessity of two administrations upon the same property, to pay debts, for which it must have been equally liable in the hands of the administrator or either or both of the decedents. *Jones v. Jones*, 15 Tex. 143; *Berry v. Young*, 15 Tex. 369." *Soye v. McCallister*, 18 Tex. 80, 99. See the title HUSBAND AND WIFE.

(6) Community Property.

See the title HUSBAND AND WIFE.

(7) Infant's Estate.

Administration by guardian is valid as to innocent parties, though matters had all been adjusted by decree in another county. *Edwards v. Halbert*, 64 Tex. 667, 669.

Where there was an appeal pending from a decision of the county court on the final settlement of the account of the guardian of a deceased minor, and the decree appealed from fully adjusted all the rights and interests in a deceased minor's estate, a court of another county had no jurisdiction to appoint the guardian as administrator of the estate. *Edwards v. Halbert*, 64 Tex. 667.

(8) Estates of Deceased Soldiers.

A grant of administration in 1850 upon the estate of a Texas volunteer,

killed in 1836, held to be without authority; there being no clear proof that any debts existed against the estate. *Duncan v. Veal*, 49 Tex. 603. See post, "Estates of Deceased Soldiers," II, A, 2, b, (3), (a), bb.

(9) Estates Liable to Be Escheated.

Act March 20, 1848 (Old & W. Dig. p. 160), providing for vesting in the state escheated property, though intended to furnish a remedy for escheating both real and personal property to which the state is entitled without a previous administration, does not prohibit administration in the county court of the estates of persons dying intestate without heirs. *Hall v. Claiborne*, 27 Tex. 217.

By its terms, this law is only applicable when no letters of administration have been granted; the jurisdiction of the county court is unquestionable, unless the jurisdiction has been ousted by the institution of proceedings in the district court for the purpose of escheating the property of the estate; but if such proceedings are instituted and dismissed, the jurisdiction of the county court again attaches. *Hall v. Claiborne*, 27 Tex. 217.

3. Withdrawal or Withholding Estate from Administration.

See post, "Estates of Deceased Soldiers," II, A, 2, b, (3), (a), bb.

a. Withdrawal by Heirs, Distributees, Devisees and Legatees.

(1) Mode.

The mode of proceeding by an heir, devisee, or legatee, when it is desired to withdraw an estate from administration, and by the administrator and the court, is prescribed in chapter 14, Rev. Stat. *Houston v. Mayes*, 77 Tex. 265, 266, 13 S. W. 1036.

Administrator's Exhibit Settlement and Discharge.—Upon the withdrawing of an estate from administration under chapter 14, Rev. Stat., the administrator is required to file in the county court an exhibit under oath of

the conditions of such estate. Such exhibit must show the exact condition of the estate. *Houston v. Mayes*, 77 Tex. 265, 266, 13 S. W. 1036.

"It is intended that * * * all claims and demands in favor of or against the administrator growing out of his management of the estate shall be there ascertained by exceptions to the exhibit, by evidence, and by a re-statement of the exhibit if it becomes necessary. All such matters must be litigated in the court in which the administration is pending upon the hearing of the administrator's final exhibit. Unless the administration is being conducted in the district court in a proper case, such questions can not be tried there except upon appeal. *Franks v. Chapman*, 61 Tex. 576." *Houston v. Mayes*, 77 Tex. 265, 266, 13 S. W. 1036.

The claims of the administrator must be filed in the county court and there entered on the claim docket as prescribed by art. 2193, Rev. Stat. *Richardson v. Kennedy*, 74 Tex. 507, 509, 12 S. W. 219; *Houston v. Mayes*, 77 Tex. 265, 266, 13 S. W. 1036.

County court must fix amount for which administrator is liable before he can be sued by one who has had estate withdrawn from administration, for assets not included in final exhibit. *Houston v. Mayes*, 77 Tex. 265, 267, 13 S. W. 1036.

The provision that administrator may be cited to show condition of an estate after inventory appraisement, and list of claims have been returned, is for the benefit of creditors. *Thomas v. Bonnie*, 66 Tex. 635, 637, 2 S. W. 724.

When Objections Filed to Administrators' Account.—Rev. St. c. 14, tit. 37, provides that where the only heir of a decedent shall apply to withdraw the estate from administration, and shall file a bond, the administrator shall deliver the estate to such heir, and shall file his account. Held, that where on such application the admin-

istrator files his account, and the heir files objections thereto, action by the court on the account is not a prerequisite to the withdrawal of the estate from administration, but the court should order an immediate delivery to the heir. *Harris v McClure* (Civ. App.), 25 S. W. 1095.

Discharge Not Asked.—When an estate is withdrawn from the court it is immaterial that the discharge of the administrator was not asked in the pleadings, since it is the duty of the court to make the order of discharge without any prayer therefor. *Houston v. Mayes' Estate*, 66 Tex. 297, 17 S. W. 729.

Operation of Order of Withdrawal.—"The entry of the order for the delivery of the estate to the heir does not put an end to the jurisdiction of the court over the administrator for the settlement of his accounts, but such jurisdiction continues so as to enable the court to fix the balance pro or con. *Houston v. Mayes*, 77 Tex. 265, 13 S. W. 1036. The discharge of the administrator provided for in art. 1972 is not a condition precedent to the withdrawal of the estate, but follows, as a consequence, the entering of the order therefor and the settlement of the accounts of the administrator." *Harris v. McClure* (Civ. App.), 25 S. W. 1095, 1096.

Appeal from Order Withdrawing Estate from Administration.—Administrator's appeal from judgment withdrawing the estate from administration vacates the order, and a new exhibit must be filed. *Houston v. Mayes*, 77 Tex. 265, 267, 13 S. W. 1036.

Appellee applied to the county court, under Rev. St. c. 14, for an order withdrawing an estate from administration, which was granted. The administrator appealed to the district court, where, on a trial de novo, a similar order was entered, and the judgment was affirmed by the supreme court. Held that, since Rev. St. art.

2207, provides that an appeal to the district court from an order of the county court withdrawing an estate from administration must be tried de novo, the administrator continued to be such after his appeal, and since, at the time the appeal was determined, the exhibit filed before commencement of the proceeding no longer represented the true condition of the estate, appellee could not maintain an action in the district court to compel the administrator to turn over the estate without first requiring him to file another exhibit in the county court. *Houston v. Mayes*, 77 Tex. 265, 13 S. W. 1036.

Appeal of administrator from order withdrawing estate from administration should be dismissed, where he has not filed and docketed his claims below. *Houston v. Mayes*, 77 Tex. 265, 267, 13 S. W. 1036. See *Richardson v. Kennedy*, 74 Tex. 507, 12 S. W. 219.

Mere order for partition under probate law of 1876 does not withdraw the property designated therein from the jurisdiction of the probate court. *Lee v. Henderson*, 75 Tex. 190, 192, 12 S. W. 981.

Property partitioned under the act of August 9, 1876, authorizing partial partition, is placed beyond the jurisdiction of the probate court and not subject to further administration. *Henderson v. Lindley*, 75 Tex. 185, 188, 12 S. W. 979; *Lee v. Henderson*, 75 Tex. 190, 12 S. W. 981.

(2) Bond Required of Party Withdrawing.

"One of the conditions of the bond required to be given by the party withdrawing the estate from administration is that he 'will pay to the executor or administrator any balance that may be found to be due him by the judgment of the court on his exhibit.'" *Houston v. Mayes*, 77 Tex. 265, 266, 13 S. W. 1036.

Operation and Effect of Bond.—It would seem that an heir having re-

ceived an estate from administration can not, in an action upon his bond, deny that he was an heir, and entitled to part of the estate. *Thomas v. Bonnie Bros.*, 66 Tex. 635, 2 S. W. 724.

An heir who has executed the prescribed bond in proceedings to withdraw an estate from administration and received the estate, can not assert that his bond is invalid because the inventory, appraisal, and list of claims had not been returned. *Thomas v. Bonnie Bros.*, 66 Tex. 635, 2 S. W. 724.

Liability of Obligees on Withdrawal Bond.—Obligees in bond for withdrawal of an estate from administration, under arts. 1969, 1970, Rev. Stat., are liable thereon for all unpaid debts against the estate, and not in proportion to the interest of their principal in the estate. *Thomas v. Bonnie*, 66 Tex. 635, 638, 2 S. W. 724.

Where parties become sureties on the bond of an heir, given for the purpose of withdrawing an estate from administration, under Rev. St. arts. 1964-1972, they are liable for all the unpaid debts of the estate, and their liability is not limited by the assets of the estate, or to the share of the estate to which the heir whose sureties they are is personally entitled on the distribution. *Thomas v. Bonnie*, 66 Tex. 635, 2 S. W. 724.

(3) Persons to Whom Delivery Made.

Rev. St. art. 1966 relating to the withdrawal of estates from administration provides that when the bond provided for in the preceding article has been given and approved, it shall be filed and recorded on the minutes of the court, and the court shall thereupon enter an order upon the minutes directing and requiring the executor or administrator to deliver forthwith to such person or persons, the portion or portions of such estate to which he or they are entitled. Held, that it was not clear from such article whether the delivery was to be made

only to such persons as apply for a withdrawal of an estate from administration, or to each of the distributees of the portion to which he is entitled. *Houston v. Estate of Mayes*, 66 Tex. 297, 17 S. W. 729.

Where, on an application for a withdrawal of an estate from administration, an order for the administrator's discharge is made, and for the delivery of the estate to a person giving a proper bond, with the concurrence of the heirs, the administrator has no cause for complaint. *Houston v. Mayes' Estate*, 66 Tex. 297, 17 S. W. 729.

If any of the heirs objected to the disposition made of the property, they themselves should have made their objection at the time, and in the manner provided by statute. *Houston v. Mayes*, 66 Tex. 297, 17 S. W. 729.

(4) Partition.

The statute (Rev. St. arts. 1964 et seq.) relating to the withdrawal of estates from administration, does not seem to contemplate that a portion of the estate shall be made before its withdrawal, unless demanded in writing by some one entitled to a portion of it. *Houston v. Estate of Mayes*, 66 Tex. 297, 17 S. W. 729.

Heirs in a proceeding under Rev. St. arts. 1964, et seq., to withdraw an estate from administration did not waive the right to have partition by failing to object to the delivery to one of their number, and could still demand it. *Houston v. Estate of Mayes*, 66 Tex. 297, 17 S. W. 729.

(5) Remedies of Creditors.

After an estate is withdrawn from administration, as provided in Revised Statutes, 1964, etc., a creditor remaining unpaid, may sue upon the bond and have judgment against its makers for the amount of his debt with execution to enforce payment; or he may sue any or all of the distributees who have taken any of the estate, but in such case the recovery

against any distributee will be proportioned according to the estate he may have received in distribution. *Thomas v. Bonnie Bros.*, 66 Tex. 635, 2 S. W. 724; *Headley v. Good*, 24 Tex. 232, 234.

Court in Which Claim Must Be Litigated.—Upon withdrawal of estate from administration all claims in favor of or against administrator, as such, must be litigated in the court in which administration is pending. *Houston v. Mayes*, 77 Tex. 265, 267, 13 S. W. 1036; *Harris v. McClure* (Civ. App.), 25 S. W. 1095, 1096.

Petition in Action on Bond.—If a petition, in an action against the obligees of a bond for the withdrawal of an estate from administration, which does not disclose what interest the principal in the bond had in the estate, is defective, the defect can be cured by the answer. In an action against a distributee, the plaintiff must show what proportion of the estate he received. *Thomas v. Bonnie Bros.*, 66 Tex. 635, 2 S. W. 724.

In a suit on a bond for the withdrawal of an estate from administration the petition showed that the account probated was for goods sold to the intestate in September, 1884, and such account would bear interest from January 1st, 1885, in the absence of a contract to the contrary. (Rev. St. art. 2977.) Furthermore, the petition showed that the claim was duly approved by the county court on February 19th, 1885, after it had been allowed by the administrator, and the trial court only allowed interest from that date. Held, that the petition was sufficient as supporting a basis for the allowance of such interest. *Thomas v. Bonnie Bros.*, 66 Tex. 635, 2 S. W. 724.

Burden of Proof.—In an action against a distributee of an estate plaintiff must show what proportion of the estate he received. *Thomas v. Bonnie Bros.*, 66 Tex. 635, 2 S. W. 724.

b. Death of Widows as Divesting Administration of Community Property.

The husband died leaving a widow. Administration was had in lifetime of the widow. Held, that her subsequent death did not divest the administration of the husband of jurisdiction over the community property. *Lawson v. Kelley*, 82 Tex. 457, 17 S. W. 717, distinguishing the case of *Rudd v. Johnson*, 60 Tex. 91, in which the wife, owning a community interest in the land, died some time prior to the death of her husband, and there was no administration until his death and none on her estate. In this case, the land was already in the course of administration as the community estate of the husband and when the wife died; it had been inventoried as community property of the estate of the deceased and his surviving wife and was subject to administration as such; and the death of the widow would not have the effect to withdraw it from the administration.

c. Independent Executorship.

See post, "Executorship Free from Contract of Court," I, F.

F. EXECUTORSHIP FREE FROM CONTROL OF COURT.

1. In General.

Article 1942, Rev. Stat., permits a testator to withdraw his estate from the control of the probate court. *Smithwick v. Kelly*, 79 Tex. 564, 572, 15 S. W. 486; *Holmes v. Johns*, 56 Tex. 41; *Roy v. Whitaker* (Civ. App.), 50 S. W. 491, 493, affirmed in 93 Tex. 649, no op.

An executor acting under such a will as is referred to in art. 1995, Rev. Stat., though not so designated by the statute is, in legal phraseology, termed an "independent executor." *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75; *Roberts v. Connellee*, 71 Tex. 11, 14, 8 S. W. 626; *Ellis v. Mabry*, 25 Tex. Civ. App. 164, 60 S. W. 571, 572. See,

also, *Holmes v. Johns*, 56 Tex. 41; *Bennett v. Kiber*, 76 Tex. 385, 13 S. W. 220.

The only difference between an independent executor and an executor under direction of a court "is that the one can act independently within the scope of the powers granted to him by the statute or will, while the other must act under the orders and with the approval of a court. Both must be governed by the warrant of authority given by will or statute, and the same rules of construction of the will, granting the authority, are applicable in both cases. The rule in all cases is to ascertain and follow the intention of the testator. *Howze v. Howze*, 19 Tex. 553, 554; *Paschal v. Acklin*, 27 Tex. 173, 193; *Orr v. O'Brien*, 55 Tex. 149, 158; *Blanton v. Mayes*, 58 Tex. 422." *Altgelt v. Sullivan & Co.* (Civ. App.), 79 S. W. 333, 337. See ante, "Definitions," I, A. See the title WILLS.

An Administration.—"The management and settlement of an estate by an independent executor is an administration." *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815, reversing 105 S. W. 837; *Roy v. Whitaker*, 92 Tex. 346, 48 S. W. 892, 49 S. W. 367.

A Trust.—"An executorship free from the control of the county court is a special personal trust." *Howard v. Johnson*, 69 Tex. 655, 659, 7 S. W. 522.

Status of Trustee.—Independent executor is a trustee for those entitled to take under the will. *Stephenson v. McFaddin*, 42 Tex. 322, 330.

2. Requisites of Will.

"Unless the will in express terms or by necessary construction indicates the desire of the testator that his estate shall be administered independent of the county court, the jurisdiction of that court attaches, and the estate must be administered under its control and orders. *Lewis v. Nichols*, 38 Tex. 54; *Smithwick v. Kelly*, 79 Tex.

564, 15 S. W. 486." *Gray v. Russell*, 41 Tex. Civ. App. 526, 91 S. W. 235.

In a will the words "I wish my estate to be kept out of the probate court" substantially complies with the probate act of 1848, art. 110, *Paschal's Dig.*, 1371, in providing that no other action shall be had in the probate court than the probate and registration of the will. *Pierce v. Wallace*, 48 Tex. 399.

In construing the will in *Pierce v. Wallace*, 48 Tex. 399, "Mr. Moore, associate justice, speaking for the court, said: 'The language of the will is not in literal conformity with this section of the statute, but evidently it is the same in substance and effect. No other inference can be drawn from the will than that it was the intention of the testator that no other action should be had in the county court in relation to the settlement of his estate than the probate and registration of his will, and the return of an inventory of his estate. Under this will the jurisdiction of the county court over the estate was limited to the completion of these special matters,' etc." *Patten v. Cox*, 9 Tex. Civ. App. 299, 304, 29 S. W. 182.

A provision in a will, empowering executors to act in the management of testator's estate without the interference of the probate court, especially when taken in connection with other provisions indicating that testator expected the executors to settle his debts, dispose of his property to settle the same, and expressly authorizing them to sell the property and to pay debts with property, gave the executors authority to do whatever was necessary in the settlement of the estate, and created an independent administration within *Sayles' Rev. Civ. St.* 1897, art. 1995, authorizing testators to provide that no action shall be had in the county court, in relation to the settlement of their estates, other than the probating and recording of the will, and return of an inventory, appraise-

ment, and list of claims. *Epperson v. Reeves*, 79 S. W. 845, 35 Tex. Civ. App. 167.

The fact that a will attempted to relieve the executor from returning an inventory, appraisement, and list of claims as required by Sayles' Civ. St. art. 1942, does not destroy the executor's right to administer independently of the court as provided in that article, when so directed by the will. *Patten v. Cox*, 9 Tex. Civ. App. 299, 29 S. W. 182.

Will Requiring Filing Report.—A further provision, directing the executors to file annual reports with the county court showing the condition of the estate, did not restrict the executors' power nor give the court supervision over their acts, especially in view of an express statement that the purpose of the filing was that it might be seen by creditors and heirs, and did not contemplate that it should be audited by the court, and the acts of the executors approved or disapproved. *Epperson v. Reeves*, 79 S. W. 845, 35 Tex. Civ. App. 167.

Provision Relieving Executor from Executing Bond.—A provision in a will relieving the executor from executing a bond does not divest the county court of the control of the estate, unless the will otherwise indicates the desire of testator that the estate be administered independent of the county court. *Gray v. Russell*, 91 S. W. 235, 41 Tex. Civ. App. 526; *Lewis v. Nichols*, 38 Tex. 54; *Smithwick v. Kelly*, 79 Tex. 564, 15 S. W. 486.

A will appointing one executrix without bond, but failing to provide that no other or further action should be taken in the county court than the return of an inventory and appraisement of the property belonging to the estate, is not an independent will. *Glover v. Coit*, 81 S. W. 136, 36 Tex. Civ. App. 104.

3. Assent of Heirs.

A direction in a will that no pro-

ceedings shall be had in the probate court, except to probate the will and file inventory, is not sufficient to take the administration out of the probate court, as it is also necessary that the persons entitled to the estate shall give their assent. *Henderson v. Van Hook*, 25 Tex. Supp. 453; *Hogue v. Sims*, 9 Tex. 546; *Carroll v. Carroll*, 20 Tex. 731, 732; *Wood v. McMeans*, 23 Tex. 481; *Shaw v. Ellison*, 24 Tex. 197, 198; *Runnels v. Kownslar*, 27 Tex. 528; *Wood v. Mistretta*, 20 Tex. Civ. App. 236, 49 S. W. 236, 50 S. W. 135, affirmed in 93 Tex. 678, no op.

Failure of Heirs to Give Security for Debts.—The provision of the law that a testator may provide that no other action shall be had in the county court, in relation to the settlement of his estate, than the probate and registration of his will, may become nugatory or inoperative if, upon a demand of security for the payment of debts of the estate, is it declined by the heirs. *Runnels v. Runnels*, 27 Tex. 515; *Roy v. Whitaker* (Civ. App.), 50 S. W. 491, 493, affirmed in 93 Tex. 649, no op.; *Hogue v. Sims*, 9 Tex. 546, 548.

4. Effect of Death, Resignation or Failure to Qualify of Persons Named in Will.

a. In General.

See post, "Estate Administered by Independent Executor Unrepresented," XII, A, 1, b.

b. Qualification of One of Several Joint Independent Executors.

The qualification and return of inventory by one independent executor under a will has the effect to withdraw the estate from the administration of the courts. *Roberts v. Connelles*, 71 Tex. 11, 17, 8 S. W. 626.

5. Operation and Effect.

a. In General.

When a testator provides in his will that the probate court shall have no control of his estate, the executor is

to manage the same and pay debts as though both the estate and debts were his own. *Pleasants v. Davidson*, 34 Tex. 459.

b. Jurisdiction of Court.

When an independent executor has been appointed, and the requirements of art. 1995, Rev. Stat., complied with, the probate court has no further jurisdiction over the estate, so long as he continues to discharge the trust and it can only acquire jurisdiction in the way and by the means which the statute prescribes. *Ellis v. Mabry*, 25 Tex. Civ. App. 164, 60 S. W. 571; *Holmes v. Johns*, 56 Tex. 41; *Bennett v. Kiber*, 76 Tex. 385, 13 S. W. 220; *Runnels v. Runnels*, 27 Tex. 515, 521; *McDonough v. Cross*, 40 Tex. 251; *Roy v. Whitaker* (Civ. App.), 50 S. W. 491, 493, affirmed in 93 Tex. 649, no op.

Rev. St. Art. 1948 was manifestly intended to enable the executor acting under a will, under which the estate was withdrawn from the jurisdiction of the county court, to have the county court determine who were entitled to the entire estate, where the will failed to do so, or in what proportions beneficiaries were entitled to take under it in order that the estate might be turned over to them after the executor had discharged his trust. *Lumpkin v. Smith*, 62 Tex. 249.

c. Powers of Executor.

An independent executor has the power to do, without an order of the court, every act which an ordinary executor administering an estate under control of the court could do with such order. *Ellis v. Smith Co.*, 35 Tex. Civ. App. 566, 80 S. W. 633, affirmed in 99 Tex. 615, no op.; *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75; *McDonough v. Cross*, 40 Tex. 251, 280; *Williams v. Howard*, 10 Tex. Civ. App. 527, 533, 31 S. W. 835, affirmed in 93 Tex. 677, no op.; *Roy v. Whitaker*, 92 Tex. 346, 355, 48 S. W. 892, 49 S. W. 367; *Stevenson v. Roberts*, 25 Tex. Civ. App. 577, 64 S. W. 230; *Carlton v. Goebler*,

94 Tex. 93, 58 S. W. 829. See, also, *Jack v. Cassin*, 9 Tex. Civ. App. 228, 28 S. W. 832; *Halbert v. Carroll* (Civ. App.), 25 S. W. 1102; *Wren v. Harris*, 78 Tex. 349, 351, 14 S. W. 696; *Murrell v. Wright*, 78 Tex. 519, 15 S. W. 156.

An independent executor takes charge of and administers the estate of his testator without action of the county court in relation to the settlement of the estate. "He is uncontrolled, uninformed, unchecked, and untrammelled by orders of the court directing, informing, or commanding what he shall do in the management and administration of the estate. He is an executor at large, exercising his own judgment and discretion, acting and doing what he pleases, unless brought to account for his actions by some one interested in the estate or affected by the way it is being administered—he is an independent executor." *Altgelt v. Mernitz*, 37 Tex. Civ. App. 397, 83 S. W. 891.

To Make Contract with Land Locator.—See post, "Contract for Location of Land," V, M, 2, d, (3), (c).

Powers before Probate of Will or Qualification.—See post, "Powers before Probate of Will and Qualification," V, E.

d. Collateral Attack.

Legal capacity of independent executor can not be attacked by stranger to estate in collateral proceeding, because he has not performed his statutory duty as executor. *Patten v. Cox*, 9 Tex. Civ. App. 299, 304, 29 S. W. 182; *Willis & Bro. v. Ferguson*, 46 Tex. 496; *Cooper v. Horner*, 62 Tex. 356, 364; *Campbell v. Cox*, 1 App. Civ. Cases, § 526.

6. Remedies of Creditors.

After heirs have assented to take the administration of the estate out of the probate court, by giving bond, the creditor may sue upon the bond, or sue person in possession of the estate. *Hogue v. Sims*, 9 Tex. 546, 549.

G. JOINT ADMINISTRATION OF COMMUNITY ESTATE OF DECEASED HUSBAND AND WIFE.

Where there are community debts, a joint administration may be granted on the community estate of a husband and wife, both deceased. *Stephenson v. Marsalis*, 11 Tex. Civ. App. 162, 33 S. W. 383. See the title HUSBAND AND WIFE.

II. Appointment, Qualification and Tenure of Office.

A. APPOINTMENT.

1. Executor.

a. Persons Who May Be Appointed.

Married Women.—See post, "Married Women," II, A, 2, a, (3).

b. Terms of Will by Which Appointment Made.

A testator desired E. S. to take charge of the children as guardian, sell the perishable property, rent out the house, hire out the negroes, etc. Held, that E. S. was virtually nominated executor. *Stone v. Brown*, 16 Tex. 425.

A provision in a will appointing executors, and requesting that they serve until testator's son becomes 21 years old, can not be construed into an appointment of the son as executor on his becoming of age. *Frisby v. Withers*, 61 Tex. 134. And see *Roy v. Whitaker* (Civ. App.), 50 S. W. 491, 496, affirmed in 93 Tex. 649, no op.

c. Renunciation of Appointment.

(1) Right to Renounce.

A person named as executor in a will is not bound to accept the trust, but, having accepted, and intermeddled with the estate, or done acts in exercise of the authority conferred by the will, he has not afterwards the right to renounce. "Some authorities have gone so far as to hold that a court, having jurisdiction over the estate, has no power to permit him to renounce, and that its order doing so is a nullity; while others hold that he has no right

to renounce, under such circumstances, and the court may refuse to permit him to do so, and should refuse when the interests of the estate require it, but that the question as to the propriety of allowing his renunciation is for the court to decide, and its decision, whether correct or not, is final until reversed. The latter is the prevailing, and, we think, the correct, doctrine. These authorities all recognize two propositions, viz: First, that, after having accepted the trust and taken charge of the estate, the executor has no longer the absolute right to renounce; and, second, the validity of a judgment allowing a renunciation and appointing a successor arises from the fact that the court entering it has jurisdiction over the estate. All of the authorities, with one voice, declare, also, that, unless authorized by statute, an executor can not by his act alone resign the trust, and thereby cause a vacancy; and wherever a subsequent administration based upon a resignation or renunciation of an executor, has been upheld, it was either in a case where the statute authorized the resignation, or where the estate was within the control of the court, so as to authorize it to pass upon the right to renounce or resign, and to determine when an administrator should be appointed." *Roy v. Whitaker* (Civ. App.), 50 S. W. 491, 495, affirmed in 93 Tex. 649, no op. See post, "Resignation," II, F, 4.

The executor is to be deemed to have accepted so as to preclude him from renouncing as matter of right, if he causes the will to be probated, takes oath, and gives bond, if one be required, and files an inventory and appraisal, which are accepted. In such case the stage of the proceedings has been reached at which, if the will be an independent one, the whole matter passes beyond the control of the probate court. "He must then, at least, be deemed to have accepted, since he has done all of the acts which

takes the estate out of court, and deprives it, by the very terms of the statute, of power to take other action. It necessarily follows that he can not thereafter renounce in that court. He is accountable, as trustee, to those interested in the estate, either out of court, or in other tribunals." *Roy v. Whitaker* (Civ. App.), 50 S. W. 491, 494, affirmed in 93 Tex. 649, no op.

Joint Executors.—When the will has been probated the court will grant letter to the testamentary executor or such of them as may qualify. *Phelps v. Ashton*, 30 Tex. 344, 345. See *Coup-land v. Tullar*, 21 Tex. 523, 524.

As to liability of judge for error in judgment in refusing letter to one of the independent executors, the other two having renounced, see the title JUDGES.

As to presumption of renunciation by joint executor, see post, "Coexecutors and Coadministrators," V, P.

(2) Effect.

(a) Renunciation by Sole Executor.

In *Langley v. Harris*, 23 Tex. 565, 569, in considering independent wills, the court, in effect, said that the trust thereby created was special in its nature and operation and could not be transferred by the executor nor delegated by the court; and that where the executor named in the will fails or refuses to accept the trust, that clause of the will fails, and is inoperative, the same as if it had been omitted. *Blanton v. Mayes*, 58 Tex. 422, 426. See post, "Estate Administered by Independent Executor Unrepresented," XII, A, 2, b.

(b) Renunciation by One or More Co-executors.

The provision of Stat. 21, Henry VIII, c. 4, which provides that the qualified and acting executors may execute the will where others named refused to qualify and act, is engrafted on the probate system of Texas by Act August 15, 1870, entitled "An act prescribing the mode of proceedings in

district courts in matters of probate," sections 85, 274, 275, thereof providing that where there is more than one executor and the letters of one or more of them be revoked or surrendered, or part die, those who remain shall discharge all the duties required by law touching such estate, etc. *Blanton v. Mayes*, 58 Tex. 422; *Mayes v. Blanton*, 67 Tex. 245, 247, 3 S. W. 40; *Johnson v. Bowden*, 43 Tex. 570, 671; *Roberts v. Connellee*, 71 Tex. 11, 15, 8 S. W. 626; *Anderson v. Stockdale*, 62 Tex. 54, 59.

Independent Executors.—Where one of two executors of an independent will refuses to qualify, the other is authorized to act as if he had been appointed sole executor. *Bennett v. Kiber*, 76 Tex. 385, 13 S. W. 220; *Mayes v. Blanton*, 67 Tex. 245, 247, 3 S. W. 40, distinguishing *Blanton v. Mayes*, 58 Tex. 422; *Roberts v. Connellee*, 71 Tex. 11, 15, 8 S. W. 626; *Johnson v. Bowden*, 43 Tex. 670; *Anderson v. Stockdale*, 62 Tex. 54.

This is the rule where there is nothing in the terms of a will to indicate a different intention. *Anderson v. Stockdale*, 62 Tex. 54, 60; *Johnson v. Bowden*, 43 Tex. 670. See *Blanton v. Mayes*, 58 Tex. 422; *Mayes v. Blanton*, 67 Tex. 245, 247, 3 S. W. 40, for an illustration.

As applied to what are termed independent wills the general doctrine is subject to exceptions and limitations, dependent upon the terms of the will. For an illustration of this, see *Blanton v. Mayes*, 58 Tex. 422. *Anderson v. Stockdale*, 62 Tex. 54, 60.

"In the case of *Johnson v. Bowden*, 43 Tex. 670, 671, by an independent will the testatrix had nominated and appointed two persons as executors; in another provision the following language occurred: 'Should my executors deem it to the interest of my estate to sell the house and lots this day deeded to me by my daughter, Drucilla Bowden, at public or private sale. I direct that they shall have full power to do so.' This will was duly probated,

and but one of the executors qualified; he then sold and conveyed the lots. The question before the court was as to the validity of this sale." It was held to be valid. *Blanton v. Mayes*, 58 Tex. 422.

d. Forfeiture of Right to Letters.

Hart. Dig. art. 1121, providing that on neglect of an executor named in a will to present the will for probate within thirty days after the death of the testator an administrator shall be appointed does not preclude the executor, in a controversy as to the right to administer, from showing a reasonable excuse for not presenting the will for probate within thirty days. *Stone v. Brown*, 16 Tex. 425.

The neglect which, under the statute (Hart. Dig., art. 1121), forfeits the right of an executor named in a will to demand letters testamentary, must be willful, and not merely a failure caused by ignorance of the law. *Stone v. Brown*, 16 Tex. 425.

"Intermeddling with an estate is not good ground for refusing letters testamentary to an executor." *Stone v. Dorsett*, 18 Tex. 700, 710.

Where an executor "performs acts prior to the issuance of the letters testamentary, they should be closely scrutinized; but they must be clearly acts of malfeasance, before they can operate to defeat the wishes of the deceased, to exclude him who has been nominated by the testator, with the hope and confiding trust that he would carry into effect the solemn behests of his last will, and to confer this office upon a stranger, and one perhaps who was distrusted by the deceased." *Stone v. Dorsett*, 18 Tex. 700, 710, distinguished in *Roberts v. Stuart*, 80 Tex. 379, 15 S. W. 1108. See post, "Executor De Son Tort," XIV.

e. Death before Qualification of Co-executor.

See post, "Coexecutors and Coadministrators," V, P.

2. Administrator.

a. Persons Who May Be Appointed.

(1) In General.

Other legal obstacles may exist to an appointment as administrator than those mentioned in art. 1910. *Stevens v. Cameron*, 100 Tex. 515, 516, 101 S. W. 791.

(2) Aliens and Nonresidents.

Under the common law an alien was not legally disqualified to administer. *Stevens v. Cameron*, 100 Tex. 515, 516, 101 S. W. 791.

Rev. St. 1895, art. 2027, provides that, where an administrator absents himself from the state for the term of three months without permission of the court, etc., he may be removed. Article 1922 provides that when a will has been probated in another state or territory, or in a foreign country, and the executor has qualified, and a copy of the will and probate has been filed, etc., any administrator previously appointed may be removed, and letters testamentary may issue to the executor. Held, that letters testamentary on the estate of a resident decedent may issue to a nonresident. Order (Civ. App.), 96 S. W. 1086, reversed. *Stevens v. Cameron*, 100 Tex. 515, 101 S. W. 791.

(3) Married Women.

At common law a wife could be an executrix or administratrix, with the assent of her husband, but it seems clear that she could not without his assent. It is not believed, however, she could sue as such without his being joined with her; nor could she be sued on her bond without making the husband a party defendant. In the ecclesiastical courts she could sue as a feme sole. *Mitchell v. Wright*, 4 Tex. 283, 286.

Under Statute of Texas.—Letters of administration can not be granted to a married woman, even with the consent of her husband, if he refuse to join in the application and the trust. *Nickelson v. Ingram*, 24 Tex. 630.

Independent Executrix.—If, when a tender of payment of a note is made to an independent executrix, the administration of the estate is pending, she may receive the payment and execute all necessary instruments thereto, without reference to her husband; but otherwise if the estate has been settled. *Stevens v. Taylor* (Civ. App.), 102 S. W. 791.

Under Pasch. Dig. art. 1284, providing that, when a married woman is an executrix, she and her husband shall act jointly in all matters pertaining to her representative capacity, a widow, becoming independent executrix, under article 1371, by qualifying as executrix of the will of her husband, has on her subsequent marriage the power to act as independent executrix, and has the power to make a conveyance, in which her husband joins, in satisfaction of an obligation incurred by her testator. *McAllen v. Raphael* (Civ. App.), 96 S. W. 760.

(4) Creditors.

A holder of a note executed by the wife only is, without proof as to the consideration, entitled as a creditor of her estate to administration thereon. *Nickelson v. Ingram*, 24 Tex. 630.

(5) Surviving Partners.

A surviving partner is not incompetent to receive the appointment of administrator of his deceased partner. *Cole v. Dial*, 12 Tex. 100.

(6) Persons Intermeddling with the Estate—Executors De Son Tort.

Where there is no will and the power of administration on the estate is derived solely from the probate court, the mere fact of intermeddling with the estate before the grant of administration would not, of itself, be sufficient ground for the refusal of letters to a person otherwise entitled. At least a grant, if made, could not be objected to on the ground that the administrator had been acting previously as executor in his own wrong. *Stone v. Dorsett*, 18 Tex. 700, 710.

(7) Guardian of Deceased Infant.

See ante, "Infant's Estate," I, E, 2, c, (7).

(8) Persons Claiming Adverse to Heirs.

Person asserting claim to property of estate inconsistent with interest of heir, though otherwise entitled to letters, ought not to be appointed administrator. So held where the wife of the decedent asserted a claim to the property inconsistent with the interest of the heir. *McIntyre v. Chappell*, 4 Tex. 187, 192.

(9) Persons of Unsound Mind.

"In art. 2027, among other grounds for the removal of executors or administrators, it is provided that, 'where an executor or administrator becomes of unsound mind, or from any other cause is incapable of performing the duties of his trust,' he may be removed. Clearly, one who may be removed for incapacity to perform the duties of the office should not be appointed. Such a doctrine would lead to the absurdity of making it the duty of the court to appoint one administrator of an estate and of then removing him." *Stevens v. Cameron*, 100 Tex. 515, 516, 101 S. W. 791, reversing 101 S. W. 791.

(10) Probate Judge.

"If the same person who has the management of an estate has the power to determine as to whether or not it is correctly administered, and to make decrees which shall benefit or injure himself, the maxims of the common law and the meaning of the constitution and laws are violated in the most flagrant manner. The administration is one protracted trial, whose incidents and conclusion may benefit or damage the executor, and he can no more be the judge presiding over it than he could in the trial of an action at law or a suit in equity where he was one of the parties whose rights were in issue." *Prendergrass v. Beale*, 59 Tex. 446, 447. See, also, *Burks v. Bennett*,

55 Tex. 237, 240. See the title JUDGES.

(11) Attorney for Creditor.

See ante, "Status of Personal Representative as Trustee," I, B.

b. Right to Appointment.

(1) Discretion of Court.

The court is not directed by statute to grant letters to person who may apply for probate of will. *Phelps v. Ashton*, 30 Tex. 344, 347.

Respective qualifications of parties contesting for letters of administration are matters within probate court's discretion. *Hall v. Claiborne*, 27 Tex. 217, 223.

Where administration upon estate was not for those interested in it, it was error to grant letters of administration. *Duncan v. Veal*, 49 Tex. 603, 611.

(9) Good Character of Applicant—Ability to Procure Bond.

Good character is an expressed addition to the applicant's qualifications as administrator (Rev. Stat. art. 1861.) *Aycock & Clifford v. Braun*, 66 Tex. 201, 18 S. W. 500.

Good character as a qualification of an administrator is passed on by the court, but its final ordeal is in the test of the applicant's ability to secure the requisite surety. He is not a fit person to administer the sacred trust unless he can give the bond. *Aycock & Clifford v. Braun*, 66 Tex. 201, 18 S. W. 500.

Hence an agreement to pay an attorney to secure a bond for one desiring to be appointed administrator is invalid. *Aycock v. Braun*, 66 Tex. 202, 18 S. W. 500. See post, "Necessity for Executing," III, A.

(3) Order of Appointment.

(a) Next of Kin, Principal Devisee and Legatee.

aa. In General.

In grant of administration, law gives preference to next of kin and enumerated persons, i. e., principal

devisee and legatee. *Cole v. Dial*, 12 Tex. 100, 102.

bb. Estates of Deceased Soldiers.

See post, "Time within Which Application May Be Made," II, B, 3.

Administration upon the estates of foreign volunteers was expressly prohibited except under the circumstances prescribed by the statute. *Duncan v. Veal*, 49 Tex. 603; *Shirley v. Warfield*, 12 Tex. Civ. App. 449, 456, 34 S. W. 390; *Harwood v. Wylie*, 70 Tex. 538, 7 S. W. 789.

The acts forbidding the grant of administration upon the estates of deceased soldiers, create exceptions to the general power and jurisdiction of the probate courts. To have the benefit of the exception, the facts relied on, as avoiding the jurisdiction, should be clearly established, the presumption being in favor of the jurisdiction. *Vogelsang v. Dougherty*, 46 Tex. 466.

Soldiers Who Were Citizens of Texas in 1836.—Pasch. Dig., art. 1400 prohibiting administration to be granted upon the estates of members of the Georgia Battalion and other volunteers from foreign countries to any other than the next of kin did not apply to citizens of Texas who fell in 1836. *Rogers v. Kennard*, 54 Tex. 30.

Act May 18, 1838, and Act Jan. 14, 1841, forbidding the granting of letters of administration upon the estates of deceased soldiers, did not include soldiers who were citizens of the state. *Vogelsang v. Dougherty*, 46 Tex. 466.

It was error to instruct the jury that said acts were applicable alike to all volunteer soldiers, whether citizens or from a foreign country. *Vogelsang v. Dougherty*, 46 Tex. 466.

Estates of Volunteers from Foreign Countries.—Under Act of the Republic of Texas (Pasch. Dig., arts. 1398, 1399), no administration could be granted on the estate of a volunteer soldier from any foreign country who had fallen in any battle of the republic or who had died within the

limits of Texas except to next of kin of such soldier or to some one authorized by the heirs or the next of kin. *Chinn v. Taylor*, 64 Tex. 385.

Act of January 14, 1841, prohibiting administration on estates of any volunteer from a foreign country who may have fallen in the battles of the republic or the sale of their lands without consent of the heirs, was enacted to protect estates of such volunteer soldiers, and was not repealed by Act of May 11, 1846 organizing probate courts. *Duncan v. Veal*, 49 Tex. 603.

Administration a Nullity.—A petition for letters of administration, by a person not related to deceased, recited that deceased was a transient person, and had no permanent domicile in this state, that he was entitled to land from the government, and that there were no kindred of deceased known to petitioner. Letters were granted, and land of the deceased was sold by order of the court. The inventory showed that the land was acquired under a bounty warrant issued to deceased's estate for his faithful services "in the army of the republic, and having been massacred with Fannin at Goliad." Held that, since Pasch. Dig., art. 1398 (Act Jan. 14, 1841), prohibited administration of the estate of such a soldier unless the person applying was next of kin, or had authority from the heirs or next of kin, the administration was a nullity and can confer no rights upon purchasers. *Templeton v. Falls Land & Cattle Co.*, 77 Tex. 55, 13 S. W. 964.

If the decedent was of the class of persons whose estates were protected in the act of May 18, 1838 (Hart. Dig., art. 984), and in the act of January 14, 1841 (Paschal's Dig., art. 1400), as "volunteers from a foreign country, who may have fallen in the battles of the republic," etc., it should be held that a grant of administration upon his estate, and all proceedings had

therein, touching the administration, were absolutely void. *Vogelsang v. Dougherty*, 46 Tex. 466.

Soldiers Dying after Passage of Act.

—Act Jan. 14, 1841, p. 53, providing that no administration shall be granted on the estates of any volunteer from a foreign country who may have fallen in the battles of the republic, to any person who shall not show himself entitled to the same as next of kin, does not apply to estates of soldiers who died after its passage. *Hill v. Grant* (Civ. App.), 44 S. W. 1016.

Weight of Evidence.—Evidence examined and held not sufficient to show that decedent was a volunteer in the Texas army from a foreign county in the sense intended by Act Jan. 14, 1841, exempting the estates of such volunteers from administration. *Flenner v. Walker*, 5 Tex. Civ. App. 145, 23 S. W. 1029.

Evidence held insufficient to show that one was a volunteer within, Act May 18, 1838; Hart. Dig., art. 984 and Act Jan 14, 1841; Pasch. Dig., art. 1400 relating to the settlement of estates of deceased foreign volunteer soldiers. *Vogelsang v. Dougherty*, 46 Tex. 466. See holding to the same effect in *Templeton v. Ferguson*, 89 Tex. 47, 33 S. W. 329, affirming 32 S. W. 148.

(b) Surviving Spouse.

The wife of the decedent is entitled to the administration in preference to the heir. *McIntyre v. Chappell*, 4 Tex. 187, 192.

Only the lawful wife has the right as wife to administer the estate of a deceased husband. *Chapman v. Chapman*, 11 Tex. Civ. App. 392, 32 S. W. 564.

Where a marriage was duly solemnized in Texas according to law, while Texas was subject to the laws of Mexico, but the husband had a former wife living in Missouri, of which fact the second wife was ignorant until after the death of the husband, such second wife was held entitled to ad-

ministration, in exclusion of the son of her husband by the first marriage. *Smith v. Smith*, 1 Tex. 621.

Loss or Waiver of Rights.—See post, "Waiver of Right to Administer," II, A, 2, b, (4).

(c) Creditors.

After the next of kin and principal devisee and legatee, it is the duty of the court, under the statute, to appoint as administrator such proper person as will accept the office and qualify. A creditor, as such, has no special claim to the appointment. *Cain v. Haas*, 18 Tex. 616.

(4) Waiver of Right to Administer.

The preference respecting the right to the appointment as administrator which the law gives the next of kin and other enumerated person is a personal privilege and may be waived or renounced. *Coe v. Dial*, 12 Tex. 100, 102.

A stranger and the next of kin applied for letters of administration. The next of kin withdrew his application, and the stranger was appointed. Afterwards the next of kin applied to have the administrator removed and himself appointed. The court refused his application, on the ground that he had waived his legal right. *Coe v. Dial*, 12 Tex. 100.

Waiver by Surviving Wife.—Under the express provisions of Rev. Stat. 1895, art. 1816, a surviving wife may renounce her privilege of administering the estate of her deceased husband, and may designate some other qualified person to act in her stead. *Order* (Civ. App.), 96 S. W. 1086, reversed. *Stevens v. Cameron*, 100 Tex. 515, 101 S. W. 791.

Rev. Stat., art. 1896, provides that, where a creditor asks for letters of administration, administration of the estate can be defeated only by those interested in the estate paying, or offering to pay, the claim, or proving that it is invalid, or by executing a bond for its payment, conditioned on its es-

tablishment by suit in a court having jurisdiction thereof within the county. Article 1914 provides that the surviving husband or wife shall have priority of administration over creditors. Held, that the right of a surviving wife to priority is not defeated by a contest of a necessity of administration, on the ground that no debt existed against the estate, though the existence of the debt is established. *Truesdale v. Puttnat* (Civ. App.), 59 S. W. 307.

B. GRANT OF LETTER.

1. Probate of Will.

See the title WILLS.

Testamentary executors or any other persons interested in the estate of a decedent may apply for the probate of his will and grant of letters and any persons interested may file opposition and letters will be granted to such testamentary executors as qualify. *Phelps v. Ashton*, 30 Tex. 344.

2. Jurisdiction and Venue.

a. Conditions Precedent.

(1) In General.

Power of county court to grant letters of administration depend upon facts existing at time. *Withers v. Patterson*, 27 Tex. 491, 502; *Baker v. De Zavalla*, 1 Posey 621, 632.

Preference between Counties.—The power to administer should not depend upon the mere contingencies upon which a preference between counties is regulated. *Green v. Rugely*, 23 Tex. 539.

(2) Death of Person on Whose Estate Administration Asked.

Decease of person on whose estate administration is sought is a fact essential to jurisdiction of a probate court to grant letters testamentary or of administration. *Martin v. Robinson*, 67 Tex. 368, 375, 3 S. W. 550; *Pleasants v. Dunkin*, 47 Tex. 343, 355.

Death of a party gives court jurisdiction over estate, and presumptions must be made in support of action of court. *Kleinecke v. Woodward*, 42

Tex. 311, 314, citing *Giddings v. Steele*, 28 Tex. 732, 742; *Alexander v. Mave-
rick*, 18 Tex. 179, 194, and *Hudson v.
Jurnigan*, 39 Tex. 579, 585.

When a person dies, leaving to the jurisdiction of the probate court an estate, then, and not before, the court has power to inquire and determine the existence or nonexistence of every fact necessary to be determined in ascertaining whether it has jurisdiction in the particular case, and the extent to which it ought to be exercised. *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550.

If a person on whose estate administration is sought is alive, no declaration of probate court to contrary can be given any effect. *Martin v. Robinson*, 67 Tex. 368, 375, 3 S. W. 550.

Person appointed administrator of living person does not possess powers of administrator. *Fisk v. Norvel*, 9 Tex. 13, 18.

Validity of administration depends upon fact of death, but not on knowledge of petitioner for letters, of that fact. *Pleasants v. Dunkin*, 47 Tex. 343, 355.

Judgment ordering administration upon estate of living man is a nullity, although proceedings in court are regular, and there is nothing upon record showing or suggesting that owner of property upon which administration is granted is living. *Caplen v. Compton*, 5 Tex. Civ. App. 410, 414, 27 S. W. 24, affirmed in 93 Tex. 637, no op.

Presumption That Proof of Death Received by Court.—It will be presumed that probate court did not grant letters of administration without receiving proof of death. *Pleasants v. Dunkin*, 47 Tex. 343, 355.

Sale of Land Certificate under Administration upon Estate of Living Person.—Administration upon the estate of one who is alive, and the sale of a land certificate thereunder, are void. *Schleicher v. Gutbrod* (Civ. App.), 34 S. W. 657.

The original headright certificate under which land was located was issued to U., plaintiffs' ancestor. While he was still alive, W. filed a petition reciting the death of U., on which he was appointed the administrator. W., as administrator, then applied for an unconditional certificate, and one was issued by the board of land commissioners, certifying that U. received the conditional certificate, and that he, by administrator, was entitled to an unconditional headright by virtue of his immigration and said conditional certificate. Thereafter the administrator sold the certificate to pay the debts of the estate consisting of the money paid to procure the certificate, and executed to the purchaser, under whom defendants claim, a deed for the certificate and the land located thereunder. Patent was subsequently issued to "the heirs of U., their heirs or assigns." Held that, without regard to the validity of the patent, the administration being void, plaintiffs had sufficient title to authorize recovery. *Buster v. Warren*, 80 S. W. 1063, 35 Tex. Civ. App. 644.

(3) Existence of Debts.

The authority of the court is not made by the statute dependent upon the existence of debts. *Kleincke v. Woodward*, 42 Tex. 311, 313, distinguishing *Blair v. Cisneros*, 10 Tex. 34, 46; *Withers v. Patterson*, 27 Tex. 491. See ante, "Estates Free from Indebtedness," I, E, 2, c.

In the case of *Withers v. Patterson*, 27 Tex. 491, there had been two precedent administrations of the same estate, and it was held that the estate had been fully administered before the third administrator was appointed. *Kleinecke v. Woodward*, 42 Tex. 311, 313.

Nor will the absence of any evidence of the presentation or approval or existence of such claims against the estate, require such administration to be

held void. *Kleinecke v. Woodward*, 42 Tex. 311.

(4) Existence and Sufficiency of Estate or Assets.

If there is no estate where administration is sought, there is nothing to which jurisdiction of a probate court can attach. *Martin v. Robinson*, 67 Tex. 368, 375, 3 S. W. 550.

Probate court has no jurisdiction to appoint administrator of person leaving no estate. *Merriweather v. Kennard*, 41 Tex. 273, 277.

Where an intestate has no domicile or fixed place of residence in Texas, and died without its limits, leaving no next of kin or property within the state, no jurisdiction is conferred on any county court of the state to grant administration on such intestate's estate. *Cooper v. Gulf, C. & S. F. Ry. Co.*, 93 S. W. 201, 41 Tex. Civ. App. 596.

An original administration granted in 1850 on the estate of an intestate who died in 1841, and in which the only property inventoried was a conditional headright certificate, which had been transferred by the intestate, is void for lack of jurisdiction; and, on such facts appearing in the record, the administration should be dismissed by the probate court. *Merriweather v. Kennard*, 41 Tex. 273. See, also, *Martin v. Robinson*, 67 Tex. 368, 377, 3 S. W. 550.

Real Property.—Administration may be granted upon the basis of real property alone. *Grande v. Herrera*, 15 Tex. 533.

Nonresident Leaving Credits in State.—Probate courts have jurisdiction over the assets of a nonresident who, dying at his domicile, leaves credits in the state. *Simpson v. Knox*, 1 Posey, Unrep. Cas. 569.

"The existence in Texas of assets gave jurisdiction over them to the courts of this state. *Pas. Dig.*, 1260; *Jones v. Jones*, 15 Tex. 143; *Green v. Rugely*, 23 Tex. 539. This jurisdiction

is not dependent upon the existence or nonexistence of any other administration at the place of domicile or elsewhere." *Simpson v. Knox*, 1 Posey 569, 575.

Transfer by Heirs of Interest to Application for Administration.—A transfer by the heirs of a decedent of their claims to the estate, with a power to the purchaser to settle the claims in such manner as the heirs themselves might have done, does not affect the power of the probate court to administer upon the estate. *Templeton v. Ferguson*, 89 Tex. 47, 33 S. W. 329.

Fact That Property Will Escheat.—The general jurisdiction of the county court for the purposes of administration on the estates of deceased persons is not limited by the fact that the property of the decedent will escheat to the estate. *Hall v. Claiborne*, 27 Tex. 217.

The act to provide for vesting in the state escheated property, passed March 20, 1848, does not prohibit administrations in the county court upon the estates of persons dying intestate without heirs. *Hall v. Claiborne*, 27 Tex. 217.

(5) Domicile of Decedent and Situs of Estate.

(a) In General.

See the title CONFLICT OF LAWS, vol. 4, p. 254.

That a party died, or had property in a particular diocese, as a general rule, is the test of jurisdiction of the ecclesiastical courts in England, to grant administration; but it will be granted, when necessary, upon unadministered effects found there. *Green v. Rugely*, 23 Tex. 539.

The difficulty in the several American states, in granting administration upon property of one dying abroad and brought within their jurisdiction, arises from the limited scope of authority given by their statutes. *Green v. Rugely*, 23 Tex. 539.

Where decedent had neither domi-

cile nor property at date of his death in county where letters or administration were issued, the letters issued would be void for want of jurisdiction. *Duncan v. Veal*, 49 Tex. 603, 611.

(b) County of Residence.

Administration was properly granted in 1838 in that county of the Texan republic where deceased resided at his death. *Delk v. Punchard*, 64 Tex. 360; *Burdett v. Silsbee*, 15 Tex. 604; *Wardrup v. Jones*, 23 Tex. 489, 494.

A mere temporary residence in any county does not give the court of that county exclusive jurisdiction to grant administration on the estate of a decedent under the statute (Hart. Dig., art. 1030). It must have been a fixed domicile or residence. *George v. Watson*, 19 Tex. 354.

(c) County of Domicile or Lex Rei Siti.

Where there is no administration in county of domicile, administration can be opened in county where decedent had real estate. *Grande v. Herrera*, 15 Tex. 533, 536.

(d) Estate of Nonresidents.

See the title COURTS, vol. 5 p. 317.

Under the laws in force in 1840, probate courts had power to grant administration on the estates of persons who were not inhabitants or residents of the county at the time of their decease. *Pleasants v. Dunkin*, 47 Tex. 343; *Brockenborough v. Melton*, 55 Tex. 493, 504. See, to the same effect, *Ferguson v. Templeton* (Civ. App.), 32 S. W. 148, 149, affirmed in 89 Tex. 47.

Where a nonresident decedent dies leaving property within the state, the probate court where the property is found has exclusive jurisdiction to appoint an administrator. *Simpson v. Knox*, 1 Posey Unrep. Cas. 569.

The jurisdiction of a probate court of a county organized under the law of 1836 of the republic of Texas was not restricted to the estate of one who

at his death was an inhabitant or resident of the county. *Ferguson v. Templeton* (Civ. App.), 32 S. W. 148; *Templeton v. Ferguson*, 89 Tex. 47, 33 S. W. 329.

Under act of 1836, probate court of Harrisburg County, had power to grant letters upon estate of soldier killed in 1836, although his residence was not in such county, it not being proved that he was not a citizen of the republic. *Templeton v. Ferguson*, 89 Tex. 47, 56, 33 S. W. 329, affirming 32 S. W. 148; *Pleasants v. Dunkin*, 47 Tex. 343; *Brockenborough v. Melton*, 55 Tex. 493, 504.

(e) County Where Death Occurred.

Ward.—Where a ward dies owing debts and owning property, the county court of the county where the death occurred has jurisdiction to appoint an administrator of the estate, though the guardian has not made final settlement. *Alford v. Halbert*, 74 Tex. 346, 12 S. W. 75. See *Fortson v. Alford*, 62 Tex. 576, 580.

Transient Person.—Where a transient dies intestate and has no fixed domicile, administration must be taken out in the county in which he dies or in which was his principal property. *Hearn v. Camp*, 18 Tex. 545; *Templeton v. Falls Land, etc., Co.*, 77 Tex. 55, 57, 13 S. W. 964.

County Where Foreign Volunteer Soldier Killed.—The county where a volunteer soldier in the Texan army from Louisiana was killed has jurisdiction of his estate where he had no property or domicile elsewhere. *Duncan v. Veal*, 49 Tex. 603.

(f) Situs of Assets.

Mansf. Dig., Ark. § 5225, in force in Indian Territory, where intestate was killed, creates a liability for wrongful death; and § 5226, authorizes recovery in such action by decedent's personal representative for the exclusive benefit of the widow and next of kin, to be divided one-third to the widow and

two-thirds to the children, if any. Held, that such liability was not assets of the decedent's estate distributable to creditors, and therefore, though regarded as located in Texas, notwithstanding the wrongful act occurred in Indian Territory, and deceased resided and died in Oklahoma Territory, was insufficient to justify the appointment of an administrator in Texas. *Cooper v. Gulf, C. & S. F. Ry. Co.*, 93 S. W. 201, 41 Tex. Civ. App. 596.

Mansf. Dig., Ark., § 5223, in force in Indian Territory, provides that for wrongs done to the person or property of another, an action may be maintained by the person injured, or, after his death, by his executors or administrators, in the same manner and with like effect as actions founded on contracts. Held, that such section was a local law, having no extraterritorial force, and hence a cause of action given to the personal representatives of a deceased person for injuries sustained in Indian Territory by such section conferred no jurisdiction on the courts of Texas where the defendant resided, to grant letters of administration on the decedent's estate for the sole purpose of suing on such claim. *Cooper v. Gulf, C. & S. F. Ry. Co.*, 93 S. W. 201, 41 Tex. Civ. App. 596, citing *Texas & Pac. R. Co. v. Richards*, 68 Tex. 375, 4 S. W. 627, and distinguishing *H. & T. C. R. Co. v. Hook*, 60 Tex. 403.

Situs of a Judgment.—Rev. Stat., art. 1843, provides that, if a deceased had no domicile within the state, administration may be granted in the county where he died, or in the one where his principal property was situated. Held, that where a deceased had had no fixed domicile, and no property, save a judgment rendered in a certain county, the statute did not authorize administration in such county, since the situs of a judgment follows the owner's residence. *Angier v. Jones*, 67 S. W. 449, 28 Tex. Civ. App. 402,

affirmed in 95 Tex. 673, no op.; *Ferris v. Kemble*, 75 Tex. 476, 12 S. W. 689.

Property Brought into State after Death of Decedent.—Property of a nonresident decedent, brought into the state after the death of decedent, will confer jurisdiction for purposes of administration. *Green v. Rugely*, 23 Tex. 539.

The terms of our statute are sufficiently broad to admit an administration to be granted in respect to any unadministered property, whether it was here at the time of the death of the party, or was brought here afterwards. *Green v. Rugely*, 23 Tex. 539.

In order to give the court powers commensurate with the general objects of the system, the grant was made thus general, in the act of 1848, "to regulate proceedings in the county court;" and the provisions of the act of 1836, which might be construed into a limitation on the power, was not inserted in it. *Green v. Rugely*, 23 Tex. 539.

b. Jurisdiction of Particular Courts.

County Court under Rev. Stat., Art. 1843.—Under Rev. Stat., art. 1843, a county court held to have no jurisdiction to grant letters of administration. *Angier v. Jones*, 28 Tex. Civ. App. 402, 67 S. W. 449, affirmed in 95 Tex. 673, no op.

County Courts as Courts of General Jurisdiction.—See post, "Presumptions as to Jurisdiction," II, D, 2, b, (3), (a), dd, (aa), ccc.

District Courts.—See the title COURTS, vol. 5, p. 268, et seq.

c. Transfer of Administration to New County.

See post, "Transfer of Administration to New County," II, B, 2, c.

d. Exclusive, Concurrent and Conflicting Jurisdiction.

See the title COURTS, vol. 5, pp. 268, 276, 323.

Under Rev. Stat., art. 1844, where two courts have concurrent jurisdic-

tion of an estate, the one in which application for letters testamentary or of administration thereon is first made is entitled to the exclusive jurisdiction. This statutory rule is applied as between an application for letters in the county of the decedent's residence, and the subsequent appointment by the court of another county of a receiver for the joint estate of the decedent and his former wife, made in connection with a suit and administration of the latter's estate in such other county. *Long v. Richardson*, 26 Tex. Civ. App. 197, 62 S. W. 964.

When letters of administration have been granted in one county the jurisdiction of that court attaches, and it has been held, that no other county court can take jurisdiction over the estate by granting letters (*Lovering v. McKinney*, 7 Tex. 521, 523; *Grande v. Herrera*, 15 Tex. 533, 535; *Grande v. Chaves*, 15 Tex. 550, 554; *Burdett v. Silsbee*, 15 Tex. 604, 616); and the same rule obtains when the administration has been closed up. *Fisk v. Norvel*, 9 Tex. 13, 18; *Hurt v. Horton*, 12 Tex. 285; *Francis v. Hall*, 13 Tex. 189, 192; *Soye v. McCallister*, 18 Tex. 80, 100; *Giddings v. Steele*, 28 Tex. 732, 750. See the title COURTS, vol. 5, p. 343.

Grant of Letters When Decree Pending in Another County Court Adjusting All Interest.—A sale of land belonging to a deceased minor's estate was made to satisfy the debts of the estate, the proceedings being regular and under the order of the probate court of D. county. Later, one of the heirs brought a bill of review in the probate court of D. county to correct the orders made in that court, on the ground that when letters of administration were granted in D. county, there was pending a decree of the district court of A. county fully adjusting all rights and interests in the estate. Held, that as between the parties whose interests were involved in the

litigation, the county court of D. county did not have jurisdiction to grant letters of administration, but that the jurisdiction of the county court in the abstract over the subject matter could not be questioned under Rev. St. arts. 2682, 2683, 2686, but that as to third persons, strangers to the litigation in A. county, the administration in D. county was not a nullity. *Edwards v. Halbert*, 64 Tex. 667; *Fortson v. Alford*, 62 Tex. 576.

3. Time within Which Application May Be Made.

a. In Absence of Statute.

"There ought to be some limit of time after death when administration could be taken out upon an estate, even in the absence of a statute." *Harwood v. Wylie*, 70 Tex. 538, 542, 7 S. W. 789.

There may be cases in which, even after a great lapse of time, administration, at least a limited one, may be deemed expedient. *Blair v. Cisneros*, 10 Tex. 34. See post, "Presumption That Administration Closed Vel Non," III, G, 3.

The act of March 20th, 1848, did not fix any period after which administration should not be opened, and the courts can not legislate by fixing an arbitrary period. *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550. See, also, *Saul v. Frame*, 3 Tex. Civ. App. 596, 605, 22 S. W. 984.

Administration Not Void from Mere Lapse of Time.—In a number of opinions of judges of the supreme court, it is asserted that the time passing between death and an application for administration may be so great that the presumption will become conclusive that there exist no debts and no basis for administration, so that there is, in law, no estate to be administered and the property had become absolutely that of those entitled to take from the decedent and is beyond the power of the probate court. This doctrine was reviewed in the case of *Martin v.*

Robinson, 67 Tex. 368, 3 S. W. 550, and it is there said that in all of the cases in which administration had been held to be void there existed other reasons for the judgments than the mere length of time between the death and the commencement of the proceeding. Whether it be true or not, that in some supposable case an administration might be adjudged void upon the sole ground stated, it is true that no decision of the supreme court has held that delay such as that here in question by itself would be attended with such a consequence. *Nelson v. Bridge*, 98 Tex. 523, 532, 86 S. W. 7. For such overruled expressions, see the following cases: *Chandler v. Hudson*, 11 Tex. 32, 37; *Boyle v. Forbes*, 9 Tex. 35; *Blair v. Cisneros*, 10 Tex. 34; *Cochran v. Thompson*, 18 Tex. 652; *Paul v. Willis*, 69 Tex. 261, 7 S. W. 357; *State v. Zanco*, 18 Tex. Civ. App. 127, 129, 44 S. W. 527, affirmed in 93 Tex. 720, no op.; *Hearn v. Camp*, 18 Tex. 545, 547; *Wardrup v. Jones*, 23 Tex. 489, 494; *Templeton v. Falls Land, etc., Co.*, 77 Tex. 55, 57, 13 S. W. 964; *Duncan v. Veal*, 49 Tex. 603, 610; *McMahon v. Rice*, 16 Tex. 335, 337; *Withers v. Patterson*, 27 Tex. 491, 492; *Patterson v. Allen*, 50 Tex. 23, 25; *Low v. Felton*, 84 Tex. 378, 385, 19 S. W. 693.

Administration Granted within Longest Period of Limitation.—When time after which administration may not be granted is not fixed by statute, a court will not declare an administration void, if granted within ten years, which is the longest period of limitation. *Martin v. Robinson*, 67 Tex. 368, 379, 3 S. W. 550, distinguishing *Francis v. Hall*, 13 Tex. 189; *Blair v. Cisneros*, 10 Tex. 34, 35.

If the period which would bar debts is to be deemed the period after which administration can not be legally granted (when not regulated by statute), then the courts ought not, in a collateral proceeding, to declare an administration void, if granted

within ten years, which in Texas is the longest period of limitation. *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550.

After Four and Less than Ten Years.

—After the lapse of four years from the death of an intestate, the presumption is that there are no debts or if any that they are barred by limitation and that the property has gone into the possession of the person entitled to receive it. *Loyd v. Mason*, 38 Tex. 212.

The administration was not void because seven or eight years elapsed between the death of the intestate and the grant of letters. *Lyne v. Sanford*, 82 Tex. 58, 63, 19 S. W. 847; *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550, and authorities cited. *Harris v. Shafer* (Civ. App.), 21 S. W. 110, 112, reversed in 86 Tex. 314.

The presumption will not prevail from lapse of nine years from the death of decedent to the confirmation of the sale that no debts existed; and hence that no administration was necessary. *Dickson v. Moore*, 9 Tex. Civ. App. 514, 30 S. W. 76; *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550.

After Ten Years.—Administration had ten years after death of decedent will be presumed to be unnecessary and illegal unless facts are alleged showing necessity therefor. *Paul v. Willis*, 69 Tex. 261, 264, 7 S. W. 357; *Martin v. Robinson*, 67 Tex. 368, 375, 3 S. W. 550.

The lapse of more than 10 years from the date of death to the time of application for letters of administration is insufficient to raise the presumption against the existence of debts, so as to prevent the probate court from taking jurisdiction. *Shirley v. Warfield*, 12 Tex. Civ. App. 449, 34 S. W. 390, distinguishing *Duncan v. Veal*, 49 Tex. 603 and *Paul v. Willis*, 69 Tex. 261, 7 S. W. 357.

The law in force at the time administration on an estate was granted (1852) not fixing any time after intes-

tate's death within which administration should commence, such administration was not void for being granted more than 10 years after death. *Lyne v. Sanford*, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852.

The fact that twelve years elapsed after the death of the intestate before grant of administration upon his estate affords a strong presumption that the debts of the estate, if any existed, had been paid; but it is only a presumption, and the jurisdictional fact of debts can exist in the face of the presumption, though no debts were paid during the administration. *Saul v. Frame*, 3 Tex. Civ. App. 596, 22 S. W. 984.

Fourteen Years.—A grant of administration after a lapse of 14 years from the death of the intestate should be regarded as a nullity. But there may be special reasons which would even then supported a grant,—as, for instance, a money demand or claim of the estate lately fallen due. *Cochran's Adm'r's v. Thompson*, 18 Tex. 652.

An order of a probate court, granting administration upon the estate of an intestate, will not be deemed void upon the sole ground that over 14 years elapsed after the death of the intestate before administration was granted. *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550; *Saul v. Frame*, 3 Tex. Civ. App. 596, 605, 22 S. W. 984.

Administration opened 15 years after the death of intestate, without any allegation of indebtedness, and when, under the longest period allowed by law, any debt that he may have owed and that had matured at the time of his death would have been barred, is void. *Stone Land & Cattle Co. v. Boon*, 73 Tex. 548, 11 S. W. 544; *Saul v. Frame*, 3 Tex. Civ. App. 596, 605, 22 S. W. 984.

Act Jan. 14, 1841, provided that "no administration shall be granted on the estate of any person who served in the Georgia Battalion, or any other

volunteer from a foreign country who may have fallen in the battles of the republic, or otherwise died in the limits of the same, to any person who shall not show himself entitled to the same as next of kin, or shall not produce an authority from the heirs or next of kin of such deceased soldier authorizing him to take administration of the same." A petition for administration, filed 15 years after the death of such a soldier, did not allege the existence of any indebtedness, and only alleged that "he died several years since," and was "a transient person," and that "there are no kindred of the deceased known to petitioner in Texas, and that he has been requested to open said estate by the heirs." Held, that there was no jurisdiction to grant the administration. *Stone Land & Cattle Co. v. Boon*, 73 Tex. 548, 11 S. W. 544.

Where administration was taken out on estate of a soldier who perished in massacre of the Alamo, nearly fifteen years after such massacre, and no debts were shown to exist, a sale under administration was invalid. *Harwood v. Wylie*, 70 Tex. 538, 542, 7 S. W. 789.

Decedent perished in Goliad in March, 1836. Administration was procured on his estate in June, 1851, more than fifteen years subsequent to his death, at a time when evidently all debts of the deceased were barred by limitation, and none were shown to exist. It was held that the grant of administration was void. *Templeton v. Falls Land, etc., Co.*, 77 Tex. 55, 57, 13 S. W. 964, following *Hearn v. Camp*, 18 Tex. 545, 547. A similar grant obtained a shorter period of time after the death of the intestate was held to be without authority of law, in *Wardrup v. Jones*, 23 Tex. 489, 494.

In case of a second administration upon the same estate it seems the time after death when administration can be taken out upon the estate is fixed at such period as would raise a pre-

sumption that all debts had been paid. *Harwood v. Wylie*, 70 Tex. 538, 542, 7 S. W. 789. See, also, *Paul v. Willis*, 69 Tex. 261, 264, 7 S. W. 357; *Saul v. Frame*, 3 Tex. Civ. App. 596, 605, 22 S. W. 984; *Duncan v. Veal*, 49 Tex. 603, 604. *Martin v. Robinson*, 67 Tex. 368, 377, 3 S. W. 550.

"In the case of *Paul v. Willis*, 69 Tex. 261, 264, 7 S. W. 357, * * * it appears there were two attempted administrations, one sued out more than ten years after the death of the intestate, and which is presumed to have been closed, and the other sued out seventeen years after intestate's death. The court holds both these attempted administrations to be void." *Saul v. Frame*, 3 Tex. Civ. App. 596, 605, 22 S. W. 984.

Where Heirs Accept and Divide Estate.—"In *Francis v. Hall*, 13 Tex. 189, it appeared that the testator died in 1837; that there was controversy about the probate of his will; that the heirs compromised it, and accepted and divided the estate, and it was held that an administration granted more than ten years afterwards was void." *Martin v. Robinson*, 67 Tex. 368, 377, 3 S. W. 550.

Petition.—Petition of creditor in 1850 for letters of administration, reciting that intestate died in 1839, owned property and owed debts, is not insufficient to give court jurisdiction, if record does not otherwise show administration was unauthorized. *Shirley v. Warfield*, 12 Tex. Civ. App. 449, 456, 34 S. W. 390.

Allegation of Special Necessity.—Where petition does not aver some special necessity for granting letters of administration it must be presumed that there was no occasion for it after great lapse of time from decedent's death. *Duncan v. Veal*, 49 Tex. 603, 610; *Stone Land, etc., Co. v. Boon*, 73 Tex. 548, 11 S. W. 544.

Evidence as to When Administration Was Begun.—In *State v. Zanco*,

18 Tex. Civ. App. 127, 129, 44 S. W. 527, affirmed in 93 Tex. 720, no op. the court said: "It is insisted by appellant that the administration was null and void, because the administration was not begun until fifteen years after the death of Zanco, and the presumption would be that all the debts were barred. Citing *Paul v. Willis*, 69 Tex. 261, 7 S. W. 357. The decision cited bears out the contention, but there are no facts in the record which would make it applicable. There is no evidence whatever as to the time when the administration was begun."

b. Under the Statutes.

When Spanish Law in Force.—The ancestor died in 1833, owing no debts, and the succession was accepted by the heirs. In 1849 the widow took out letters of administration upon the estate. Held, that the grant of administration was a nullity. *Blair v. Cisneros*, 10 Tex. 34.

"In *Blair v. Cisneros*, 10 Tex. 34, 35, it appeared that the intestate died in 1833, when the Spanish law was in force, which permitted heirs to accept an estate without administration; that this was done; that there were no debts, and upon this state of facts it was held that administration taken out in 1849 was void." *Martin v. Robinson*, 67 Tex. 368, 376, 3 S. W. 550. See, also, *Kleinecke v. Woodward*, 42 Tex. 311, 313, in which it said: "The great lapse of time, sixteen years, after the death of the intestate, appears to have weighed heavily with the court in deciding the case."

Under Probate Act of 1870.—Under the probate act of 1870, no administration can be granted after four years have elapsed from the death of the intestate. *Loyd v. Mason*, 38 Tex. 212.

Under Revised Statute, Art. 1827.—The statute as revised fixes the time after death when administration can be taken out upon an estate at four years after death of the intestate. Rev.

Stat., art. 1827; *Harwood v. Wylie*, 70 Tex. 538, 542, 7 S. W. 789; *Nelson v. Bridge*, 98 Tex. 523, 532, 86 S. W. 7; *Rogers v. Watson*, 81 Tex. 400, 403, 17 S. W. 29; *Wardrup v. Jones*, 23 Tex. 489, 491; *Patterson v. Allen*, 50 Tex. 23, 25; *Low v. Felton*, 84 Tex. 378, 385, 19 S. W. 693.

Construction of Statute and Effect upon Jurisdiction of Courts.—Rev. St. 1895, arts. 1880, 1881, provide that applications for letters testamentary or of administration must be filed within four years after the death of testator or intestate. Articles 1840-1843 provide that certain specified administrations shall be void, but there is no provision that the granting of letters after the lapse of four years shall be beyond the jurisdiction of the court. Articles 1884, 1888, 1926, 1927, prescribe the requisites of applications and proofs in granting letters, one of which is the statement of the time and place of the death, and another is that the court has jurisdiction of the estate. Article 1882 declares that, where letters testamentary or of administration have once been granted, any person interested may proceed after any lapse of time to compel a settlement of the estate when it does not appear from the record that the administration has been closed. Held, that the granting of letters of administration more than four years after the death of testator is not wholly beyond the jurisdiction of the court, so as to render the administration proceedings subject to collateral attack. *Nelson v. Bridge*, 86 S. W. 7, 98 Tex. 523.

The theory "that after a sufficient lapse of time there is a conclusive presumption of the nonexistence or extinguishment of debts and of all justification for administration was not applied by the legislature in adopting four years as the limitation for the commencement of proceedings; for, irrespective of administration, art. 2089 expressly continues the charge of debts upon the property of heirs, dev-

isees and legatees so long as the debts themselves are not barred 'by the laws of limitation.'" *Nelson v. Bridge*, 98 Tex. 523, 532, 86 S. W. 7.

Ancillary Administration.—Articles 1880 and 1881, Rev. Stat., prohibiting the appointment of executors or administrators after the lapse of four years from the death, apply to an application for letters in Texas upon the estate of a nonresident, though merely ancillary to probate proceedings commenced before that time in the state of his residence. *Nelson v. Bridge*, 98 Tex. 523, 86 S. W. 7.

4. Parties.

a. Parties Who May Apply.

See ante, "Right to Appointment," II, A, 2, b.

b. Parties Contestant or Defendant.

See post, "Objections to Appointments," II, B, 6.

In a contest for letters of administration between two parties, the party who appears and contests the application assumes the position and responsibilities of a defendant. *Hall v. Claiborne*, 27 Tex. 217.

5. Petition or Application.

a. Application for Administration on More than One Estate.

The fact that administration on two estates was applied for in one petition does not invalidate the administration. *Saul v. Frame*, 3 Tex. Civ. App. 596, 22 S. W. 984; *Grande v. Herrera*, 15 Tex. 533, 538. See post, "Collateral Attack," II, D, 2, b, (3), (a).

b. Averments.

(1) Necessary Averments.

Situs of Property or Residence.—Under Act 1846, requiring that letters of administration be granted in the county of deceased's residence, or where he owned property, or where he died, letters issued by the probate court of a county where deceased did not die, on an application which fails to show either the situs of deceased's

property or his residence, are void. *Paul v. Willis*, 69 Tex. 261, 7 S. W. 357.

That Decedent Died Possessed of Estate.—Failure to show in the application for letters of administration that the decedent died possessed of an estate is not fatal to the jurisdiction of the court, when there is such an estate, and the necessity for administration exists and is shown in the application. *Odell v. Kennedy*, 64 S. W. 802, 26 Tex. Civ. App. 439.

Facts Showing Reason for Administration.—Under the probate act of 1848, the jurisdiction of the probate court was not dependent upon the averment in the petition for administration, of fact, showing its necessity. *Kleinecke v. Woodward*, 42 Tex. 311.

Allegation of Facts Necessitating Administration after Great Lapse of Time.—See ante. "In Absence of Statute," II, B, 3, a.

(2) Sufficiency of Averments.

Fact of Death.—The validity of an administration under which title is claimed can not be attacked because the petition for letters only stated, in reference to the death of the party, that petitioner "verily believed that D. had departed this life." *Pleasants v. Dunkin*, 47 Tex. 343.

Such averment is sufficient to admit proof of death. *Pleasants v. Dunkin*, 47 Tex. 343, 355.

That Deceased Had Property in the County.—Under Act 1840, it was sufficient allegation to give the probate court jurisdiction, prima facie at least, to allege that the deceased had property in that county. *George v. Watson*, 19 Tex. 354.

Residence.—The words "late of Lamar county," following the name of the deceased in the petition on which the letters of administration were granted in Red River county, do not show that the deceased had a fixed residence in the former county.

at the time of his death. *George v. Watson*, 19 Tex. 354.

6. Objections to Appointment.

Any person interested may oppose grant of letters of administration, where there is contest about vacancy of succession. *Chandler v. Hudson*, 11 Tex. 32, 36.

Interest of Contestant.—One desiring to contest an application for letters of administration in the probate court may be required to state his interest in the estate which requirement must be made by exception in limine, taken to his appearance, and the exception can form no part of the inquiry after issue joined upon the merits. *Newton v. Newton*, 61 Tex. 511; *Davenport v. Hervey*, 30 Tex. 309, 327. See post, "Review of Proceedings of District Court," II, B, 10, c.

Creditor.—Where, after the death of the owner of a judgment, the defendant therein paid the amount thereof into court, and the clerk paid from such sum a claim against decedent secured by an assignment of the judgment, the creditor so paid had no interest in the estate entitling him to contest an application for administration. *Angier v. Jones*, 67 S. W. 449, 28 Tex. Civ. App. 402.

7. Intervention.

See post, "Costs," II, B, 11.

8. Hearing.

In proceedings to determine which of two women has the right, as widow of a decedent, to administer his estate, the court can not determine the right of one of them to an interest in property acquired by decedent as community estate. *Chapman v. Chapman*, 88 Tex. 641, 32 S. W. 871, affirming 11 Tex. Civ. App. 392, 32 S. W. 564.

Such contest does not involve question of community rights, and such question can not be properly brought into case in county or district court. *Chapman v. Chapman*, 88 Tex. 641, 642, 32 S. W. 871, affirming 32 S. W. 564, 11 Tex. Civ. App. 392.

9. Order or Decree.

Annexing Condition to Appointment.—The county court has no authority to annex any condition to the appointment of administrator but such as are provided by law. *Cain v. Haas*, 18 Tex. 616.

Form, Requisites and Validity.—

Where application is made for administration upon several estates, the administrations are not rendered void by the court's granting them in one order, prescribing amount of bond in each. *Templeton v. Ferguson*, 89 Tex. 47, 56, 33 S. W. 329, affirming 32 S. W. 148.

An order of probate court granting letters of administration on one estate out of a number, without stating which one, applies to none. *Harwood v. Wylie*, 70 Tex. 538, 7 S. W. 789.

An original grant of letters of administration is not void, because the reason or necessity for the administration does not appear (of record) on the face of the proceedings. *Kleinecke v. Woodward*, 42 Tex. 311, 313.

Operation and Effect.—See post, "Operation and Effect," II, D, 2, b.

10. Review, Appeal, Certiorari.

a. Abatement by Death of Party.

See the title APPEAL AND ERROR, vol. 1, p. 380.

b. Review of Proceedings of County Court.

Applicant for letters of executorship in county court may review the refusal thereof by either appeal or certiorari. *Coupland v. Tullar*, 21 Tex. 523, 525. See the title CERTIORARI, vol. 4, p. 40.

The action of a court of probate jurisdiction in granting letters of administration can not be reviewed upon appeal from a judgment against the party as administrator. *Homuth v. Zapp*, 33 Tex. 130.

Repeal of Old and Passage of New Probate Law.—Where an order granting letters of administration was made October 13, 1873, and a petition for re-

view was filed October 14, 1875, the repeal of the act of 1870 and passage of the probate act of 1876, under the constitution of 1876, before trial of the case, did not make the petition subject to general demurrer. *Ramirez v. McClane*, 50 Tex. 598.

"That jurisdiction is as ample as it was under the constitution of 1845, under which proceedings in probate matters were not only corrected on appeal, and by certiorari, but also in cases of fraudulent combination, by an original suit in the district court. (*Lott v. Ballaud*, 21 Tex. 167, 169; *Newson v. Chrisman*, 9 Tex. 113.)" *Ramirez v. McClane*, 50 Tex. 598, 600. See the title COURTS, vol. 5, p. 271.

Jurisdiction.—Since the jurisdiction conferred by the constitution upon the district court in probate matters is appellate only, it has not jurisdiction of a suit originally brought therein by petition for certiorari to the county court to review an order of the latter court appointing an administrator of an estate, and to have plaintiff, upon a trial de novo in the district court, appointed as such administrator. Const., art. 5, § 8; Rev. Stat., art. 1920. *Ballard v. Wheeler*, 23 Tex. Civ. App. 422, 56 S. W. 946; *Franks v. Chapman*, 60 Tex. 46.

After an appeal to the district court from an order of the county court of H. county appointing R. permanent administrator, said county court had no jurisdiction of the subject matter; said district court having complete and perfect jurisdiction and control of said litigation; so that said county court had no jurisdiction to adjudge R. in contempt for signing an agreement, as administrator, in the district court, to change the venue to another county, though after the appeal the county court also appointed him temporary administrator. Ex parte *Robertson*, 72 S. W. 859, 44 Tex. Cr. App. 566.

Where, in a contest in the probate court over the right to administer on

a deceased husband's estate, between two persons each claiming to be his wife, an appeal from the judgment there is taken to the district court, the latter court acquires thereby only such jurisdiction as the probate court had, and is not authorized to adjudicate the title to the property involved. *Chapman v. Chapman*, 11 Tex. Civ. App. 392, 32 S. W. 564, affirmed in 88 Tex. 641.

Position of Parties as Plaintiffs and Defendants.—If the contestant of a petition for letters of administration appeals to the district court, the parties occupy relatively the same position, as plaintiff and defendant, that they did in the county court. *Hall v. Claiborne*, 27 Tex. 217.

Trial De Novo Statement of Interest of Contestant.—Since a contest for letters of administration is triable de novo on appeal in the district court, under Rev. St. art. 2207, if in the district court the contestants make a statement that they are interested in the estate, the applicant may either except to its want of certainty, or, by requiring proof, have this issue settled before going to trial on the merits, as in the probate court, but can not, on motion, dismiss the appeal. *Newton v. Newton*, 61 Tex. 511.

Jury Trial.—In a contest over the granting of letters of administration, a jury trial must be allowed on appeal to the district court upon demand of a party; a probate proceeding being a "cause" within const., art. 5, § 10, providing that in all causes in the district courts plaintiff or defendant shall, upon application made in open court, have the right to a jury trial. *Tolle v. Tolle*, 101 Tex. 33, 104 S. W. 1049.

Review of Discretionary Matters.—The respective qualifications of applicants for the appointment of administrator is a matter within the discretion of the county court; and where there is nothing in the record to induce the belief that it was, in view of all the facts, improperly exercised,

the action of the court will not be disturbed. *Hall v. Claiborne*, 27 Tex. 217.

c. Review of Proceedings of District Court.

Objections Not Made below.—

Where objections are filed to the grant of letters of administration, which are sustained, and there is an appeal to the district court, where they are also sustained, on appeal to the supreme court it would seem that objections, not filed in the probate or district court, will not be considered, although the grounds therefor may seem to appear from the statement of facts. *Stone v. Brown*, 16 Tex. 425.

Time of Filing Petition.—See following paragraph.

Description of Order.—Under the probate act of 1870 a petition for review of acts done on the probate side of the district court could be brought within two years from the date of the order, and on general demurrer it was sufficient, as a description of the order sought to be revised, to set out the substance of such order. *Ramirez v. McClane*, 50 Tex. 598, citing *Janson v. Jacobs*, 44 Tex. 573.

Grounds.—That it was falsely alleged that decedent died within four years of an application for letters of administration shows sufficient grounds for review under probate act of 1870, of the order granting letters. *Ramirez v. McClane*, 50 Tex. 598.

11. Costs.

In a contest for administration, where different parties intervene, it is proper to give and impose such costs to the parties intervening as are awarded to the principals whom they espouse. *Howard v. Russell*, 75 Tex. 171, 180, 12 S. W. 525.

C. QUALIFICATION.

1. Necessity and Effect of Failure to Qualify.

The executor has no title to or authority over the estate until the will is probated and he qualifies as directed by law. *Roberts v. Stuart*, 80 Tex. 379,

387, 15 S. W. 1108, distinguishing *Stone v. Dorsett*, 18 Tex. 700, 706.

An executor can not act under a will until he has qualified as required by law, and can not be held liable for failure to deliver legacies before such time. *Roberts v. Stuart*, 80 Tex. 379, 382, 15 S. W. 1108.

Powers before Probate of Will and Qualification.—See ante, "Forfeiture of Right to Letters," II, A, 1, d; post, "Powers before Probate of Will and Qualification," V, E.

Effect of Failure to Qualify.—See ante, "Effect," II, A, 1, c, (2).

Effect of Failure of Coexecutor to Qualify.—See ante, "Renunciation by One or More Coexecutors," II, A, 1, c, (2), (b); post, "Effect of Death, Resignation or Refusal to Act," V, P, 2.

2. Time and Manner.

a. Time.

Where a testator provides in his will that a certain person shall be his executor, if alive at testator's death, providing he qualifies within three months thereafter, and provided for a succession of others as executor under similar conditions, failure to qualify within the specified time owing to unavoidable delay in probating the will will not disqualify the first appointee where he acted with reasonable diligence. *Von Rosenberg v. Wickes*, 50 Tex. Civ. App. 455, 109 S. W. 968.

Extending Time.—County court may extend the time in which an administrator shall qualify. *Willard v. Cleveland*, 14 Tex. Civ. App. 557, 560, 38 S. W. 222.

b. Oath.

Pasch. Dig. art. 5574, provides that, where not otherwise provided, a bond shall be given by executors and administrators, and an oath taken. Article 5626 allows a will to direct that no action be had in the district court in administering the estate, except to prove the will and return an inventory, and that the executor be not

required to give bond. Article 5628 provides that, where a will contains such directions, no other provision of the act shall apply to the estate, but it shall become like any other property to be administered under a power, chargeable in the hands of a trustee, and liable to execution in any court having jurisdiction. Held that, where a will contains such directions, the executor's qualification is complete on probate of the will, and his acceptance, with the return of an inventory where required by law, and it is not essential that he take an oath. *Connellee v. Roberts*, 1 Tex. Civ. App. 363, 23 S. W. 187, citing *Mayes v. Blanton*, 67 Tex. 245, 247, 3 S. W. 40, and distinguishing *Roberts v. Connellee*, 71 Tex. 11, 14, 8 S. W. 626.

The omission in the oath taken by an administrator *de bonis non* of the statutory words, "died without leaving any lawful will," is unimportant: the question of a will being presumed to be set at rest by the oath of the former administrator. *Williams v. Verne*, 68 Tex. 414, 4 S. W. 548.

c. Bond.

See post, "Bond," III.

d. Independent Executor.

See ante, "Oath," II, C, 2, b.

3. Proof.

Parol evidence will not be admitted to show that an executor qualified as such. *Roberts v. Connellee*, 71 Tex. 11, 8 S. W. 626.

Letters as Proof.—See post, "Proof of Appointment and Authority," II, D, 2, b, (1), (b).

D. NECESSITY FOR, VALIDITY AND EFFECT OF ISSUANCE OF LETTERS.

1. Necessity.

Order of court making appointment, execution of bond and taking oath do not make a person executor or administrator of an estate: commission must be actually issued. *Werbiskie v. McManus*, 31 Tex. 116, 122.

2. Validity, Operation and Effect of Grant of Letters.

a. Validity.

(1) In General.

The power of the county court to grant letters of administration in any particular case, depends upon the facts as they exist at the time the letters are granted; and if the court had not the power to grant the letters, all of the proceedings in the course of the administration are nullities, and they can have no validity in favor of any person because such person was ignorant of the want of power in the court to grant the letters of administration. *Withers v. Patterson*, 27 Tex. 491. See, to the same effect, *Baker v. De Zavalla*, 1 Posey 621, 632.

Necessity for Revenue Stamp.—Letters of administration, although properly signed, sealed, and issued, can not legally be offered as testimony, unless they also show that the revenue due to the United States has been paid, as evidenced by the proper affixed and canceled stamp. *Werbiskie v. McManus*, 31 Tex. 116, 123.

(2) Irregularities and Omissions.

When a probate court has jurisdiction of an estate, mere irregularities or unsupplied omissions in its proceedings, had in granting letters of administration or orders of sale, do not invalidate the letters or orders. *Giddings v. Steele*, 28 Tex. 732, citing *Soye v. McCallister*, 18 Tex. 80, 100; *Baker v. Coe*, 20 Tex. 430; *Lynch v. Baxter*, 4 Tex. 431; *Poor v. Boyce*, 12 Tex. 440, and *Dancy v. Strickling*, 15 Tex. 557.

Mere irregularity in the appointment of an executor who has acted for a number of years will not vitiate his acts otherwise legal. *Lewis v. Ames*, 44 Tex. 319, 334; *Poor v. Boyce*, 12 Tex. 440.

(3) Publication of Notice of Appointment.

The legality and conclusiveness of the orders of the county court are in

no degree affected by the failure of the administrator to publish notice of his appointment as required by the statute. *Tiboldi v. Palms*, 34 Tex. Civ. App. 318, 78 S. W. 726, affirmed in 97 Tex. 414.

"All parties interested in the estate were required to take notice of the pendency of the administration which had been regularly begun, and the only effect of the failure of the administrator to publish the notice of his appointment would be to render him liable for any damage thereby occasioned a creditor, and could not defeat the jurisdiction of the court, nor render invalid any orders regularly made in the administration of the estate. Rev. Stat., art. 2067; *McGowen v. Zimpleman*, 53 Tex. 479, 483; *Hirshfeld v. Brown*, 30 S. W. 962, 963, affirmed in 93 Tex. 686, no op." *Tiboldi v. Palms*, 34 Tex. Civ. App. 318, 321, 78 S. W. 726, affirmed in 97 Tex. 414.

(4) Effect of Unwise Execution.

Given administration legal in its inception, it is immaterial to its validity whether it was wisely executed, or not. *Baker v. De Zavalla*, 1 Posey 621, 638.

That an estate was consumed by costs and expenses, to the loss or want of benefit to the heirs, does not affect the existence of an administration. *Kleinecke v. Woodward*, 42 Tex. 311; *Baker v. De Zavalla*, 1 Posey 621, 638.

b. Operation and Effect.

(1) Operation as Evidence.

(a) Probate of Will.

At common law, the granting of letters testamentary is conclusive proof of the probate of a will. *Denison v. Ingram*, Dallam 519.

(b) Proof of Appointment and Authority.

"The letters of administration issued to an administrator are evidence that the person to whom issued is the administrator, and has the authority incident to such office, and that the preliminary proceedings have been prop-

erly taken; and in any actions affecting the estate, or in regard to its settlement, they are conclusive of the right of the administrator to maintain such actions." *Rogers v. Tompkins* (Civ. App.), 87 S. W. 379, 382, affirmed in 101 Tex. 654, no op., citing *Brockenborough v. Melton*, 55 Tex. 493; *Ferguson v. Templeton* (Civ. App.), 32 S. W. 148, affirmed in 89 Tex. 47; *Stone v. Ellis* (Civ. App.), 40 S. W. 1077, affirmed in 93 Tex. 696, no op.; *Paul v. Willis*, 69 Tex. 261, 7 S. W. 357 and *Nelson v. Bridge*, 98 Tex. 523, 86 S. W. 7. See, to the same effect, *English v. Murray*, 13 Tex. 366, 367.

In trespass to try title, where defendant by his answer put in issue the right of plaintiff to prosecute the action as community administratrix of the estate of herself and her deceased husband, thereby casting upon her the burden of showing that she was such administratrix, the probate proceedings appointing her administratrix were admissible in evidence. *Rogers v. Tompkins* (Civ. App.), 87 S. W. 379.

As Evidence of Identity in Assertion of Claim.—Litigation between two sets of claimants for lands granted to heirs of Wm. Wallace, who fell with Fannin at Goliad. The plaintiffs claimed as heirs of a soldier from Georgia, a member of a named company. The defendants claimed as heirs of a soldier from Virginia, member of same company. As a circumstance, it was competent to prove administration proceedings by which the widow was asserting such relationship and had procured an augmentation certificate in name of her husband, and that she was asserting claim thereto and this although the proceedings were void. *Bvers Bros. v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760, reversing 25 S. W. 1043.

Presumption from Clerk's Certificate and Lapse of Time.—There being produced a certificate of the clerk of court that a certain person was then, and had

been, administrator, and other papers showing that the court recognized him as such, it will be presumed after 50 years that he had been regularly appointed and was duly acting as administrator. *Pendleton v. Shaw*, 44 S. W. 1002, 18 Tex. Civ. App. 439, citing *Bartlett v. Cocke*, 15 Tex. 471, 478, and *Poor v. Boyce*, 12 Tex. 440.

Presumption as to Vacancy under Will.—Ordinarily the act of granting letters of administration upon application therefor raises presumption that a vacancy in the administration under a will has been determined by competent evidence. *Willis & Bro. v. Ferguson*, 46 Tex. 496, 504.

(c) As Proof of Death.

In Suits Brought by Executor or Administrator.—In an action by an executor, the order of the court probating the will and appointing the executor is admissible and prima facie proof of testator's death and of the existence of facts authorizing such order. *Fischer v. Giddings*, 43 Tex. Civ. App. 393, 95 S. W. 33.

In Collateral Inquiries.—"In the case of *English v. Murray*, 13 Tex. 366, it was held that letters of administration can not be collaterally offered to establish the death of the supposed deceased, or, where the death is admitted, to prove the time of his death.' The same rule was announced and applied by this court in the case of *Turner v. Sealock*, 21 Tex. Civ. App. 594, 54 S. W. 358. In both of these cases proof of the fact and date of the death of the alleged decedent was essential to the establishment of the defense pleaded in the one, and the cause of action alleged in the other, and the question of the right of an executor or administrator to maintain a suit brought by him to recover property of the estate without showing the death of the decedent by evidence aliunde the order granting the application for probate or administration and granting letters was not passed on in either case." *Fischer*

r. Giddings, 43 Tex. Civ. App. 393, 95 S. W. 33, affirmed in 101 Tex. 635, no op. See, to the same effect, *Turner v. Sealock*, 21 Tex. Civ. App. 594, 597, 54 S. W. 358.

(2) As Terminating Wife's Representation of Husband's Estate as Survivor.

If, upon one of the contingencies specified by the statute (Pas. Dig., arts. 4649, 4651), administration upon the estate of the deceased husband be granted by the county court, the wife ceases thereupon to represent his estate as survivor, and can not be further proceeded against as such by suit or execution. *Tucker v. Brackett*, 28 Tex. 336, 337, affirmed in *Moke & Bro. v. Brackett*, 28 Tex. 443.

(3) Conclusiveness of Decision.

(a) Collateral Attack.

aa. In General.

The granting of letters of administration by the probate court having jurisdiction of the subject matter can not be collaterally attacked. *Rogers v. Kennard*, 54 Tex. 30; *Burdett v. Silsbee*, 15 Tex. 604, 615; *Lynch v. Baxter*, 4 Tex. 431; *Hudson v. Jurnigan*, 39 Tex. 579, 588; *Alexander v. Maverick*, 18 Tex. 179, 195; *Giddings v. Steele*, 28 Tex. 732, 749; *Pleasants v. Dunkin*, 47 Tex. 343; *Kleinecke v. Woodward*, 42 Tex. 311; *Poor v. Boyce*, 12 Tex. 440, 451; *Soye v. McCallister*, 18 Tex. 80, 98; *Murchison v. White*, 54 Tex. 78, 84.

It is competent for the probate court of a county where administration of an estate of a decedent is first opened to decide the question of the residence of the decedent on the petition for the grant of administration, and its decision is conclusive until reversed and it can not be drawn in question in a collateral action, and it confers authority on the administrator appointed to act until his power has expired or is revoked by competent authority and the probate court of an-

other county has no authority to revoke it nor to subsequently grant administration to another. *Burdett v. Silsbee*, 15 Tex. 604.

bb. Matters Concluded.

See post, "Irregularities or Error in Exercise of Jurisdiction," II, D, 2, b, (3), (a), dd, (aa), ddd.

The orders and decrees of the county court in probate proceedings, and the letters of administration issued by it, are not subject to collateral attack in an action by an administrator, but are conclusive of his right to maintain the action. *Rogers v. Tompkins* (Civ. App.), 87 S. W. 379.

Necessity for Appointment.—The appointment of an administrator by the probate court is an adjudication of the necessity of the appointment, which is conclusive in a collateral issue. *Ferguson v. Templeton* (Civ. App.), 32 S. W. 148, affirmed in 89 Tex. 47.

Capacity of Person Appointed.—The authority of an administrator to act can not be collaterally attacked. *Rindge v. Oliphant*, 62 Tex. 682, 686.

Thus where the fiduciary character of one acting as administrator has been recognized by the probate court, as between the heirs and those dealing with the acting administrator, his authority can not be "drawn in question in a collateral action, for the purpose of invalidating his lawful acts, done in the due course of administration. (*Hurt v. Horton*, 12 Tex. 285; *Poor v. Boyce*, 12 Tex. 440; *Howard v. Bennett*, 13 Tex. 309, 316; *Dancy v. Strickling*, 15 Tex. 557; *Burdett v. Silsbee*, 15 Tex. 604.)" *Shannon v. Taylor*, 16 Tex. 413, 416.

Whether or not a woman, who was a feme covert at the time of her appointment as an administratrix, had been legally appointed, can not be inquired into in a collateral way; where she has been appointed by a court of competent jurisdiction, and the record does not show any legal impediment existing at the time, she not being

shown to have been a feme covert when administration was committed to her. The judgment of the probate court on her capacity is not void, if voidable. *Mitchell v. Wright*, 4 Tex. 283, 286.

The authority of the executor can not be drawn in question by the defendant in an action, for the purpose of invalidating a solemn judgment of the court, rendered in a cause in which he was party representing the estate, when it is shown that he was acting as executor with the sanction of the probate court, and was recognized as the rightful executor by the defendant and the other heirs. *Shannon v. Taylor*, 16 Tex. 413, 416.

cc. Persons Concluded.

Administration proceedings are in the nature of those in rem, of which, when the requisites of the statute are complied with, all parties interested must take notice at their peril and by the decrees in which they are bound, unless set aside on direct proceedings for this purpose. *McGowen v. Zimpelman*, 53 Tex. 479.

Creditor of Estate.—Proceedings of a court, sitting in probate, annulling the appointment of an executrix as in dependent executrix, and appointing her administratrix with the will annexed, can not be collaterally attacked in a contest by a creditor of the estate over the classification of his claim. *King v. Battaglia*, 84 S. W. 839, 38 Tex. Civ. App. 28.

Where a claimant against a decedent's estate filed his claim with decedent's widow after she had been appointed administratrix with the will annexed, and after the court had annulled her appointment as independent executrix under the will, and claimant thereafter appealed from the court's action in postponing his claim in favor of others, he was not entitled to object to the validity of the court's proceedings in changing the character of the administration. *King v. Battaglia*, 84 S. W. 839, 38 Tex. Civ. App. 28.

dd. Grounds of Attack.

(aa) Want of Jurisdiction.

aaa. In General.

A judgment or order of the probate court, granting letters as to an estate, may be impeached collaterally by proof that the court was without jurisdiction. *Fisk v. Norvel*, 9 Tex. 13.

Thus, for example, that the person was not dead. *Fisk v. Novel*, 9 Tex. 13; *Howard v. Bennett*, 13 Tex. 309, 315.

bbb. Where Record Affirmatively Shows Want of Jurisdiction.

It is only when the record affirmatively discloses that the court did not have jurisdiction to grant the letters of administration that the order making the appointment can be collaterally attacked. *Chapman v. Brite*, 4 Tex. Civ. App. 506, 511, 23 S. W. 514; *Harwood v. Wylie*, 70 Tex. 538, 540, 7 S. W. 789; *Duncan v. Veal*, 49 Tex. 603, 604, and *Merriweather v. Kennard*, 41 Tex. 273, are cases illustrative of this principle. *Mills v. Herndon*, 60 Tex. 353, 360; *Mills v. Herndon*, 77 Tex. 89, 90, 13 S. W. 854.

Where the proceedings of the probate court show that the administration was not within fifteen years after the death of the intestate, in a county other than that prescribed by statute, and was intended to consume the estate in costs, such administration will not be upheld in a collateral attack. *Harwood v. Wylie*, 70 Tex. 538, 7 S. W. 789.

Action of court taken after estate is closed may be attacked collaterally for want of jurisdiction by one who was no party to the proceedings. *Fisk v. Norvel*, 9 Tex. 13, 18; *Howard v. Bennett*, 13 Tex. 309, 315; *Hurt v. Horton*, 12 Tex. 285; *Rose v. Newman*, 26 Tex. 131, 133.

ccc. Presumption as to Jurisdiction.

Where Court Has General Judicial Power.

—Where an order appointing an administrator does not on its face disclose want of jurisdiction, it will be

presumed on collateral attack that jurisdiction of the probate court properly attached. *Mills v. Herndon*, 77 Tex. 89, 90, 13 S. W. 854; *Alexander v. Maverick*, 18 Tex. 179, 194; *Murchison v. White*, 54 Tex. 78, 82; *Hudson v. Jurnigan*, 39 Tex. 579, 585; *Giddings v. Steele*, 28 Tex. 732, 742; *Chapman v. Brite*, 4 Tex. Civ. App. 506, 511, 23 S. W. 514; *Lyne v. Sanford*, 82 Tex. 58, 63, 19 S. W. 847; *Hurley v. Barnard*, 48 Tex. 83, 87; *Guilford v. Love*, 49 Tex. 715; *Williams v. Ball*, 52 Tex. 603, 608; *Heath v. Lyne*, 62 Tex. 686, 691; *Templeton v. Ferguson*, 89 Tex. 47, 55, 33 S. W. 329, affirming 32 S. W. 148; *Baker v. De Zavalla*, 1 Posey 621, 632; *Kleinecke v. Woodward*, 42 Tex. 311, 313.

On collateral attack, an order granting administration upon an estate must be upheld if the facts could exist that would authorize the action taken. *Saul v. Frame*, 3 Tex. Civ. App. 596, 22 S. W. 984.

Every presumption will be indulged in to support the action of a probate court, having general jurisdiction over the estates of decedents, in appointing an administrator, in the absence of any facts showing a want of jurisdiction. *State v. Zanco's Heirs*, 44 S. W. 527, 18 Tex. Civ. App. 127; *Templeton v. Ferguson*, 89 Tex. 47, 33 S. W. 239, affirming 32 S. W. 148.

If the record of a court of general jurisdiction over all matters pertaining to the estates of deceased persons shows that the steps necessary to clothe it with power to act in the given case were taken, or if the record be silent upon this subject, then its judgment, order or decree must be held conclusive in any other court of the same sovereignty, when collaterally attacked. *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550. See, to the same effect, *Saul v. Frame*, 3 Tex. Civ. App. 596, 22 S. W. 984; *Guilford v. Love*, 49 Tex. 715, 741; *Baker v. De Zavalla*, 1 Posey 621, 632; *Murchison v. White*, 54 Tex. 78.

In an action for the recovery of real estate, where defendant's title was based upon an administrator's sale and deed, the record of the probate court did not show any petition for the appointment of the administrator except the statement, in the order of appointment, that on a certain day the petition came on to be heard. Held, that it would be presumed that the probate court had jurisdiction, and that sufficient facts were before the court to authorize the appointment of the administrator. *Mills v. Herndon*, 77 Tex. 89, 13 S. W. 854.

Where a petition for administration represented that the decedent had died in 1839 in H. county intestate and that he was possessed of property and owed debts, and that letters were applied for at the request of a creditor, an order appointing an administrator on such application could not be declared void (in a collateral proceeding) for want of jurisdiction unless it appeared from the record that the administration was unauthorized. *Shirley v. Warfield*, 12 Tex. Civ. App. 449, 34 S. W. 390.

Administration by Court Notwithstanding Independent Will.—Under Probate Act 1848, § 110 (*Hartley's Dig.*, art. 1219), providing that the probate court shall administer an estate notwithstanding a provision in the will for an independent administration, if the heirs fail to give bond to pay the testator's debts to the extent of the estate on an application therefor by a creditor, it will be presumed, where the record is silent as to whether such bond was given, that the probate court had jurisdiction of an estate on which it administered for over thirty years in spite of a provision in the will for an independent administration. *Wood v. Mistretta*, 49 S. W. 236, 20 Tex. Civ. App. 236.

Word "Nullity."—When, in a collateral attack, it is said that an administration was a nullity, unless some fact be then shown, the word "nullity"

is to be construed as equivalent to the word "voidable," but if there be then a fact, proof of which would make the administration valid, the legal presumption is that the very fact which would give validity was pressed before the court which granted administration. *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550.

Defective records may be held sufficient to raise a presumption that one recognized by a court exercising jurisdiction over an estate as its administrator had been regularly appointed. See *Pendleton v. Shaw*, 18 Tex. Civ. App. 439, 44 S. W. 1002, affirmed in 93 Tex. 693, no op., as instance.

Presumption That Petition Presented.

—In a collateral attack on probate proceedings it will be presumed from the order granting letters of administration that a valid petition therefor was presented, although the petition may be absent from the files. *Corley v. Goll*, 8 Tex. Civ. App. 184, 27 S. W. 819.

Administration Granted after Four Years from Death of Testator.—See ante, "Time within Which Application May Be Made," II, B, 3.

When No Presumption Exists.—In classes of "cases over which a court has not, under the very law of its creation, any possible power, e. g., an administration upon the estate of a living person, administration upon the estate of a deceased soldier when prohibited by statute, * * * the entire proceedings are coram non judice the law raises no presumption in their support, and the facts bringing any particular case within one of such classes may be established by evidence dehors the record, either in a direct or collateral attack, for the purpose of destroying the apparent binding force of such proceedings. This is upon the principle that the court, being as a matter of law without power to investigate or determine any question connected with such matters, can not, by a clear

usurpation of power, preclude inquiry into the facts establishing such usurpation and the consequent nullity of its proceedings. In such cases the court is without jurisdiction of the subject matter, the status of the parties, or the person of the defendant, as the case may be, and other courts have no difficulty or hesitation in ignoring its proceedings or decrees." *Templeton v. Ferguson*, 89 Tex. 47, 55, 33 S. W. 329, affirming 32 S. W. 148.

ddd. Irregularities or Error in Exercise of Jurisdiction.

See ante, "Matters Concluded," II, D, 2, b, (3), (a), bb.

That the probate court in granting administration had acted irregularly or erroneously upon a subject matter properly within its cognizance can not be proved in a collateral proceeding. *Clayton v. Hurt*, 88 Tex. 595, 598, 32 S. W. 876; *Templeton v. Ferguson*, 89 Tex. 47, 56, 33 S. W. 329, affirming 32 S. W. 148.

Failure to Give Bond.—Where executor has been administering an estate, the fact that the record does not show that he gave bonds will not avoid his acts on collateral attack. *Moody v. Butler*, 63 Tex. 210, 212.

Failure to Give Bond within Time Required.—An administrator appointed in 1852 failed to give bond within twenty days after his appointment, but in giving bond thereafter his appointment was confirmed without objection. Held, that in a collateral proceeding the mere irregularity of his appointment can not be held to vitiate his acts, otherwise legal, he having acted for a number of years. *Lewis v. Ames*, 44 Tex. 319.

Proceedings including two or more estates in one administration, though irregular, can not be attacked collaterally on that ground. *Grande v. Herrera*, 15 Tex. 533; *Templeton v. Ferguson*, 89 Tex. 47, 33 S. W. 329; *Williams v. Howard*, 10 Tex. Civ. App. 527, 31 S. W. 835, affirmed in 93 Tex.

677, no op.; *Brockenborough v. Melton*, 53 Tex. 493, 502; *Stephenson v. Marsalis*, 11 Tex. Civ. App. 162, 167, 33 S. W. 383.

Decision as to Proper Venue.—By the 36th section of the act of the 5th of February, 1840, which was in force in 1846 (Hart. Dig., art. 1030), a rule was prescribed by which a probate judge, on every application for letters of administration, should determine, by proof whether his county were the proper one wherein the administration should be granted; and his decision upon that question was conclusive until reversed on appeal or other proceeding taken for its revision, and it can not be attacked in a collateral action. *Giddings v. Steele*, 28 Tex. 732, citing *Burdett v. Silsbee*, 15 Tex. 604, 616; *Wardrup v. Jones*, 23 Tex. 489, 494.

Where the county court as a court had jurisdiction of the subject matter of estates and from the uncertainty in the construction and execution of the laws, and the facts pertaining thereto, the place or venue where such jurisdiction should be exercised was rendered uncertain, and all of the parties interested in the estate acted upon and acquiesced in the assumption of jurisdiction, it being assumed in no other place during that period, the jurisdiction can not be called in question collaterally, so as to treat the acts of said court, done thus in good faith as nullities. *Lewis v. Ames*, 44 Tex. 319, 334; *Burdett v. Silsbee*, 15 Tex. 604, 615; *Grande v. Herrera*, 15 Tex. 533, 536; *Green v. Rugely*, 23 Tex. 539, 550.

Nonresidence of Decedent.—An order of a probate court, granting administration in the county in which it sets, although erroneous, by reason of the nonresidence of the decedent, is not for that reason void, but voidable only. *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550.

That no order of the court appears, continuing the term of an adminis-

trator from year to year, is not sufficient to invalidate his lawful acts done in the due course of administration. On the contrary, it has been held that an extension of the term of administration will be presumed, if necessary, to sustain the validity of such acts, when drawn collaterally in question. *Shannon v. Taylor*, 16 Tex. 413, 416.

Order Extending Time for Qualification.—The county court may extend the time for qualification of an administrator, and its action in so doing can not be collaterally attacked. *Willard v. Cleveland*, 38 S. W. 222, 14 Tex. Civ. App. 557. See post, "Extension," II, F, 1, b.

eee. Showing and Determination of Jurisdiction.

See the title COURTS, vol. 5, p. 325.

"In administration proceedings under the probate act of 1848, to determine whether or not an administration is void, the courts should look not only to the time that elapsed before it was applied for but to the entire record of the proceedings, and ascertain therefrom whether or not there was a necessity, or apparent necessity, for the administration; whether or not the application to administer was made in good faith to benefit the estate by those interested to take care of it, and who were entitled to administer it." *Saul v. Frame*, 3 Tex. Civ. App. 596, 597, 22 S. W. 984; *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550.

(bb) Effect of Lapse of Time and Intervention of Rights of Third Persons.

One who has been recognized as the administrator of an estate, both by the court in which the administration was pending and by all parties interested in the estate, for a period of about eighteen years, is conclusively presumed the legal administrator, when his acts are collaterally attacked. *Halbert v. De Bode*, 40 S. W. 1011, 15 Tex. Civ. App. 615; *Halbert v. Martin*

(Civ. App.), 30 S. W. 388, 389, citing *Poor v. Boyce*, 12 Tex. 440; *Rindge v. Oliphint*, 62 Tex. 682; *Miller v. Alexander*, 8 Tex. 36; *Guilford v. Love*, 49 Tex. 715; and *Lyne v. Sandford*, 82 Tex. 58, 65, 19 S. W. 847.

When the general jurisdiction, assumed by the probate court, to grant letters of administration, is attempted to be collaterally impeached, thirty-one years after its assumption, and more than twenty years after one of plaintiffs came to Texas to look after the estate, by proving facts, avoiding the jurisdiction, as that the deceased was a soldier, etc., and when the lands have subsequent to sale under such administration, been bought and sold by innocent parties, and in which time, part has a second time passed through the probate court, it seems, that, even had the proof of the facts alleged been clear, the claim of the heirs, attacking such administration, should be held a stale demand. *Vogelsang v. Dougherty*, 46 Tex. 466.

Letters of administration were granted January, 1852, in Austin county, upon estate of one who was alleged to have died in 1841, a citizen of Texas, etc. In 1888 the heirs of the intestate instituted suit for the land located by a purchaser under the administrator, objecting to the probate sale because it was not shown that Farris (intestate) died in Austin county. Held, the county court had general jurisdiction in the administration of estates. Nothing to the contrary appearing upon the record, it will be presumed, when its judgments are collaterally attacked, that it found the facts to exist that would give it jurisdiction. *Lyne v. Sanford*, 82 Tex. 58, 19 S. W. 847.

(cc) Appointment Secured by Fraud or Collusion or for a Fraudulent Purpose.

If an appointment as administrator was secured by fraud or collusion, it

can only be attacked on that account by a direct proceeding and not collaterally. *Rogers v. Tompkins* (Civ. App.), 87 S. W. 379, 382, affirmed in 101 Tex. 654, no op.; *Brockenborough v. Melton*, 55 Tex. 493; *Ferguson v. Templeton* (Civ. App.), 32 S. W. 148, affirmed in 89 Tex. 47; *Stone v. Ellis* (Civ. App.), 40 S. W. 1077, affirmed in 93 Tex. 696, no op.; *Paul v. Willis*, 69 Tex. 261, 7 S. W. 357; *Nelson v. Bridge*, 98 Tex. 523, 86 S. W. 7; *Rutherford v. Stamper*, 60 Tex. 447, 449.

Where a want of jurisdiction in the probate court is not shown, an administration can not be held void and subject to collateral attack on the ground of fraud, because of the fact that such fraud may be inferred from the course and result of the probate proceedings, without other proof of fraud being made. *Shirley v. Warfield*, 12 Tex. Civ. App. 449, 34 S. W. 390.

Fraudulent Purpose to Consume and Misapply Estate.—The fact that an administration was obtained to consume the estate and misapply it under the semblance of legal authority and by the aid of the probate court could not of itself, render the administration void. *Shirley v. Warfield*, 12 Tex. Civ. App. 449, 456, 34 S. W. 390, distinguishing *Paul v. Willis*, 69 Tex. 261, 7 S. W. 357, and *Duncan v. Veal*, 49 Tex. 603.

(b) Vacating or Setting Aside.

Where an administrator was appointed in Texas for the estate of a nonresident decedent, for the sole purpose of permitting such administrator to maintain an action against a railroad company for injuries to and the wrongful killing of his intestate, such railroad company was entitled to maintain a suit to set aside such administration proceedings for lack of jurisdiction. *Cooper v. Gulf, C. & S. F. Ry. Co.*, 93 S. W. 201, 41 Tex. Civ. App. 596.

Requirements of Petition for Equitable Relief.—Where an administration is fraudulently procured affirmative equitable relief must be sought by appropriate averments, and is not available under the ordinary petition, as in this case, of trespass to try title. *Shirley v. Warfield*, 12 Tex. Civ. App. 449, 457, 34 S. W. 390; *Fisher v. Wood*, 65 Tex. 199; *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550.

Matters Considered.—In administration proceedings under the probate act of 1848, to determine whether or not the administration is void, the court should consider not only the time that elapsed before it was applied for, but also the entire record, and ascertain thereunder whether there was necessity for the administration, and whether the application to administer was made in good faith to benefit the estate, by persons interested in taking care of it, who were entitled to administer. *Saul v. Frame*, 3 Tex. Civ. App. 596, 22 S. W. 984, following *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550.

E. SUSPENSION OF POWER.

Effect of Citation to Administrator to Give New Bond.—See post, "Requiring New or Additional Bond," III, G.

Suspending Executor and Appointment of Receiver.—See post, "Receivers," XIII.

F. DURATION AND TERMINATION.

1. Term of Administration.

a. In General.

Administrator loses his representative capacity at expiration of period fixed by law for administration. *Fisk v. Norvel*, 9 Tex. 13, 17.

Administrator whose appointment is valid remains such as long as he is recognized by court. *Baker v. De Zavalla*, 1 Posey 621, 635.

After petition for discharge and audit of accounts and order to deliver

estate to successor, administrator can not be required to act in official capacity. *Oldham v. Smith*, 26 Tex. 530, 532.

Under Laws of Louisiana.—Under the laws of Louisiana adopted in 1836 by the Texas legislature an administrator held his appointment for one year only, but it could be extended for sufficient cause shown from year to year not exceeding five years. The laws of Louisiana, so adopted, continued in force until superseded by the act of the Texas congress of February 5th, 1840. *Boyle v. Forbes*, 9 Tex. 35, 40; *Flores v. Howth*, 5 Tex. 329; *Dodge v. Phelan*, 2 Tex. Civ. App. 441, 21 S. W. 309; *Murphy v. Mennard*, 14 Tex. 62, 65; *Portis v. Cummings*, 14 Tex. 139; *Cochran v. Thompson*, 18 Tex. 652, 656; *Martin v. Robinson*, 67 Tex. 368, 376, 3 S. W. 550.

Under the law in force from 1836 to 1846, the terms of administration on an estate were limited to one year unless extended. *Dodge v. Phelan*, 2 Tex. Civ. App. 441, 447, 21 S. W. 209.

The policy of speedy administration was enjoined under the probate law of 1840. *Cochran v. Thompson*, 18 Tex. 652, 656.

Real property of an estate ought not to remain under administration in this state any longer than may be necessary for the discharge of the debts speedily and advantageously for the estate. *Cochran v. Thompson*, 18 Tex. 652, 656.

b. Extension.

Extension of administration need not be made before expiration of year. *Bartlett v. Cocke*, 15 Tex. 471, 476.

Necessity for Formal Order.—Though no order of court continuing administration from year to year appears in record, his lawful acts done in due course of administration are valid. *Shannon v. Taylor*, 16 Tex. 413, 417; *Hurt v. Horton*, 12 Tex. 285; *Poor v. Boyce*, 12 Tex. 440; *Howard v. Bennett*, 13 Tex. 309, 314; *Dancy v.*

Stricklinge, 15 Tex. 557; Burdett v. Silsbee, 15 Tex. 604; Giddings v. Steele, 28 Tex. 732; Baker v. De Zavalla, 1 Posey 621, 635.

Under the Civil Code of Louisiana and the act of congress of 1840 in force in that year (Hart. Dig., art. 1026), it is not material that an extension of an administration should have been granted before the expiration of the year. The proposition that at the end of the year the estate vests immediately in the heirs, on the supposition that it is fully administered and the administrator discharged by operation of law, is not sound. Bartlett v. Cocke, 15 Tex. 471.

That an administration was not formerly extended did not affect its existence. Baker v. De Zavalla, 1 Posey, Unrep. Cas. 621; Poor v. Boyce, 12 Tex. 440.

It is no objection to administration proceedings that it does not affirmatively appear that the time for administration was extended, or that it continued for a period of over five years, where it appeared that the administrator acted under sanction of the court. Galbraith v. Howard & Hume, 11 Tex. Civ. App. 230, 32 S. W. 803.

Third persons are not required to look further than to see that a person once duly invested with the powers of administrator continues to act as such with the sanction of the probate court. Bartlett's Heirs v. Cocke, 15 Tex. 471, approving Poor v. Boyce, 12 Tex. 440.

Five Years' Limitation.—Where a succession was opened in 1834 by the appointment of A as curator, and A next appeared as administrator in 1837, and acted and was recognized as such by the probate court, until 1840, the court properly refused to instruct the jury, that if five years elapsed from the original appointment of A as administrator in 1834, before the order of sale was granted, the court had no power to continue him in his functions, and his acts after five years had

elapsed from his original appointment, in selling the land claimed, were null and void. Soye v. McCallister, 18 Tex. 80. See, also, Galbraith v. Howard, 11 Tex. Civ. App. 230, 32 S. W. 803, affirmed in 93 Tex. 661, no op.; Lynch v. Baxter, 4 Tex. 431; Poor v. Boyce, 12 Tex. 440; Dancy v. Stricklinge, 15 Tex. 557; Giddings v. Steele, 28 Tex. 732.

Orders in administration proceedings had from 1844 to 1854 can not be assailed on ground that under laws then in force, administration on deceased person's estate could not be continued for more than one year from date of issuance of letters of administration, unless ordered by court to be continued for longer period, and in no event could same be continued for more than five years. Galbraith v. Howard, 11 Tex. Civ. App. 230, 32 S. W. 803, affirmed in 93 Tex. 661, no op. See Williams v. Howard, 10 Tex. Civ. App. 527, 31 S. W. 835, affirmed in 93 Tex. 677, no op.

In Burdett v. Silsbee, 15 Tex. 604, it is held that "the five years limitation or restriction referred to in the law of Louisiana (invoked as at the time in force in this state) never had effect upon any estates administered in this country." Galbraith v. Howard, 11 Tex. Civ. App. 230, 32 S. W. 803, affirmed in 93 Tex. 661, no op.

Extension of administration will be presumed from fact that administrator continues to act with court's sanction. Bayne v. Garrett, 17 Tex. 330, 335; Poor v. Boyce, 12 Tex. 440; Soye v. McCallister, 18 Tex. 80, 81; Williams v. Howard, 10 Tex. Civ. App. 527, 32 S. W. 835, affirmed in 93 Tex. 677, no op.

Under the laws of Louisiana, "to extend the administration a new order by the court and a renewal of his security by the administrator were required. Flores v. Howth, 5 Tex. 329, 332." Williams v. Howard, 10 Tex. Civ. App. 527, 532, 31 S. W. 835, affirmed in 93 Tex. 677, no op.

2. Temporary Administrator.

See post, "Duration and Termination of Appointment," XI, A, 5.

3. Revocation or Removal.**a. Grounds.**

When an executor qualifies after an administrator has been appointed, administration must be revoked. *Batchelor v. Douglas*, 31 Tex. 182, 184.

Fraud in Obtaining.—Where obtaining of administration is part of fraudulent scheme to divert property of estate from heirs, real parties in interest may, by suit in district court, arrest administration and recover property. *Sevier v. Teal*, 16 Tex. 371, 375.

Failure to File Bond.—Under Rev. Stat., arts. 1944, 1946, enabling creditors to enforce the execution of a bond by an independent executor, they can not insist on his removal, except for disregarding the order of the court to give bond. *Perkins v. Wood*, 63 Tex. 396, citing *Jerrard v. McKenzie*, 61 Tex. 40, 43. See, also, *Roy v. Whitaker* (Civ. App.), 50 S. W. 491, 495, affirmed in 93 Tex. 649 no op.

Failure to give new bond is ground for removal. *Bills v. Scott*, 49 Tex. 430, 433.

Administrator Absenting Himself from State.—The fact that an administrator with permission of the county court, absents himself from the county wherein the administration is pending, does not authorize that court to remove him from his administration. *Hall v. Monroe*, 27 Tex. 700.

An administrator may be removed on proof of his absence from the state for a period of three months without permission of the court. *Hall v. Monroe*, 27 Tex. 700.

Failure to Return Inventory.—Under Pasch. Dig., arts. 1294, 1295, it was the duty of the court to remove the executrix upon her failure to return an inventory within sixty days of the grant of letters; and, if the court and creditors who were interested failed to require such removal, persons who ac-

quired rights through her action in the capacity of executrix should not be allowed to suffer injury by her default, and by the action of the court in not requiring her to furnish a better security for her faithful discharge of duty. *Willis v. Ferguson*, 46 Tex. 496, distinguishing *Langley v. Harris*, 23 Tex. 565; *Cooper v. Horner*, 62 Tex. 356, 364. See, also, *Roy v. Whitaker* (Civ. App.), 50 S. W. 491, 496, affirmed in 93 Tex. 649, no op.; *Harris v. Shafer* (Civ. App.), 21 S. W. 110, 112, reversed in 86 Tex. 314.

Failure to Make Annual Report or File Exhibit of Claims and Condition of Estate.—See post, "Time of Filing," IX, B, 2, c, (1).

Refusal to Obey Order of Court.—Under Act 1876, § 27, allowing a probate judge of his own motion to remove an administrator for failing "to obey any order consistent with this act in relation to the estate," etc., an administrator may be removed for failing to execute an order to sell land, although claiming that it was illegal for including the homestead. *Wright v. McNatt*, 49 Tex. 425.

An order to sell 300 acres of land, including the homestead, for payment of the debts of the estate, although erroneous, is not a nullity; and the administrator's refusal to obey such order is ground for his removal. *Wright v. McNatt*, 49 Tex. 425.

Misappropriating Property.—The rule requiring the removal of a personal representative as part of the remedy against him for misappropriating estate property, applies only when the property can not be returned. *Chifflet v. P. J. Willis & Bro.*, 74 Tex. 245, 11 S. W. 1105.

Taking Property at Appraised Value.—The statute forbids an executor or an administrator to take property of the estate at its appraised value and when he does so, the court should remove him and appoint a successor whose duty it becomes to sue upon

the offender's bond *Chifflet v. P. J. Willis & Bro.*, 74 Tex. 245, 11 S. W. 1105.

Fraudulent Sale.—If necessary an administrator who made a fraudulent sale can be removed. *Giddings v. Steele*, 28 Tex. 732, 749, citing *Long v. Wortham*, 4 Tex. 381; *Evans v. Oakley*, 2 Tex. 182, and *Burdett v. Silsbee*, 15 Tex. 604.

Wrongful Claim of Right to Control Property.—Where a will provided that the executor should control property until the devisee's majority, the executor disqualified himself after her death during her minority by claiming to be entitled to control the estate until the time when the devisee would have become of age had she lived. *Newman v. Dotson*, 57 Tex. 117.

The acts of an administrator, which favor an improper claim of the chief justice, in respect to his distributive share in the estate, do not affect the competency of the chief justice, but may be urged as a reason for displacing the administrator, either before the county court, or on appeal to the district court. *Glavecke v. Tijirina*, 24 Tex. 663.

b. Jurisdiction.

The district court has jurisdiction of a suit by a surviving wife, as guardian of her children, to revoke an order granting letters of administration on the estate of her deceased husband, to vacate a judgment allowing a claim against the estate, and to enjoin the administrator from acting as such. *Ramirez v. McClane*, 50 Tex. 598.

"The power to revoke letters of administration and to grant other letters in the first instance is original jurisdiction, and belongs exclusively to the county court." *Ballard v. Wheeler*, 23 Tex. Civ. App. 422, 423, 56 S. W. 946.

Appointment of administrator in proper county can not be revoked by subsequent appointment of another administrator in another county. *Burdett v. Silsbee*, 15 Tex. 604, 616;

Grande v. Herrera, 15 Tex. 533, 535; *Dancy v. Stricklinge*, 15 Tex. 557; *Alexander v. Maverick*, 18 Tex. 179.

Fraud.—See ante, "Grounds," II, F, 3, a.

c. Time of Application.

An application by decedent's son and heir for removal of the administrator, made two years after he had been appointed temporary administrator and failed to give bond, is properly refused, since his silent delay was acquiescence. *Mayes v. Houston*, 61 Tex. 690.

d. Petition.

See post, "Effect of Removal," II, F, 3, i.

e. Effect of Bringing Suit.

"The power and authority of administrator, derived from the order of appointment, and his qualification thereunder, in 1880, are not nullified or suspended during the pendency of the litigation to overthrow the administration. Having been duly vested with the power and authority of administration, such power and authority would continue in him until abrogated by a final judgment of a court of competent jurisdiction terminating the litigation over the matter. The fact that the administration was adjudged void and the administrator dismissed by a judgment rendered during these proceedings, which was appealed from by the administrator, did not have the effect to annul or suspend his functions as administrator pending the appeal. There was no such finality in such a judgment as would prevent him from exercising his powers as administrator; the judgment finally terminating the litigation alone could have that effect. *Texas Trunk R. Co. v. Jackson Bros.*, 85 Tex. 605, 22 S. W. 1030." *Bowen v. Kirkland*, 17 Tex. Civ. App. 346, 354, 44 S. W. 189, affirmed in 93 Tex. 725, no op.

Effect of Action to Revoke on Running of Statute of Limitations

against Administrator.—See post, "Suspension," V, S, 4, c.

f. Order.

An order of a probate court removing an administrator, which recited that no service could be made upon him, though entered on the same day the application was made, without any attempt to obtain service, was at most only voidable, and can not be collaterally attacked by his sureties when sued on his bond. *Grant v. McKinney*, 36 Tex. 62.

Res Adjudicata.—An action against an administrator to recover the value of lands sold by him as such under letters alleged to have been fraudulently procured can not be maintained after a judgment revoking said letters of administration has been previously reversed on appeal in an action for that purpose. *Halbert v. Alford* (Sup.), 12 S. W. 77.

g. Review of Order.

See ante, "Order," II, F, 3, f.

An administrator was removed, without notice, for failure to file an inventory. At a subsequent term the administrator petitioned for reinstatement, alleging that the inventory had been found in the clerk's office; but the evidence failed to show that, on a motion for reinstatement, he had shown such fact to the court, or on appeal to the district court had proved that the inventory had been filed in time. Held insufficient to show that the removal of the administrator did not result from his own negligence, either from failing to file the inventory or to present the facts to the court sufficiently to prevent the judgment complained of. *Ruenbuhl v. Heffron* (Tex. Civ. App.), 38 S. W. 1028.

Writ of error is not the remedy for one removed from an administration, who gave no notice of appeal at time of his removal, and who took no such steps to obtain appeal or review, as are contemplated by statute. *Smith v. Robb*, 42 Tex. 260.

Bond.—An independent executor under the act of 1870 (Paschal's Dig., arts. 5626-28), against whom judgment was obtained in a suit brought to enjoin him from further acting under the will, and to appoint a receiver, is not relieved by the statute (Paschal's Dig., art. 1503) from the necessity of executing an appeal bond, as other parties, for in such a suit, the executor is a party defendant, acting in defense of himself, to protect his right to retain his position as an independent executor of the will, and not as an ordinary executor administering the will under the direction of the probate court, in a suit to determine the rights of the estate in property claimed by him for it. *Guest v. Guest*, 48 Tex. 210.

The bond on appeal to district court from order removing an administrator must bind the makers to pay to county judge such sum as may be necessary to satisfy the decision, order, decree or judgment to be rendered. *Munzsheimer v. Wickham*, 74 Tex. 638, 639, 12 S. W. 751.

h. Restraining Removal.

An administrator can not enjoin an order removing him for want of a new bond. *Bills v. Scott*, 49 Tex. 430, 432.

i. Effect of Removal.

Where the petition also sought to vacate the allowance and approval of a claim against the estate, on the ground that the administration was a nullity, the court said: "In holding the petition sufficient as a suit to vacate an administration fraudulently procured after the lapse of four years, we do not intend to intimate that the effect of vacating the administration would be to vacate the establishment of a claim in favor of third parties not participants in the fraud." *Ramirez v. McClane*, 50 Tex. 598, 601.

Validity of Acts Done Prior to Revocation.—All acts done by an adminis-

trator previous to qualification of executor and revocation of letters of administration are valid. *Batchelor v. Douglas*, 31 Tex. 182, 184.

j. Delivery of Papers Belonging to Estate.

See the title COURTS, vol. 5, p. 318. See, also, ante, "Effect of Removal," II, F, 3, i.

Under Act of 1848, § 119 (Hart. Dig., art. 1228) authorizing the chief justice, upon complaint filed, to cause previous administrators to appear before him and deliver up any papers which he may have in his possession belonging to an estate; an administrator who has been removed can not be required to surrender his own vouchers, or papers necessary to his own defense. *Miller v. Jasper*, 10 Tex. 513.

But he may be required to surrender all other documents belonging to the estate. *Miller v. Jasper*, 10 Tex. 513, 517.

k. Proceedings to Set Aside Removal.

In proceedings to set aside a removal of an administrator with the will annexed, made on the ground that he had not seasonably filed an inventory, evidence that deceased had not intended such person should be administrator, and that he was seeking to have certain claims allowed him against the estate, is not admissible. *Ruenbuhl v. Ruenbuhl's Estate*, 11 Tex. Civ. App. 197, 32 S. W. 722.

l. Presumption That Order of Removal Set Aside.

See post, "Presumption That Order of Discharge or Removal Revoked," II, F, 6.

m. Cost.

An independent executor protecting his right to the position is individually liable for costs. *Guest v. Guest*, 48 Tex. 210, 211.

4. Resignation.

See ante, "Renunciation of Appointment," II, A, 1, c.

By the general principles of law an executor can not, by his own act, resign such a trust, once accepted. *Roy v. Whitaker* (Civ. App.), 50 S. W. 491, affirmed in 93 Tex. 649, no op.

Under the act of 1848 (Hart. Dig., art. 1146), an executor can not resign and become discharged of his trust until he accounts for and delivers the estate to some person entitled to receive it. *Ingram v. Maynard*, 6 Tex. 130.

The probate law of 1840, which contained no provision for independent administration, gave an executor the unqualified right to resign. *Roy v. Whitaker* (Civ. App.), 50 S. W. 491, 496, affirmed in 93 Tex. 649, no op.; *Ingram v. Maynard*, 6 Tex. 130.

Power of District Court to Accept Resignation.—Testator provided in his will that his estate should not be partitioned until all of his children had married or reached their majority, and until that time it should remain in the hands of the executor, who was to use the income of the estate in educating and supporting decedent's children. The executor appointed filed a petition in the district court to be discharged, though two of the heirs still minors, because he was unable to act, and his successor appointed in the will had refused to act. Held, that a decree discharging the executor, in the absence of an affirmative finding by the trial court that the executor was no longer able to act and that his successor had refused to act, was error, since the district court has no power to accept the resignation of an executor. *Wells v. Houston* (Civ. App.), 56 S. W. 233.

Under Rev. Stat. 1895, art. 2030, requiring that the resignation of an executor shall be presented to the court in which administration of the estate is pending, the judge of a district court has no power to accept such a resignation, since estates must be administered in the county court. *Wells v. Houston* (Civ. App.), 53 S. W. 233.

Independent Executor.—"The statute contains no provision authorizing an independent executor to resign." *Roy v. Whitaker* (Civ. App.), 50 S. W. 491, 497, affirmed in 93 Tex. 649, no op., distinguishing *Langley v. Harris*, 23 Tex. 565; *Tippett v. Mize*, 30 Tex. 362; *Willis & Bro. v. Ferguson*, 46 Tex. 496; *Willis & Bro. v. Ferguson*, 59 Tex. 172; *Frisby v. Withers*, 61 Tex. 134; *Ingram v. Maynard & Bro.*, 6 Tex. 130; *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75; *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803, and *Blanton v. Mayes*, 58 Tex. 422. But see *Roy v. Whitaker*, 92 Tex. 346, 356, 48 S. W. 892, 49 S. W. 367, holding that an independent executor has the same right to resign his trust as any other executor or administrator under art. 2030, Rev. Stat.

5. Death.

See post, "Necessity and Grounds for Appointment," XII, A, 2.

6. Presumption That Order of Discharge or Removal Revoked.

Where administration on the estate of a deceased person was granted in 1842, and the administrator's final account was filed and approved, and the administrator discharged, in 1848, and application filed in 1854 by which a creditor sought payment, by a judgment recovered against the administrator in 1850, which was affirmed on appeal to the supreme court in 1851, and it appeared that, notwithstanding the discharge of the administrator in 1848, he had afterwards acted and been recognized in that capacity by the probate court, it will be presumed that the order discharging him was revoked, and that he was still amenable to an order directing satisfaction of the judgment. *Bayne v. Garrett*, 17 Tex. 330, following *Townsend v. Munger*, 9 Tex. 300. See, also, *Dancy v. Strickling*, 15 Tex. 557, 559.

7. Effect of Termination.

"After the termination of an admin-

istration, however that termination may occur, the probate court has no power to render a decree against one who formerly held the fiduciary relation of administrator or executor." *Timmins v. Bonner*, 58 Tex. 554, 560.

G. CLOSING SUCCESSION AND DISCHARGE.

1. Necessity and What Constitutes.

"Administrations under our laws are not intended to endure for the life of the grantees. In contemplation of law they must be brought to a close at some fixed or reasonable period." *Hurt v. Horton*, 12 Tex. 285, 288.

Succession can not be closed until the estate is fully administered. *Howard v. Bennett*, 13 Tex. 309, 313.

Under laws in force from 1836 to 1846, when letters of administrator appointed in 1840 were revoked, and his bond canceled in 1841, and court made no order continuing it, administration was closed. *Dodge v. Phelan*, 2 Tex. Civ. App. 441, 447, 21 S. W. 309. See *Flores v. Howth*, 5 Tex. 329; *Boyle v. Forbes*, 9 Tex. 35, 36; *Murphy v. Mennard*, 14 Tex. 62, 65; *Portis v. Cummings*, 14 Tex. 139.

That a long time elapsed between the death of the intestate and the grant of letters de bonis non does not affect the existence of the administration. *Baker v. De Zavalla*, 1 Posey 621; *Howard v. Bennett*, 13 Tex. 309, 315.

The fact that there was an interval of several years between entries or evidence of acts as administrator does not affect the existence of the administration. *Burdett v. Silsbee*, 15 Tex. 604, 616.

The fact that an estate was consumed by costs and expenses, to the loss or want of benefit to the heirs, does not affect the existence of the administration. *Baker v. De Zavalla*, 1 Posey 621; *Kleinecke v. Woodward*, 42 Tex. 311.

Refusal and neglect of administrator to properly continue administration

and thereby losing right to longer exercise, trust does not close administration. *Howard v. Bennett*, 13 Tex. 309, 314.

Administration is not closed, although administrator neglects duties for three years. *Howard v. Bennett*, 13 Tex. 309, 316.

An Order Setting Aside All of the Estate to the Surviving Widow.—Where all the property of a deceased husband was set aside to his widow, there being no homestead, held, that this concluded the administration. *Floyd v. Terrell*, 60 Tex. 284.

Partial Partition.—In view of the provision of Rev. Stat., arts. 2035, 2107, after an order for partition and distribution, an estate is as effectually closed, so far as it concerns creditors not previously made parties to the administration, as if it had been so declared by an order of court. *Bledsoe v. Beiler*, 66 Tex. 437, 1 S. W. 164.

2. Objections to Discharge.

The heirs of the deceased ward can not object to the discharge of the administrator on the ground that he had not sold all the real estate, since on the closing of the estate the title thereto would vest in them. *De Berry v. Wootters* (Civ. App.), 57 S. W. 885.

3. Presumption That Administration Closed Vel Non.

After the lapse of a certain time, administrations must be considered as closed, whether ever administered, in point of fact, or not. *Blair v. Cisneros*, 10 Tex. 34. But see *Kosminsky v. Estes*, 27 Tex. Civ. App. 69, 65 S. W. 1108, affirmed in 95 Tex. 681, no op.; *Harris v. Shafer* (Civ. App.), 21 S. W. 110, 113, reversed in 86 S. W. 314.

Administration will be presumed closed after lapse of eight years without any official act on part of administrator. *Portis v. Cummings*, 14 Tex. 139, 140. See, to same effect, *Murphy v. Mennard*, 14 Tex. 62; *Ingram v. Maynard*, 6 Tex. 130. See, also, *Har-*

ris v. Shafer (Civ. App.), 21 S. W. 110, 113, reversed in 86 Tex. 314.

After lapse of ten years, without any act in the administration of the estate, the administration is presumed to be closed. *Marks v. Hill*, 46 Tex. 345; *Poor v. Boyce*, 12 Tex. 440, 449; *Dancy v. Stricklinge*, 15 Tex. 557; *Burdett v. Silsbee*, 15 Tex. 604, 606; *Shannon v. Taylor*, 16 Tex. 413; *Soye v. McCallister*, 18 Tex. 80; *Harris v. Shafer* (Civ. App.), 21 S. W. 110, 113, reversed in 86 Tex. 314; *Easterling v. Blythe*, 7 Tex. 210; *Howard v. Bennett*, 13 Tex. 309; *Boyle v. Forbes*, 9 Tex. 35.

The record of an administration granted in May, 1840, showed no extension of time, nor any action therein, until 1851. Held that it should be presumed that the administration was closed. *Marks v. Hill*, 46 Tex. 345.

Lapse of Thirteen or More Years.—Administration having been granted upon an estate in 1838, the presumption would be, in 1852, that it was closed, unless the contrary were shown. *Wardrup v. Jones*, 23 Tex. 489. See, also, *Lovering v. McKinney*, 7 Tex. 521; *Birdwell v. Cox*, 15 Tex. 535; *Fisk v. Norvel*, 9 Tex. 13, 18; *Hurt v. Horton*, 12 Tex. 285; *Francis v. Hall*, 13 Tex. 189, 192; *Soye v. McCallister*, 18 Tex. 80, 100; *Giddings v. Steele*, 28 Tex. 732.

"In *Boyle v. Forbes*, 9 Tex. 35, 36, * * * it was said that 'independently of the statute fixing the precise period of one year to the administration, it would seem that after the lapse of thirteen years the presumption would be that all legal demands against the succession had been discharged.'" *Martin v. Robinson*, 67 Tex. 368, 376, 3 S. W. 550. See, also, *Howard v. Bennett*, 13 Tex. 309, 314.

Under art. 1829, Rev. Stat., administrator is not discharged nor estate closed until order to that effect has been made and entered of record, and no presumption of such facts arises from lapse of time. *Blackwell v.*

Blackwell, 86 Tex. 207, 210, 24 S. W. 389.

Under Rev. Stat., art. 1829, providing that any person interested in the administration of an estate may proceed after any lapse of time to compel settlement when it does not appear from the record that the administration has been closed, in the absence of an order discharging an executor or closing the estate he can not claim a discharge by any presumption based on his own neglect to call for a discharge. Blackwell v. Blackwell, 86 Tex. 207, 24 S. W. 389, citing Main v. Brown, 72 Tex. 505, 10 S. W. 571.

Rev. Stat., art. 1829, provides that, when letters testamentary have once been granted, any person interested may proceed, after any lapse of time, to compel a settlement, when it does not appear that the administration has been "closed." Held, that the administration is not closed, though the final account of the executor is approved, and the money on hand is ordered to be distributed, if he is not discharged, and he subsequently asks for orders regarding the estate, acquires property for the estate under the orders, and renders two annual accounts. Blackwell v. Blackwell, 86 Tex. 207, 24 S. W. 389.

Validity of Compromise by Heirs.—Where it has not been alleged nor proved that administration on estate was closed at time of an alleged compromise by the heirs of a judgment in favor of administrator de bonis non, it will not be presumed that administration was closed. Chapman v. Mansfield (Civ. App.), 29 S. W. 820, affirmed in 93 Tex. 701, no op.; Northcroft v. Oliver, 74 Tex. 162, 163, 11 S. W. 1121.

Presumption from Order of Probate Court.—It will be presumed, from an order made by the probate court, that estate was still open and that administration was pending. Guilford v. Love, 49 Tex. 715, 742.

4. Proof of Closing.

The papers and orders of the probate court, or copies thereof, are the best evidence to show that an administration is not closed; oral testimony to that effect is secondary evidence. Williams v. Davis, 56 Tex. 250.

5. Effect of Closing.

An administration is "finally closed, and the estate fully administered, when the property passes out of the control of the probate court, for administrative purposes. Their jurisdiction ceases, and the property is revested in fact or in law in the heirs. And consequently all grants of administration and acts of the administrators over such property are nullities, and can afford no protection, or confer no right." Hurt v. Horton, 12 Tex. 285, 288.

H. REOPENING.

When a succession has once been administered and closed, the effects are, by operation of law, restored to the heirs; they have the full ownership, with all the rights of control, disposition, and actions for its recovery and possession; and the probate court has no authority to reopen the succession. Fisk v. Norvel, 9 Tex. 13. See Blinn v. McDonald (Civ. App.), 38 S. W. 384, 386, reversed in 92 Tex. 604. See post, "Reopening, Revising and Correcting Settlement," IX, C.

Grounds.—Probate court can not reopen succession after lapse of twelve years, for purpose of letting in dormant judgment. McGreal v. Jones, 36 Tex. 673, 674.

The purpose of completing a partition held not to be a sufficient excuse for reopening administration after a lapse of nearly 21 years. Guilford v. Love, 49 Tex. 715.

"The reopening of an administration seven years after the last order had been made in a previous administration and seventeen years after the death of the intestate could not be tolerated under the circumstances

shown in this case. (*Withers v. Paterson*, 27 Tex. 492, 493; *Boyle v. Forbes*, 9 Tex. 39, 40; *Duncan v. Vise*, 49 Tex. 610, 611." *Paul v. Willis*, 69 Tex. 261, 265, 7 S. W. 357.

Stale demands can not be made the grounds for reopening a succession by granting letters of administration. *Chandler v. Hudson*, 11 Tex. 32.

Where a creditor who had obtained an execution against two debtors, one of whom was the deceased, neglected to put in his claim before the judge of probate, and nine years after their appointment the administrators were discharged, it was held that this stale demand was no ground for reopening the succession. *Chandler v. Hudson*, 11 Tex. 32.

III. Bond.

A. NECESSITY FOR EXECUTING.

"An executor must give bond with security, unless otherwise directed by the testator (Hart. Dig., art. 1130.)" *Stone v. Dorsett*, 18 Tex. 700, 710.

"An executor who administers an estate free from the control of the county court may be relieved by the will of the testator from giving bond." *Dwyer v. Kalteyer*, 68 Tex. 554, 558, 5 S. W. 75.

A provision in a will, "I wish my estate to be kept out of the probate court," is equivalent to the provision of Pasch. Dig. § 1371, that "no other action shall be had in the probate court than the probating and registering" of the will, and under such a provision the county court had no jurisdiction to take an executor's bond. *Pierce v. Wallace*, 48 Tex. 399.

Bond Demanded by Heir or Person Having Claim against Estate.—Under art. 1944, Sayles' Civ. Stat., in cases where no bond had been required of an executor, any person having a claim against the estate may, upon proper written showing made in the court where the will was probated, obtain an order on the executor to show cause why he should not be required to give

bond. *Harris v. Hicks*, 13 Tex. Civ. App. 134, 34 S. W. 983.

Where heirs believe independent executor is wasting or mismanaging estate, they may under statute compel him to give bond or have him removed for failure to do so. *Jerrard v. McKenzie*, 61 Tex. 40, 43.

Clause Relieving against Giving Bond Not Applicable to Successor of Named Executor.—A clause in a will naming certain persons as executors, and providing that they should not be called on to give bonds or be subject to the jurisdiction of the county courts, becomes inoperative on the failure or refusal of such person to accept such trust, and has no application to succeeding executors or administrators. *Langley v. Harris*, 23 Tex. 564.

B. PURPOSE OF BOND.

An administrator's bond is for the protection of creditors, devisees and heirs who may sue thereon for negligence, maladministration, etc. *Ward's Heirs v. Ward*, 1 Posey Unrep. Cas. 123.

The object of the executor's or administrator's bond is merely to provide security, that he shall well and truly perform all the duties required of him under the appointment. The bond adds nothing to the obligation of the principal. *Dwyer v. Kalteyer*, 68 Tex. 554, 558, 5 S. W. 75.

C. FORM AND REQUISITES.

1. In General.

The bond is conditioned for the true and faithful performance of all the duties of the administrator under his appointment. *Fort v. Fitts*, 66 Tex. 593, 595, 1 S. W. 563.

Omission of Formal Conclusion.—A bond, intended as an administrator's bond, is binding as such, though there has been omitted a formal conclusion declaring the circumstances under which it shall become void or shall remain in force and effect, if the condition of the bond intended by the

parties executing it is manifest. *Rose v. Winn*, 51 Tex. 545.

2. By Whom Executed.

An administrator may execute his bond by an attorney in fact. *Hall v. Monroe*, 27 Tex. 700.

Joining Husband with Wife.—Husband must unite with wife in execution of bond as executrix. *Airhart v. Murphy*, 32 Tex. 131, 134.

A testator appointed his wife executrix of his will, without accountability to the probate court. After his death she probated the will, and filed an inventory as required by the statute. Subsequently she married, and a creditor of the testator sued her as executrix, joining her husband as a codefendant, although he had never joined her in any bond. Held, that *Paschal's Digest*, art. 1284, requiring a husband to join his wife in the execution of a bond, when she shall become an executrix or administratrix did not apply. *Airhart v. Murphy*, 32 Tex. 131.

In 1838, one surety on administrator's bond was sufficient. *Delk v. Punchard*, 64 Tex. 360, 363.

3. Amount.

Under the act prescribing the mode of proceeding in district courts in matters of probate, providing (section 106) that the administrator shall give bond, with sureties, in an amount not less than double the estimated value of the real and personal property, it is error to require a bond for more than such amount. In *re Bowden's Estate*, 33 Tex. 730.

Double Value of Estate.—Rev. Stat., art. 1889, requiring the bond of an administrator to be double the estimated value of the estate, means double the value estimated by the court, and it will be presumed, from the order of the court fixing the penalty of the bond, that it estimated the estate at half that amount. *Williams v. Verne*, 68 Tex. 414, 4 S. W. 548.

Exempt Property Not Included in Fixing Amount.—The act prescribing

the mode of proceeding in district courts in matters of probate, providing (section 26) that exempted property, or its value if there be no such property, forms no part of the estate of a decedent when a constituent of the family survives, is applicable in estimating the value of an estate for the purpose of fixing the amount of the bond to be required of the administrator. In *re Bowden's Estate*, 33 Tex. 730.

4. Voluntary Bond.

Where a will substantially complied with the probate act of 1848, authorizing, in certain instances, that no other action shall be had in the probate court than the probating and registration of a will, and the executor, acting under said act, executed a bond conditioned as in ordinary cases, of administration, the bond was without authority law, and was purely voluntary. *Pierce v. Wallace*, 48 Tex. 399.

Where a will provides that no action shall be taken thereon, under the statute, by the probate court, a bond executed by the executor thereunder can not be enforced as a common-law bond; it being purely voluntary. *Pierce v. Wallace*, 48 Tex. 399.

As a common-law bond, suit could not be maintained on it in the name of the distributees. *Pierce v. Wallace*, 48 Tex. 399.

D. OPERATION AND EFFECT.

An administrator and the sureties on his bond are liable to the creditors of the estate for the settlement of his trust in accordance with the directions of the court. *Trammel v. Philleo*, 33 Tex. 395.

Property within Contemplation of Bond.—A vendor in an executory contract of sale rescinded the sale, and brought trespass to try title against the widow of the deceased purchaser, individually and as administratrix, and sequestered the property. The administratrix executed a replevy bond, by means of which she acquired posses-

sion as administratrix and collected the rents for the property. Final judgment was rendered in favor of the vendor. Held, that the surety on her bond as administratrix was liable for the rents so collected; she lawfully receiving them in her representative capacity. *Fidelity & Deposit Co. of Maryland v. Texas Land & Mortgage Co.*, 90 S. W. 197, 40 Tex. Civ. App. 489.

In a suit on an administrator's bond, brought by the administrator *de bonis non* against the original administrator and his sureties, it appeared that the original administrator was the surviving partner of the intestate, and that the assets of the estate consisted of the intestate's interest in the goods of the firm left in the hands of the surviving partner, who was appointed the original administrator, and who, as such, inventoried the assets, but failed to account for them. His sureties, being defendants in this suit, pleaded that the assets did not come to the hands of their principal as administrator, but as surviving partner, and, if converted at all, were converted by him as surviving partner, and not as administrator; and further alleged that the partnership had never been settled up. But it was neither alleged nor proved that the assets had been applied to payment of partnership debts. Held, that on this state of case the defendants were liable to the administrator *de bonis non* for the value of the assets and interest. *Grant v. McKinney*, 36 Tex. 62.

Where Proceeds Paid to Devisees.

—Where an executor, without authority from the court, sells decedent's land to the satisfaction of the devisees, and pays the proceeds to them, and the estate owes no debts, the sureties on his bond are not liable for the value of the land to the devisees. *Homes v. O'Conner*, 9 Tex. Civ. App. 454, 29 S. W. 236.

Acts Covered.—Where the allowance

of a claim by an administrator was improper and in fraud of the heirs of the estate, the heirs had a plain and adequate remedy against the administrator on his bond. *Snow v. Mather*, 52 Tex. 650.

E. BREACH OF BOND.

The condition of an administrator's bond is broken by a misappropriation of assets. *Fort v. Fitts*, 66 Tex. 593, 1 S. W. 563.

Failure of administrator to comply with court's order to pay claim renders him and his sureties primarily liable for damages sustained by creditor. *Gray v. McFarland*, 29 Tex. 163, 169.

Upon conversion by administrator of property of the estate before grant of letters, he must account for it or pay its value, in suit upon bond. *Lockhart v. White*, 18 Tex. 102, 112.

Failure to Recover from Predecessor before Right Barred.—Under the statute making it the duty of a surviving administrator to recover from the estate of the deceased administrator and his sureties any part of the estate which was in the hands of deceased, or for which he was accountable, a failure to do so until limitation has run against the right will constitute a breach of the administration bond. *Keowne v. Love*, 65 Ga. 152.

Failure to Deliver Property to Successor.—The sureties of an administrator are liable for his failure to deliver to his successor, on demand, property shown to be in his hands, and not accounted for, after the date of his bond as administrator. *Baldwin v. Dearborn*, 21 Tex. 446.

Failure to Pay Claim.—Where an administrator is ordered by the county court, under Old & W. Dig. arts. 784-786, to pay a claim against the estate, and fails to make such payment, the sureties upon his bond thereupon become immediately and primarily liable to the creditor for the amount ordered to be paid. *Gray v. McFarland*, 29 Tex. 163.

Not Paying All Creditors of Same Class.—A surviving wife, administering the community estate under the statute, who, after having allowed a claim, exhausts the estate in paying other creditors of the same class, is liable on her bond. *Evans v. Taylor*, 60 Tex. 422.

Delivering Deed without Receiving Security.—Where administrator delivers deed, where sale is made on credit, without first receiving note and mortgage of purchaser, sureties are liable for full amount of sale. *Heath v. Lyne*, 62 Tex. 686, 693.

F. RIGHTS AND LIABILITIES OF SURETIES.

1. In General.

Sureties on an administrator's bond are liable for the correct administration of his estate. *Trammel v. Philleo*, 33 Tex. 395, 411.

Sureties on an administrator's bond are liable for all the assets that come into his hands and not accounted for, except as might be varied by discharge by payment or expenditure. *Batsell v. Richards*, 80 Tex. 505, 16 S. W. 313.

"Whatever an administratrix lawfully receives in her official capacity, her sureties become responsible for. It is immaterial that it may thereafter develop that the property so received did not in law belong to the estate. If the receipt is lawful and in an official capacity, the surety becomes bound and so remains until proper disposition is made of the thing received." *Fidelity, etc., Co. v. Texas Land, etc., Co.*, 40 Tex. Civ. App. 489, 90 S. W. 197, affirmed in 101 Tex. 635, no op.

Conversion by Principal.—Where an administrator was sued in his representative capacity for conversion of a bank deposit given to plaintiff by the intestate, the administrator's sureties on his official bond were liable for the recovery had against him. *Hill v. Es-cort*, 86 S. W. 367, 38 Tex. Civ. App. 487.

Lending Legacies on Personal Security.—Sureties of administrator *de bonis non* with will annexed, who has loaned legacies on personal security, are liable for the fund, even though administrator acted in good faith. *Vardeman v. Ross*, 36 Tex. 111, 113.

Effect of Removal of Principal for Failure to Give New Bond.—After the removal of the survivor in community because of his failure to give a new bond when required, an administrator appointed as his successor may bring an action for the value of wasted assets against the sureties on his old bond. *Brown v. Seaman*, 65 Tex. 628.

Administrator's Turning Over Property to Indemnify Sureties.—Whether property placed by administrator in hands of sureties as indemnity belonged to the administrator or to the estate it can not affect right of heirs to recover from said sureties on administrator's bond. *Keowne v. Love*, 65 Tex. 152, 155.

2. Liability of Different Sets of Sureties.

Two joint administrators gave a joint and several bond and later were required by the county court to give a new bond. One of the sureties on the new bond died, having previously deposited a large amount of property with the sureties on his second bond as security. One of the administrators died, being largely indebted to the estate and the administration was continued by the remaining administrator under the same bond. No steps were taken by the surviving administrator to collect the debt and suit was brought by the heirs against the two sets of sureties, the surviving administrator and the administrator of the deceased surety. Held, that whether the property placed in the hands of the second set of sureties belonged to the estate or to the administrator, could not affect plaintiff's right to recover from the sureties, since their liability depended on their bond and the exist-

ence of facts showing liability on the part of their principals. *Keowne v. Love*, 65 Tex. 152.

Administrators, while their original bond was in force, executed a second bond as required by the statute. The heirs of the intestate sued the administrators and the sureties on both bonds, and alleged that a large sum of money was in the hands of the administrator, when the second bond was executed; that large funds of the estate were invested in railroad stock by one administrator while the first bond was in force in connection with the sureties on the second bond before the same was executed and in their own name which were held as collateral to indemnify the second sureties from loss on their suretyship and prayed that the amount wrongfully converted, for which each set of sureties were liable, should be ascertained. Held, that the sureties on the second bond, having before their liability as such began, wrongfully connected themselves with the subject matter of the suit, were liable in connection with the sureties on the first bond without reference to the bond which they executed, and the sureties on the second bond held the proceeds of funds thus invested in railroad stock on account of which funds, in part, the liability of the sureties on the first bond depended, could not be permitted to appropriate the same on the discharge of their own liability on the first bond. *Love v. Keowne*, 58 Tex. 191.

Under the facts set forth in the preceding paragraph it was further held that the sureties on the second bond were connected with the subject matter of the suit before their liabilities as sureties began on account of their conversion of the assets of the estate, and also afterwards in the wrongful appropriation of a trust fund, which not only the heirs might follow but which the sureties on the first bond might follow for their own protection in adjusting

liabilities between the two sets of sureties. *Love v. Keowne*, 58 Tex. 191.

3. Extent of Indemnity.

Where the sureties of the administrator of an estate, which consisted entirely of partnership assets, settled a claim pending a suit against them in behalf of all the creditors for a sum less than the creditor would have been entitled to if the claim had been submitted to a pro rata adjustment with the other claims, after judgment against the sureties, the court in its decree properly gave them credit only for the amount actually paid by them, and rendered judgment against them for the difference between that sum and the total amount of assets unaccounted for by the administrator. *Batsell v. Richards*, 80 Tex. 505, 16 S. W. 313.

4. Discharge of Sureties.

A release of one surety on an administrator's bond by the succeeding administrator, under an order of the probate court authorizing a compromise upon certain settlement, does not release the other sureties not so settling, even though the receipt to such surety does not reserve a right of action against the others, since the order of the court must be considered in relation thereto. *Ulrich v. Hoefling*, 23 Tex. Civ. App. 289, 292, 56 S. W. 199, affirmed in 94 Tex. 708, no op.

Expiration of Term.—Sureties on administrator's bond are not liable for acts done after expiration of term for which they are bound. *Murphy v. Menard*, 14 Tex. 62, 65.

Since the time for the completion of the administration of a vacant succession is limited to one year, the sureties on the administrator's bond are not responsible for breaches committed after that period has elapsed. *Flores v. Howth*, 5 Tex. 329.

Sureties for the faithful performance of the duties of an administrator of a vacant succession under the laws in force before the introduction of the

common law were not responsible for breaches which were committed after the year allowed for administering the estate had expired. *Jones v. Perkins*, 8 Tex. 337.

Existence of Substitute Note.—Liability of administrator and his bondsmen for conversion of assets by administrator's accepting substitute note in lieu of another could not be discharged by showing new note was in existence and had not been paid. *Chapman v. Brite*, 4 Tex. Civ. App. 506, 512, 23 S. W. 514.

5. Right to Question Distribution of Assets.

The liability of the sureties being for the amount of assets not accounted for, and such liability not being changed in amount by the court including both firm and individual claims in his distribution of the assets, the sureties can not question the legality of such distribution. *Batsell v. Richards*, 80 Tex. 505, 16 S. W. 313.

6. Curator or Administrator of Vacant Succession.

The sureties on the bond of a curator, or administrator, of a vacant succession, were responsible for the failure of their principal, to settle with the court at the end of the year, and to deliver up the property of the succession, or to obtain an extension of the administration, giving new security. *Flores v. Howth*, 5 Tex. 329.

G. REQUIRING NEW OR ADDITIONAL BOND.

1. In General.

Probate court has power to require an independent executor without bond or administrator to file an additional inventory, and to give bond. *White v. White*, 11 Tex. Civ. App. 113, 114, 32 S. W. 48. See the title COURTS, vol. 5, p. 317.

New bond required by administrator may be given through attorney in fact. *Hall v. Monroe*, 27 Tex. 700, 701.

It appearing by the petition in an

action on the first bond given by an administrator that the bond was insufficient in amount, held, that under Rev. Stat., arts. 1949, 2229, making such insufficiency ground for requiring new bond, the order requiring a new bond could not be attacked in such collateral proceeding. *Hines v. Givens*, 29 Tex. Civ. App. 517, 68 S. W. 295, affirmed in 95 Tex. 675, no op.

Under the statutes giving the probate court authority to require a new bond of an administrator under certain conditions, it could not be shown, in a collateral attack on the order approving a new bond, which released the obligors of the old bond sued on, that the conditions did not exist justifying the taking of the new bond. *Hines v. Givens*, 29 Tex. Civ. App. 517, 68 S. W. 295, affirmed in 95 Tex. 679, no op.

New or Additional Bond by Community Survivor.—See the title HUSBAND AND WIFE.

If executrix marry after executing bond, no additional bond is required for the bond given when she was single binds all her property. *Airhart v. Murphy*, 32 Tex. 131, 134.

Administrator May Plead No Funds.—In an action against an administrator by the heirs to compel him to give a new bond, he may plead no funds in his hands belonging to the estate. *Hanlon v. Wheeler* (Civ. App.), 45 S. W. 821.

Notice of Appeal as Suspending Order.—See the title APPEAL AND ERROR, vol. 1, p. 544.

2. Effect of Notice to File New Bond.

Filing of application of administrator's sureties to be released and citation to administrator to give a new bond, suspends administrator's power to act as such beyond mere protection of the estate. *Mott v. Riddell*, 2 Posey 107, 110.

Under Act March 23, 1871, § 6, an administrator against whom a motion has been made to compel a new bond

has, notwithstanding service of that motion, a right to prosecute a suit brought to final judgment, unless he has been finally removed from the administration. *Hitson v. Dillahunty*, 38 Tex. 585.

While under Act May 23, 1871, § 6, an administrator would not have authority to do certain things, after service of notice of motion to compel a new bond, it seems he might have the right to prosecute suit or do any other act having for its direct object the saving of the estate from loss or damage. *Hitson v. Dillahunty*, 38 Tex. 585.

H. ACTION ON BOND.

1. Nature and Form of Action.

A suit against an administrator and his sureties, for an amount ordered to be paid to a creditor by the probate court, is not a proceeding to establish an original debt. *Gray v. McFarland*, 29 Tex. 163.

Where an administrator misappropriates estate property, the proper and only remedy is to hold him and his securities, responsible on his bond for the damage to the estate. *Chifflet v. Willis & Bro.*, 74 Tex. 245, 252, 11 S. W. 1105.

2. Right of Action and Conditions Precedent.

a. Demand.

In an action against an administrator and his sureties for funds of the intestate's donee, alleged to have been converted by the administrator, no demand either on the administrator or his sureties was necessary as a condition precedent to the donee's right to sue. *Hill v. Escort*, 86 S. W. 367, 38 Tex. Civ. App. 487.

b. Fixing Devastavit.

An administrator and his sureties may be sued on his bond without the amount, etc., of his indebtedness being first ascertained and established by proceedings in the county court. *Francis v. Northcote*, 6 Tex. 185.

Under our blended system of equity and common law, it is unnecessary to institute a preliminary action to fix a devastavit, but the bond may be put in suit and the liability and amount of damages ascertained in one action. *White v. Gardner*, 37 Tex. 407.

In ascertaining whether there has been devastavit, such property as would have been set aside as exempt, or as the year's allowance should not be considered assets of the estate. *Nichols v. Oliver*, 64 Tex. 647, 654.

c. Settlement of Account and Discharge.

Only after accounts are settled and administrator discharged can he be sued on his bond. *Buchanan v. Bilger*, 64 Tex. 589, 592.

Heirs can not sue administrator on his bond when there are unsettled claims and administration is pending. *Peveler v. Peveler*, 54 Tex. 53, 58.

Creditor of estate can not sue upon executor's bond until administration has been closed. *Wiren v. Nesbitt*, 85 Tex. 286, 287, 20 S. W. 128; *Buchanan v. Bilger*, 64 Tex. 589.

Suit on administrator's bond can not be brought in county court until administrator has severed his connection with the court and the estate. *Fort v. Fitts*, 66 Tex. 593, 594, 1 S. W. 563.

An original suit on an administrator's bond can not be brought before the discharge of the administrator and the passing on his final account, even though, practically, the administration has been closed. *Buchanan v. Bilger*, 64 Tex. 589.

The administrator of an estate can not be sued on his bond by a creditor for waste unless it appear that the administration is closed, or that there are no assets in his hands, subject to the orders of the probate court, sufficient to pay the debts of the creditor who sues. *Hall v. McGehee*, 34 Tex. 386.

Exceptions to Rule.—It is not necessary to first compel administrator to

make final statement of administration account before suit on bond for accounting. *Love v. Keowne*, 58 Tex. 191, 198.

The final settlement of a decedent's estate in the county court is not prerequisite to the maintenance of a suit in the district court to recover the property, or its value, misappropriated by the administrator. *Chapman v. Brite*, 4 Tex. Civ. App. 506, 23 S. W. 514.

Where an administrator neglects to pay to the distributees the shares decreed to them by the probate court upon approval of his final report, the distributees may sue for such shares the administrator and his bondsmen, though the administrator has not been discharged. *Stewart v. Morrison*, 81 Tex. 396, 17 S. W. 15.

It seems that administrator de bonis non may maintain suit on bond of former administrator for malfeasance or misfeasance of latter, before final settlement. *Farris v. Berry*, 33 Tex. 701, 704. See ante, "Administrator De Bonis Non and with the Will Annexed," XII.

3. Jurisdiction.

See, generally, the titles COURTS, vol. 5, p. 161; JURISDICTION.

The court in which the suit must be brought is the one having jurisdiction of a suit for the amount claimed to be due on the bond, which, in this case, is the district court. *Brown v. Seaman*, 65 Tex. 628, 630; *Frank & Co. v. De Lopez*, 2 Tex. Civ. App. 245, 21 S. W. 279.

To charge administrator with waste or defalcation of estate administered by him in another state, suit should be brought on his bond in proper forum. *Easley v. McClinton*, 33 Tex. 288, 297.

Pending administration, suit can not be brought on administrator's bond in another court, but such right arises after approval of final account. *Stewart v. Morrison*, 81 Tex. 396, 398, 17 S. W. 15.

Jurisdiction of District Court.—See, also, ante, "Fixing Devastavit," III, H, 2, b.

Under constitution 1866, the district court has original jurisdiction in suit against administrator for devastavit. *Sloan v. Sears*, 33 Tex. 392, 394.

Administrator and sureties may be sued in district court without first establishing indebtedness in county court. *Francis v. Northcote*, 6 Tex. 185, 187; *Brown v. Seaman*, 65 Tex. 628, 630.

Suit may be brought against administrator in district court on bond, without establishing breach of trust in probate court. *Martel v. Martel*, 17 Tex. 392, 396; *Francis v. Northcote*, 6 Tex. 185.

The district court having acquired jurisdiction of the cause, its jurisdiction was coextensive with all issues to a proper determination of the subject matter at issue; and it had the power to hear evidence of offsets to the liability of the administrator offered by the sureties without such claims having the approval of the county court. *Chapman v. Brite*, 4 Tex. Civ. App. 506, 23 S. W. 514; *Mitchell v. Rucker*, 22 Tex. 66, 67; *Traders' Nat. Bank v. Cresson*, 75 Tex. 298, 12 S. W. 819.

In an action against an administrator and the sureties on his bond for wasting the assets of the estate, the district court has power to determine whether claims of the administrator against the estate for compensation and expense of administration are just, though they have not been approved by the county court. *Chapman v. Brite*, 4 Tex. Civ. App. 506, 23 S. W. 514.

Under the constitutional provision giving district courts jurisdiction of all suits when the matter in controversy amounts to \$500, exclusive of interest, a suit against sureties on an administration bond for a sum exceeding the amount limited may be brought in the district courts. *Fort v. Fitts*, 66 Tex. 593, 1 S. W. 563.

The district court has jurisdiction of a suit by an administrator, appointed to succeed the survivor in community to the management of the community property, against the survivor and her sureties on a bond given by her to obtain absolute management of the community estate, where the amount claimed is within the jurisdiction of the court, since it is not a condition precedent to a recovery on the bond that the devastavit by the survivor be first established in the county court. *Brown v. Seaman*, 65 Tex. 628. See *Fort v. Fitts*, 66 Tex. 593, 1 S. W. 563.

Where Ample Remedy in Probate Court.—The probate court decreed that the executor should sell a draft on which the petitioner had a lien, and pay him therefrom. The executor collected it and did not pay the petitioner. Held, that he had an ample remedy in the probate court, and therefore could not resort to the district court to recover from the executor and his sureties. *Wheeler v. Goffe*, 24 Tex. 660.

The county court settles the accounts of executors and administrators, and through them transacts all business appertaining to the estates of deceased persons. But a suit upon an administrator's bond can not be brought until he has severed his connection with the court and the estate. The court can not then act through him, and neither he nor his sureties are subject to its orders. Hence, no proceeding will lie against him in that court, nor could it render any judgment upon his bond which could be enforced. *Fort v. Fitts*, 66 Tex. 593, 594, 1 S. W. 563.

4. Venue.

See, generally, the title VENUE.

Suit upon administrator's bond should be brought in county where defendants reside. *Stewart v. Morrison*, 81 Tex. 396, 399, 17 S. W. 15.

Surety on administrator's bond must be sued in county of his residence. *Cohen v. Munson*, 59 Tex. 236, 237.

The fifth exception contained in the statute to its requirement that a defendant must be sued in the county of his residence, does not apply to a surety on an administrator's bond, when the administration is pending in a different county from that of the surety's residence. Such a bond does not require the surety to answer for the defalcation of his principal in any particular county. *Cohen v. Munson*, 59 Tex. 236.

Where Sureties Reside in Different Counties.—Suit was brought by a surety on an administrator's bond, in which by its terms the obligation of the parties was made joint and several, against his cosureties for contribution, alleging the death and insolvency of the administrator and the payment of the bond by plaintiff on judgment rendered. Held, that the suit could be maintained against all the cosureties in any county in which either of them resided. *Rush v. Bishop*, 60 Tex. 177.

5. Accrual of Cause of Action and Limitations.

Articles 2176-2179, Rev. Stat., authorize action against qualified survivor and sureties on approved claim, after twelve months from filing inventory if devastavit be shown or survivor holds assets. *Nichols v. Oliver*, 64 Tex. 647, 651.

Under the Texas statute the relation of executors and administrators to the trust property, except in case of his death, when no further fiduciary relation can exist, is considered such that limitation will not run in his favor, or in favor of the sureties on his bond until, in the decree of a court, evidence that he has resigned, been removed or discharged, is produced. Cases may arise in which suits on the bond of an executor, administrator or guardian may be maintained before they are discharged; but even the right to maintain such an action can not control the statute of limitation. *Marlow v. Lacy*, 68 Tex. 154, 158, 2 S. W. 52.

6. Process.

See the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 6, p. 452.

7. Parties.**a. Parties Who May Sue.****(1) In General.**

Creditors, heirs and devisees can alone complain of and sue for breach of administrator's bond where breach consists in maladministration of estate. *Ward v. Ward*, 1 Posey 123, 125; *Johnson v. Hogan*, 37 Tex. 77.

The sureties of an administrator are primarily liable to creditors of the estate, or to an administrator de bonis non for the benefit of creditors; and, so long as there are creditors of the estate, the sureties are not liable to the heirs or distributees in an action on the bond. *Remick v. Luter*, 32 Tex. 797.

Probate act (acts of fifteenth legislature, ch. 84, §§ 24, 41), authorizing persons injured by breach of administrator's bonds to sue in their own names, merely regulates procedure and creates no new rights of action. *Peveler v. Peveler*, 54 Tex. 53, 58.

(2) Heirs and Distributees.

Where an estate remains vacant after removal of the administrator, and no debts remain unpaid, the title to the property of the estate vests in the heirs, who are entitled to sue such administrator and his sureties for waste and embezzlement of the estate. *Ward's Heirs v. Ward*, 1 Posey Unrep. Cas. 123. See *Fort v. Fitts*, 66 Tex. 593, 594, 1 S. W. 563.

Where the administrator is dead, and no administrator d. b. n. has been appointed, the heirs and other distributees of the estate may bring suit to recover from the sureties on the administrator's bond. So held as to a suit to recover for property of estate converted by administrator. *Fort v. Fitts*, 66 Tex. 593, 1 S. W. 563.

Administration Pending and Claims Unsettled.—Where there is a pending

administration and unsettled claims the heirs of an estate have no right *prima facie* to sue in their own name on the bond of a former administrator. *Peveler v. Peveler*, 54 Tex. 53.

Administrator's appropriation of property of the estate or his failure to settle his accounts and turn over a balance in his hands constitutes a breach of his bond to the injury of the heirs only in case the property or the balance would be in whole or in part coming to them; if there are creditors whose claims might absorb the estate, the injury is to the estate and creditors, not the heirs. *Peveler v. Peveler*, 54 Tex. 53, 57.

Must Show Injury.—*Prima facie*, heirs can not maintain an action on an administrator's bonds. To maintain such action, they must show an injury to themselves as heirs. *Peveler v. Peveler*, 54 Tex. 53.

Heir Should Seek Appointment as Administrator De Bonis Non.—Where an administrator received assets, and left the state without settling his accounts, and there were outstanding debts, an heir, instead of suing the sureties on the administrator's bond, should seek appointment as administrator de bonis non, and in that capacity proceed on the bond of the original administrator. *Remick v. Luter*, 32 Tex. 797. See post, "Administrator De Bonis Non and with the Will Annexed," XII.

(3) Creditors.

A creditor may sue upon the bond, whenever its terms are broken, to recover his claim, in any court having jurisdiction of the amount. *Frank & Co. v. De Lopez*, 2 Tex. Civ. App. 245, 21 S. W. 279; *Huppmann v. Schmidt*, 65 Tex. 583, 585; *Leatherwood v. Arnold*, 66 Tex. 414, 416, 1 S. W. 173.

Suit for Waste.—Creditors of the deceased husband may maintain a suit for conversion or waste of the assets of the estate, on a bond given by the widow as survivor, under art. 5494,

vol. 2, Pasch. Dig. *Green v. Raymond*, 58 Tex. 80.

Act Aug. 1870, repealing a former act in reference to suits by any creditor against an administrator and sureties, but providing that "no remedy to which a creditor is entitled under the provisions of the laws heretofore in force shall be impaired by this act," does not apply to creditors suing on an administrator's bond for devastavit occurring since the act. *Collins v. Warren*, 63 Tex. 311.

(4) Administrator De Bonis Non.

See post, "Suit against Former Administrator for Maladministration," XII, E, 2.

In case an administrator de bonis non has been appointed, he is the proper plaintiff in a suit against the sureties on the bond of an administrator to recover money belonging to the estate alleged to have been received and converted by him. (Rev. St. art. 1960.) *Fort v. Fitts*, 66 Tex. 593, 1 S. W. 563.

An administrator de bonis non may maintain an action against the preceding administrator and his sureties for omission to account for articles of property received. *Martel's Adm'r v. Martel*, 17 Tex. 391.

Under Hart. Dig. art. 1224, declaring that administrators de bonis non shall have power to settle with a former executor or administrator, to receive and receipt for all such portions of the estate as remain in their hands, and shall have power to bring suit on the bond of the former executor or administrator for all the estate not accounted for, an administrator de bonis non is entitled to maintain a suit against the sureties on the bond of the former administrator for the value of assets which came to the hands of such administrator, for which he failed to account. *Martel's Adm'r v. Martel*, 17 Tex. 391.

Suit for Devastavit.—An administrator de bonis non can not maintain a

suit against the former administrator or his sureties for a devastavit. *Johnson v. Hogan*, 37 Tex. 77.

"However, under the act of 1870, the administrator de bonis non not only had the right to maintain the suit, but he was required to do so; and the discharge of that duty was regarded of such importance that he was by express enactment 'entitled to any order or remedy which the court has power to give,' to enforce the liability of the sureties of his predecessor. All damages recovered, or which by reasonable diligence might have been recovered, by the administrator de bonis non, upon the bond of his predecessor, on account of a devastavit, are chargeable to him as unadministered assets, and his sureties are liable therefor." *Collins v. Warren*, 63 Tex. 311, 321. See *Brown v. Seaman*, 65 Tex. 628.

b. Parties Defendant.

Heirs may join the administrator and his sureties in the same proceeding, though he has been discharged. *Fonton v. Bellows*, 22 Tex. 681.

Party obtaining fraudulently from administrator property of estates is a proper party to a suit against administrator, although he is surety upon a second bond. *Love v. Keowne*, 58 Tex. 191, 203.

Joint Administrators.—When there had been joint administrators on an estate, suit could not be maintained against one of them and the sureties on the joint bond, no legal cause being shown for not joining the other administrator. *Farris v. Berry*, 33 Texas 701.

In an action on a bond given by administrators as a joint obligation, where only one of them was made a defendant, and plaintiffs dismissed as to him and took judgment against the sureties on the bond, the error requires the dismissal of the action. *Farris v. Berry*, 33 Tex. 701.

One Principal and One Surety Dead.

—In a suit on an executor's bond, where one of the principals and one

of the sureties are dead, the principal surviving can not object to the nonjoinder of the legal representatives of the deceased executor or of the deceased surety. *Stephenson v. McFaddin*, 42 Tex. 322.

Administratrix of Deceased Administrator.—Under Sayles' Civ. St. art. 1204, authorizing a suit against a surety alone where the principal is dead, the administratrix of a deceased administrator is not a necessary party to a suit against the heirs of the administrator's sureties for funds of the estate misappropriated by the administrator. *Strickland v. Sandmeyer*, 52 S. W. 87, 21 Tex. Civ. App. 351.

Joinder of Different Sets of Sureties.—Administrators, while their original bond was in force, executed a second bond as required by the statute. The heirs of the intestate sued the administrators and the sureties on both bonds, and alleged that a large sum of money was in the hands of the administrator, when the second bond was executed; that large funds of the estate were invested in railroad stock by one administrator while the first bond was in force in connection with the sureties on the second bond before the same was executed and in their own name which were held as collateral to indemnify the second sureties from loss and prayed that the amount wrongfully converted for which each set of sureties were liable, should be ascertained. Held, that a joinder of both sets of sureties as defendants was not only proper for the protection of those interested in the estate, but also for the adjusting of equities among the sureties themselves, and the joinder was proper to avoid a multiplicity of suits. *Love v. Keowne*, 58 Tex. 191.

Where No Privity between Sureties and Copartners.—Where no privity was shown between bondsmen of administrator and his copartners, they are improperly joined as defendants in action for administrator's conversion of

property belonging to estate. *Williams v. Robinson*, 63 Tex. 576, 582.

May Dismiss As to Sureties Where No Bond Required.—Where a will provided that the estate should be kept out of the probate court and the executor acting under the will executed a bond conditioned as in ordinary cases of administration, held a suit could be prosecuted against the principal, dismissing as to the sureties on the bond. *Pierce v. Wallace*, 48 Tex. 399.

Plea in Abatement for Nonjoinder of Administrator.—Where heirs sued an administrator's bond, evidence showing pending administration and unsettled claims showed that heirs had no right to sue, and defendants were not required to plead nonjoinder of administrator in abatement. *Peveler v. Peveler*, 54 Tex. 53, 59.

8. Petition.

See the title PLEADING.

A petition of an heir against the sureties of the administrator alleged as breach of their bond that the administrator had received assets, and had left the state without settling up his accounts as administrator; but it further showed that there were debts still outstanding against the estate. Held, that a general demurrer to the petition was properly sustained. *Remick v. Luter*, 32 Tex. 797.

Allegation as to Condition of Bond.

—Where a petition in an action on an administrator's official bond averred the execution and breach of the bond, it was not necessary for plaintiff to allege the condition thereof. *Hill v. Escort*, 86 S. W. 367, 38 Tex. Civ. App. 487.

Bond Referred to as Exhibit.—Where petition in suit on administrator's bond refers to bond as an exhibit, and by reference makes it a part of the petition, it is sufficient to allow of the admission of said bond in evidence although defective in not setting forth tenor thereof. *Peveler v. Peveler*, 54 Tex. 53, 56.

In suit upon administrator's bond, made by reference a part of the amended petition, which, however, did not set forth its tenor and effect, the bond in the record must be treated as the exhibit referred to in the petition. *Peveler v. Peveler*, 54 Tex. 53, 56.

Allegations as to Execution and Delivery of Note Allowed by Administrator.—Suit was brought against a widow for waste on her bond as administratrix of the community estate. The petition, which was filed by the holders of a note and open account, did not allege the execution and delivery of the note, nor set out the items constituting the account, or a bill of particulars, but referred merely to an account filed by defendants showing the several items. It alleged that the claim had been allowed by defendant, survivor of the estate and been approved by the county judge. Held, that the defects were cured, since such allowance and approval were in effect an admission of liability relieving plaintiffs from necessity of proof, and, not being required by law, did not merge the claim into a judgment, as in case of regular administrations under the statute. *Frank v. De Lopez*, 2 Tex. Civ. App. 245, 21 S. W. 279.

Allegation as to Class of Claims.—The fact that the widow had violated the bond by wasting the estate far in excess of all the debts due by the estate rendered it unnecessary for plaintiffs to state in their petition to what class their claim belonged, although such claim could, under the law, be paid only in its class, as the fact stated showed a liability for plaintiffs' as well as all other claims. *Frank v. De Lopez*, 2 Tex. Civ. App. 245, 21 S. W. 279.

Allegation as to Time of Devastavit.—In an action on an administrator's bond for a devastavit by the administrator, a petition which fails to allege when the devastavit occurred is demurrable, where, under a law, if the devas-

tavit occurred after its passage, the action would not lie. *Collins v. Warren*, 63 Tex. 311.

9. Plea.

Plea in Abatement.—See ante, "Parties Defendant," III, H, 7, b.

10. Set-Off.

Administrator will not be allowed to offset a claim for value of estate property misappropriated by him, expenses incurred in its care and preservation, unless such care has enhanced its value and such enhanced value is made the measure of his liability. *Chapman v. Brite*, 4 Tex. Civ. App. 506, 514, 23 S. W. 514.

Administrator will not be allowed as offset to judgment against him for misappropriation of estate funds, the commissions he would have been entitled to on such funds if they had been properly accounted for. *Chapman v. Brite*, 4 Tex. Civ. App. 506, 513, 23 S. W. 514.

11. Evidence.

a. Presumptions and Burden of Proof.

An action was brought against a surviving widow and the sureties on her bond, given for the management of the community estate, for a breach of such bond, which required her to faithfully administer the estate and pay over one-half the surplus after payment of all the debts with which the estate was charged. The alleged breach was that she had disposed of the property of the estate, so that the judgment sued on could not be satisfied, though she had ample means to satisfy it. Held that, to entitle the complainant to a recovery, it was necessary that he establish the breach of the bond as alleged. *Bergstroem v. State*, 58 Tex. 92.

Alteration of Bond.—Defendants in suit on administrator's bond have the burden of proving that such bond, executed on day of filing inventory and for the amount required by law, has

been altered. *Peveler v. Peveler*, 54 Tex. 53, 57.

Presumptions That Security for Purchase Price Was Taken.—In an action on the bond of an administratrix, she will be presumed to have taken ample security for the unpaid purchase price of property of the estate sold by her, until the contrary is shown. *Lockhart v. White*, 18 Tex. 102.

b. Admissibility.

See the titles **DECLARATIONS AND ADMISSIONS**, vol. 6, p. 1; **EVIDENCE**, vol. 6, p. 1098.

In a suit on an administrator's bond against himself and his sureties, admissions made by the administrator, after the administration was closed, though evidence against him, are not evidence against the sureties and it is competent to prove such admissions as against the administrator himself by his deposition as a witness taken in another suit. *Lacoste v. Bexar County*, 28 Tex. 420.

Declarations of deceased administrator in reference to the estate in his hands after execution of his land, made in litigation affecting the estate and to which as administrator he was a party, are admissible in suit by heirs against surviving administrator and sureties. *Keowne v. Love*, 65 Tex. 152, 158.

Right of Surety to Object.—If evidence is admissible against the representatives of a deceased administrator, the sureties can not object to its introduction. *Keowne v. Love*, 65 Tex. 152.

12. Instructions.

An action was brought against a surviving widow and the sureties on her bond given for the management of the community estate for a breach of such bond, which required her to faithfully pay over one-half the surplus after payment of all the debts with which the estate was charged. The alleged breach was that she had disposed of the property of the estate,

so that the judgment sued on could not be satisfied, though she had ample means to satisfy it. Held, that an instruction directing a verdict for plaintiff if defendant had received of the property belonging to the community, above that which was exempt from sale, enough to equal the plaintiff's demand, was erroneous, as it submitted an erroneous test of the defendant's liability. *Bergstroem v. State*, 58 Tex. 92.

Charge Not to Consider Evidence against Sureties.—If evidence was produced admissible against the representatives of the deceased administrator, but not against the sureties, the sureties should have protected themselves by asking a charge to the effect that such evidence could not be considered against them, and not by objecting to the introduction of the evidence. *Keowne v. Love*, 65 Tex. 152.

13. Judgment.

See the title **JUDGMENTS AND DECREES**.

A default judgment in an action by an administrator de bonis non against only one of two administrators on their joint bond, for failure to perform their duties, and against the sureties on such bond is error prejudicial to the sureties. *Farris v. Berry*, 33 Tex. 701.

A money judgment was rendered in favor of minors, against an administrator, and his securities, in which, after entry of judgment the following was inserted by the court: "The said A. have during this term to make an additional showing, if he can, whether he has paid said minors said amount here adjudger to be due them, or any part thereof." Held, that the judgment rendered was final, and its validity not affected by the language inserted by order of the court after its entry. *Harmon v. Bynum*, 40 Tex. 324. See the title **FINAL JUDGMENTS AND DECREES**.

De Bonis Propriis.—That an administrator died testate, and that his executrix took possession of the estate in process of administration, does not authorize a judgment *de bonis propriis* against the executrix. *Keowne v. Love*, 65 Tex. 152.

Conclusiveness of Allowance of Account—Res Adjudicata.—In a suit on an administrator's bond to recover the value of property alleged to have been wrongfully appropriated, it appeared that the county court had allowed an account presented by the administrator, in which the estate was credited with the value of the property. Held, that this constituted a *res adjudicata*, though the account was allowed after the suit was commenced. *Williams v. Robinson*, 63 Tex. 576.

Recovery of Interest on Value of Property Misapplied.—See post, "Interest," V, M, 9.

Judgment against Sureties Where Discontinuance Entered as to Administrator.—See the title DISMISSAL, DISCONTINUANCE AND NON-SUIT, vol. 6, p. 433.

14. Amount of Recovery.

In a suit upon the bond of a removed administrator for the misappropriation of property, recovery may be had for the value of the property with interest from the date of the misappropriation, if the property was unprofitably employed, or of any profit made as well as for the value of the property when misapplied. *Chifflet v. P. J. Willis & Bro.*, 74 Tex. 245, 11 S. W. 1105.

In such case the administrator's accountability is secured by his bond; his death can not relieve his estate and his security for the faithful administration from liability. *Evans v. Oakley*, 2 Tex. 182, 183.

15. Appeal.

The probate court is to decide in the first instance whether facts exist which authorize an action, and its de-

cision may be reviewed by the district court without regard to the amount in controversy. *Nichols v. Oliver*, 64 Tex. 647.

The fact that the survivor married after the institution of the proceeding in the probate court was no reason why the proceeding there commenced should not be reviewed in the district court; and if the right to sue was established by the district court, the marriage did not interfere with the right of the creditor to pursue his remedy in the county court as provided by statute, but the husband should be made a party. *Nichols v. Oliver*, 64 Tex. 647.

Necessity for Appeal Bond.—Order requiring administrator to give new bond affects "his right to administer," and he can not perfect appeal therefrom without appeal bond. *Bills v. Scott*, 49 Tex. 430, 432. See the title APPEAL AND ERROR, vol. 1, p. 542.

IV. Inventory and Appraisal. A. NECESSITY.

It seems that no property is subject to the jurisdiction of the probate court for decretal orders until inventoried. *Schmeltz v. Garey*, 49 Tex. 49.

It is necessary for an independent executor to return an inventory and appraisal of the assets of the estate. *Langley v. Harris*, 23 Tex. 565; *Tippett v. Mize*, 30 Tex. 362; *Willis & Bro. v. Ferguson*, 46 Tex. 496; *Willis & Bro. v. Ferguson*, 59 Tex. 172; *Roy v. Whitaker* (Civ. App.), 50 S. W. 491, 496, affirmed in 93 Tex. 649, no op.

Not Essential to Validity of Independent Executor's Sale.—See the title EXECUTORS' AND ADMINISTRATORS' SALES.

B. REQUISITES AND VALIDITY.

An executor is required to return under oath a full and complete inventory of the estate. *White v. Sheperd*, 16 Tex. 163, 166.

C. PROPERTY TO BE INVENTORIED.

See post, "Assets or Property Subject to Payment of Debts," VII, C.

By the act of February 5th, 1840, the administrator was required to inventory and cause to be appraised not only the goods and chattels but also the lands of the deceased. *Howard v. Republic*, 2 Tex. 311, 312.

Insurance Policy.—Where a life insurance policy or benefit certificate names a beneficiary who survives the insured, and has an insurable interest, the proceeds of the policy or certificate form no part of his estate, and the probate court has no power to require an executrix to file an inventory thereof. *White v. White*, 11 Tex. Civ. App. 113, 32 S. W. 48. See the title INSURANCE.

Under Rev. St. art. 1912, providing that the executors shall return an inventory, which shall embrace all the property belonging to the estate, a certificate of insurance on the life of deceased should be inventoried, when it belongs to the estate. *White v. Smith*, 2 Willson, Civ. Cas. Ct. App. § 399.

Interest in Partnership.—See post, "Partnership Assets," VII, C, 20.

D. OPERATION AND EFFECT.**1. As Evidence.****a. As Evidence of Title.****(1) Admissibility.**

Inventories are admissible in evidence in suits in which administrator is interested. *White v. Shepperd*, 16 Tex. 163, 167.

Where deed of partition allotted "two leagues of land situated on Altacoosa creek, in Live Oak county, 4603," inventory of estate containing like description, is admissible to support title to one league belonging to estate in such county. *Ammons v. Dwyer*, 78 Tex. 639, 647, 15 S. W. 1049.

(2) Weight and Sufficiency.

An inventory is only prima facie evidence of the title in the estate, which may be rebutted by evidence that title was in another. *Little v. Birdwell*, 21 Tex. 597; *Carroll v. Carroll*, 20 Tex. 731, 745; *Ross v. Harbert, etc., Co.*, 1 App. Civ. Cases, § 1019; *White v. Shepperd*, 16 Tex. 163; *Bradshaw v. Mayfield*, 18 Tex. 21, 27.

An inventory of a decedent's estate is admissible as prima facie evidence of the assets of the estate. *Devine v. United States Mortg. Co.* (Civ. App.), 48 S. W. 585.

An inventory is not conclusive as to title either for or against an executor or administrator. *Campbell v. Cox*, 1 App. Civ. Cases, § 526; *White v. Shepperd*, 16 Tex. 163, 167; *Calhoun v. Burton*, 64 Tex. 510, 516; *Little v. Birdwell*, 21 Tex. 597; *Carroll v. Carroll*, 20 Tex. 731; *Ross v. Harbert, etc., Co.*, 1 App. Civ. Cases, § 1019.

"The inventory is not intended to be conclusive, and no distinction is made between an inventory voluntarily made, and one returned under the judgment of the court, as to its effect in evidence. Neither the one nor the other is conclusive." (*White v. Shepperd*, 16 Tex. 163, 168.) *Davis v. Harwood*, 70 Tex. 71, 73, 8 S. W. 58.

"The statute (Hart. Dig., art. 1151) * * * does not make the right to show by proof the true state of the title, depend upon the knowledge or ignorance of the state of the title, by the party, at the time of returning the inventory. Its effect is to make the inventory, but prima facie evidence as against the party, that the title is as represented in the inventory. And so it would be, it is believed, on general principles. It is not an estoppel in deed; and to constitute it an estoppel in pais, the admission it contains must have been acted on by others, who would be prejudiced in consequence, were the party who made the admis-

sion permitted to retract it. It must be such as that good faith and fair dealing towards others, who have received it as true, and acted upon it, forbid that it be retracted." *Little v. Birdwell*, 21 Tex. 597, 607.

An administrator returned an inventory of the estate in which certain land was included as property of the estate, but a note was not so included. Held presumptive evidence that the administrator claimed the land, and not the note, as the property of the estate. *Ross v. Harbert*, 1 White & W. Civ. Cas. Ct. App. § 1019.

The widow procured an administration upon her husband's estate. The administrator having inventoried the property standing in name of the husband, the court properly held that such facts did not prevent her recovering property so inventoried if her separate property. *Mitchell v. Mitchell*, 80 Tex. 101, 15 S. W. 705.

Against Strangers.—Inventories are not evidence of title against strangers. *Calhoun v. Burton*, 64 Tex. 510, 516.

Character of Land as Homestead.—The inventory and appraisalment of certain land as part of the estate of testator is prima facie evidence that the land was not his homestead. *Hamm v. Hutchins*, 46 S. W. 873, 19 Tex. Civ. App. 209.

The recitals in an inventory made by an administrator are not evidence, in a subsequent controversy, to show the homestead character of the property. *Blessing v. Edmonson*, 49 Tex. 333.

Whether Property Community or Separate.—An inventory by an executor is merely prima facie evidence and is not conclusive either for or against him as to whether the property is separate or community. *Campbell v. Cox*, 1 White & W. Civ. Cas. Ct. App. § 526; *Little v. Birdwell*, 21 Tex. 597, 607; *Carroll v. Carroll*, 20 Tex. 731, 745; *Bradshaw v. Mayfield*, 18 Tex. 21, 27; *Haley v. Gatewood*, 74 Tex. 281, 286, 12 S. W. 25.

A purchaser of land from the husband, as administrator of his deceased wife's estate, sold by him under proceedings in the probate court, insisted on as insufficient to bind the estate, is not estopped from denying that the property was community property by the inventory of the husband as administrator. *Watson v. Hewitt*, 45 Tex. 472. See, also, *Page v. Arnim*, 29 Tex. 53. See the title **ESTOPPEL**, vol. 6, p. 992.

Estoppel of Executor or Administrator to Claim Property Inventoried.

—The fact that a personal representative inventoried certain property as part of the estate does not estop him from subsequently claiming title to the same. *Little v. Birdwell*, 21 Tex. 597; *Ross v. Harbert*, 1 White & W. Civ. Cas. Ct. App. § 1019; *Haley v. Gatewood*, 74 Tex. 281, 12 S. W. 25; *Clapp v. Engledow*, 72 Tex. 252, 10 S. W. 462; *Mitchell v. Mitchell*, 80 Tex. 101, 15 S. W. 705; *Carroll v. Carroll*, 20 Tex. 731; *White v. Shepherd*, 16 Tex. 163; *Bradshaw v. Mayfield*, 18 Tex. 21; *Gray v. Cockrell*, 20 Tex. Civ. App. 324, 329, 49 S. W. 247. See post, "Power to Claim and Hold Adversely to Estate," V, K, 4.

While the executor and administrator in his individual capacity is a stranger to the estate (*White v. Shepherd*, 16 Tex. 163, 168), still the inventory is evidence against a claim subsequently asserted by such administrator adverse to the estate, and imposes the burden of producing a greater amount of testimony to establish such adverse right. *Clapp v. Engledow*, 72 Tex. 252, 10 S. W. 462.

Where administrator owning part of estate in common with heirs permitted entire estate to be portioned among heirs at their request without prejudice to his rights, he was not estopped to assert his claim and his lien was prior to mortgage given by one of heirs for pre-existing debt. *Gray v. Cockrell*, 20 Tex. Civ. App. 324, 329, 49 S. W. 247.

Rights of Widow or Husband Including Own Property in Inventory.

—Wife as executrix, who inventories all property as belonging to estate, is not precluded from claiming her share of community property. Proof of its status may be made aliunde. *Carroll v. Carroll*, 20 Tex. 731, 745; *Campbell v. Cox*, 1 App. Civ. Cases, § 526; *Bradshaw v. Mayfield*, 18 Tex. 21, 27.

That a widow acting as executor placed lands upon the inventory of property of the husband's estate does not estop her from showing that the lands were bought with her separate funds and claiming them as her separate property. *Haley v. Gatewood*, 74 Tex. 281, 12 S. W. 25.

A widow is not deemed to have made an election, and thereby modified her right to community property, by returning, as executrix, an inventory of the whole property as the estate of the deceased. *Carroll v. Carroll*, 20 Tex. 731.

Inventory returned by widow, as administratrix of husband's estate, is not conclusive against her upon question of title to property placed therein. *Little v. Birdwell*, 21 Tex. 597, 607; *White v. Shepherd*, 16 Tex. 163, 167.

Where a person devised to his wife a life estate in separate property constituting his homestead, she is not estopped from claiming it in fee, if she was entitled thereto in the absence of a will, by the fact that she qualified as independent executrix under the will, and probated it, and had the property inventoried and set aside as her homestead. *Haby v. Fuos* (Civ. App.), 25 S. W. 1121.

"The will undertook to dispose only of the testator's property, and made no attempt to dispose of anything belonging to the wife; and therefore she was not put upon election to take, or not, under the will. *Rogers v. Treva-*

than, 67 Tex. 406, 409, 3 S. W. 569." *Haby v. Fuos* (Civ. App.), 25 S. W. 1121.

Fact that executrix inventoried one-half of lot as estate of her deceased husband does not estop her from claiming title to the whole lot through deed from her husband as against claimants under tax sale against the husband. *Huff v. Maroney*, 23 Tex. Civ. App. 465, 468, 56 S. W. 754, affirmed in 93 Tex. 687, no op.; *White v. Shepherd*, 16 Tex. 163, 168.

Where a husband, as administrator of his deceased wife's estate, included in the inventory his own real estate, he was not thereby divested of title or estopped to deny the correction of the inventory. *Koppelman v. Koppelman*, 94 Tex. 40, 57 S. W. 570; *Dunham v. Chatham*, 21 Tex. 231; *White v. Shepherd*, 16 Tex. 163, 166; *Little v. Birdwell*, 21 Tex. 597, 613; *Carroll v. Carroll*, 20 Tex. 731, 732.

When a Married Woman an Administratrix.—The wife's interest in her separate property would not be destroyed or lost by her and her husband's placing it upon an inventory of an estate of which she was administratrix. *Clapp v. Engledow*, 72 Tex. 252, 10 S. W. 462.

"The inventory would be testimony. But as an admission of the husband, either by words or conduct, it could have no effect against the wife's separate estate if she had any. Whether she had any depended upon the existence of the deed." *Clapp v. Engledow*, 72 Tex. 252, 255, 10 S. W. 462.

Knowledge of Right.—It is not necessary, in order to admit proof of title in an administratrix of property inventoried by her as belonging to the estate, that the administratrix in returning the inventory, acted in ignorance of her rights. *Little v. Birdwell*, 21 Tex. 597.

Estoppel to Claim Interest by Donation to Intestate.—Where one sued as heir for land granted to her ancestor, and it appeared that the intestate of defendant, an administratrix,

had, as administrator of the grantee of the land in controversy, returned the land in his inventory of the property of the grantee's estate, defendant was not thereby estopped to claim an interest in the land by donation to her intestate from the grantee in his lifetime, where the defendant's intestate did nothing as administrator on which parties acted, so that they would be injured if he was permitted to claim against his acts, and his acts as administrator were open to explanation, in that he might have thought himself entitled to the land, as heir, by virtue of an adoption. *Teal v. Sevier*, 26 Tex. 516.

Impeachment by Loose, Uncontradicted Opinion.—The inventory returned by the administrator being, by statute, prima facie evidence of the property of the estate in his hands, can not be impeached or contradicted by mere loose and uncontradicted opinions of witnesses as to its correctness. *Johnson v. Morris*, 45 Tex. 463.

b. As Evidence of Solvency.

Creditors put on inquiry as to sufficiency of estate to satisfy claim may not rely on statements of inventory. *Calhoun v. Burton*, 64 Tex. 510, 516.

As to whether the personal property of an estate is ample to pay the debts, the inventory is the best evidence. *McCown v. Terrell* (Civ. App.), 40 S. W. 54.

c. Evidence That Land Not Included in Partition.

Where the object is to establish a partition and allotment of land by circumstances, and that it was not the property of a decedent, the inventory filed by the latter's administrator is admissible to show that the land was not included therein. *Hendricks v. Huffmeyer* (Civ. App.), 27 S. W. 777.

2. Operation as Notice.

An instrument purporting to be an appraisalment of decedent's property

imparted no notice that his widow sought to qualify under the statute as survivor of the community. *Busby v. Davis*, 57 Tex. 323.

E. FAILURE TO FILE.

Estate is bound by acts of executrix continuing to act as such after failure to file inventory required by statute where neither court nor creditors have objected to her so acting. *Willis & Bro. v. Ferguson*, 46 Tex. 496, 502; *Cooper v. Horner*, 62 Tex. 356, 364.

Effect on Capacity to Sue.—The failure of an executor, under a will exempting him from filing a bond, to file an inventory, appraisement, and list of claims as required by Sayles' Civ. St. art. 1942, does not affect his legal capacity as independent executor to sue in behalf of the estate. *Patten v. Cox*, 9 Tex. Civ. App. 299, 29 S. W. 182.

An executor who held property in trust for a legatee, and who was required by the will to file an inventory, may maintain an action for the recovery of such property, which had been levied upon and sold as the property of the executor, although he had failed to file the inventory as required by the will. *Campbell v. Cox*, 1 White & W. Civ. Cas. Ct. App. § 526.

Effect on Bona Fide Purchaser.—Where an independent executor has not filed an inventory as required and neither the court nor creditors have required a compliance with the statute, persons in good faith acquiring property of the estate will not be allowed to suffer it on account of the failure to file the inventory. *Campbell v. Cox*, 1 White & W. Civ. Cas. Ct. App. § 526; *Willis & Bro. v. Ferguson*, 46 Tex. 496; *Cooper v. Horner*, 62 Tex. 356, 364.

That no inventory was filed for more than seven years after administrator qualified, where court afterward exercised jurisdiction over estate by approving inventory, making

order of sale and confirming it, is not sufficient to sustain finding that administration had lapsed, and administrator's sale was therefore invalid. *Harris v. Shafer* (Civ. App.), 21 S. W. 110, reversed, on another point in 86 Tex. 314.

If any presumption should be indulged, it should be in favor of the court's power to act as it did. *Shannon v. Taylor*, 16 Tex. 413; *Giddings v. Steele*, 28 Tex. 732, 733; *Soye v. McCallister*, 18 Tex. 80, 81; *Dancy v. Strickling*, 15 Tex. 557; *Poor v. Boyce*, 12 Tex. 440; *Harris v. Shafer* (Civ. App.), 21 S. W. 110, 112, reversed in 86 Tex. 314. See, also, *Murphy v. Mennard*, 14 Tex. 62, 63; *Paul v. Willis*, 69 Tex. 261, 265, 7 S. W. 357; *Rose v. Newman*, 26 Tex. 131.

Grounds for Removal.—See ante, "Grounds," II, F, 3, a.

F. PROOF OF EXISTENCE AND RETURN.

Under Act Aug. 1870, requiring that official oaths of executors and administrators and all inventors of estates be copied at length in the court records, and giving the same effect to certified copies of such record entries as to original copies, the loss of the original inventory will not authorize parol evidence of its former existence and return, nor can the custodian of the records testify that a will has been duly recorded, and that the executor returned an inventory of all property belonging to the estate. *Roberts v. Connellee*, 71 Tex. 11, 8 S. W. 626.

G. COMPELLING RETURN.

"If the independent executor fails to file an inventory, appraisal, and list of claims of the estate, he may be compelled by the county court to perform such statutory duty." *Patten v. Cox*, 9 Tex. Civ. App. 299, 304, 29 S. W. 182; *White v. White*, 111 Tex. Civ. App. 113, 114, 32 S. W. 48.

H. CORRECTED ADDITIONAL AND SUPPLEMENTARY INVENTORIES.

1. Right of Administrator to Make.

Sayles' Ann. Civ. St. 1897, art. 1973, expressly authorizes an administrator to make and return an additional inventory of newly discovered property not included in the original inventory. *Texas Loan Agency v. Dingee*, 75 S. W. 866, 33 Tex. Civ. App. 118.

2. Proceedings to Compel Making.

On complaint of any person interested in estate and a proof of omission of property, executor may be compelled to make and return additional inventory in like manner as original. *White v. Shepperd*, 16 Tex. 163, 167.

New or additional property of an estate should be brought into administration through an additional inventory and list of claims and not through exhibits filed by the administrator. *Chifflet v. P. J. Willis & Bro.*, 74 Tex. 245, 11 S. W. 1105.

Mode.—If creditors of an estate believe that property not inventoried belongs to the estate, their proper course is to petition the court to require the administrator to show cause why such property should not be included in an additional inventory. *Chifflet v. P. J. Willis & Bro.*, 74 Tex. 245, 11 S. W. 1105.

Rev. St. arts. 1921, 1922, provide that any administrator shall, on complaint of any person interested in the estate, be cited to show cause why he shall not be required to return an additional inventory of the estate, and if, on the hearing, there appears to be property of the estate not included in the inventory, the court shall require the additional inventory to be filed, and the property appraised. Held, that it is not proper to include the proceeding to have the additional property inventoried in a proceeding to require the administrator to make an exhibit of the condition of the es-

tate. *Chifflet v. Willis*, 74 Tex. 245, 11 S. W. 1105.

Const., art. 5, § 16, and Rev. St. 1895, art. 1840, give general probate powers to the county court, and Batts' Ann. Civ. St. arts. 1973, 1974, 1975, require executors and administrators to file additional inventories in case additional property comes to their knowledge, and also give any person interested in the estate the right to file a complaint to compel an executor or administrator to make an additional inventory. Legatees and devisees filed a complaint to compel the executor to make an additional inventory, alleging that before the death of administratrix the executor had acted as her agent in loaning the money, and that he had failed to inventory notes and credits in his hands at the time of her death to an amount exceeding the jurisdiction of the county court in actions of debt. Held, that the proceeding to compel the filing of an additional inventory did not amount to an action for debt against the executor, so as to be beyond the jurisdiction of the county court, but, on the contrary, was within its probate jurisdiction, under the constitution and statutes. *Moore v. Mertz*, 85 S. W. 312, 38 Tex. Civ. App. 283.

Jurisdiction.—Where it is sought to have the inventory as returned by the executor or administrator corrected so as to include property belonging to the estate alleged to be in his possession, which he had failed to embrace therein; the county court has jurisdiction to determine the matter. If the allegation were sustained by proof, then, under the statute, the protestants were entitled to the relief they asked. *Moore v. Mertz*, 38 Tex. Civ. App. 283, 85 S. W. 312, citing *Chifflet v. Willis & Bro.*, 74 Tex. 245, 11 S. W. 1105; *White v. Shepperd*, 16 Tex. 163; *White v. White*, 11 Tex. Civ. App. 113, 32 S. W. 48, and *Dulany v. Walsh* (Civ. App.), 37 S. W. 615, affirmed in 90 Tex. 329.

The county court has not jurisdiction of the issue of title raised by the defense to motion to compel administratrix to place land on the inventory of the estate, that the land, though conveyed to deceased, her husband, was paid for out of her separate means, and was her separate estate. *Miers v. Betterton*, 45 S. W. 430, 18 Tex. Civ. App. 430, citing *White v. Shepperd*, 16 Tex. 163; *Bradley v. Love*, 60 Tex. 472; *Mayo v. Tudor*, 74 Tex. 471, 12 S. W. 117; *Groesbeck v. Groesbeck*, 78 Tex. 664, 14 S. W. 792; *Hamm v. Hutchins*, 19 Tex. Civ. App. 209, 46 S. W. 873. See, also, *Wadsworth v. Chick*, 55 Tex. 241.

"If it belonged to the estate, or the estate owned any interest therein, the creditor might have the question of this right and title determined in the district court, and upon such determination of the title in his favor there, the county court could then compel her to place it upon the inventory, or such interest therein belonging to the estate as was determined by the judgment of the district court." *Miers v. Betterton*, 18 Tex. Civ. App. 430, 432, 45 S. W. 430.

The probate court has no authority to order an inventory after the estate has been withdrawn from administration, though no formal discharge has been entered. *Davis v. Harwood*, 70 Tex. 71, 8 S. W. 58.

Complaint of Petition.—Batts' Ann. Civ. St. art. 1973, provides that, if property not inventoried by an executor shall come to his knowledge, he shall return an additional inventory. Article 1974 declares that any executor, on the complaint in writing of any person interested in the estate, shall be cited to show cause why he should not make an additional inventory; and article 1975 declares that upon the hearing of such complaint the court shall, on proof that any property has not been included in the inventory, require an additional inventory, etc. Held, that a complaint

under these sections for an additional inventory, which alleged that a particular description of the notes and credits which it was sought to have included in the additional inventory could not be obtained because the executor had suppressed and destroyed all evidence concerning them, stated a sufficient excuse for not specifically describing the property. *Moore v. Mertz*, 85 S. W. 312, 38 Tex. Civ. App. 283.

Order.—A decree against an executor in a suit by heirs to compel him to inventory land to which he claimed title is not a conclusive adjudication of the title thereto in a subsequent suit by the heirs of the testator against the executor's heirs, after his death, to recover the property. *White v. Shepperd*, 16 Tex. 163.

1. Presumption as to Filing.

The statute authorizes a supplementary inventory, and in case land of the decedent is omitted from the original inventory, the presumption that such an inventory was filed would prevail. *Jamison v. Dooley*, 34 Tex. Civ. App. 428, 430, 79 S. W. 91, affirmed in 48 Tex. 206.

It is not a valid objection to the admission in evidence of an administrator's deed that the original inventory of his decedent's estate did not contain the land, since the statute authorizes a supplementary inventory, and the presumption will be indulged that the land appeared therein. *Jamison v. Dooley*, 34 Tex. Civ. App. 428, 79 S. W. 91, affirmed in 48 Tex. 206.

V. Collection, Custody, Control and Preservation of Estate.

A. LAWS GOVERNING.

A statute declares that the rights, duties, and powers of executors and administrators shall be governed by the common law when it is not in conflict with any of the provisions of the statutes of the state. (Rev. Stat.,

art. 1815.) *Roberts v. Stuart*, 80 Tex. 379, 386, 15 S. W. 1108.

B. CONTROL AND INSTRUCTION OF COURT.

1. In General.

An administrator will not be allowed to pursue such a course in the management of the trust in his hands as will result in gross injustice to other parties. *Cock v. Carson*, 38 Tex. 284.

2. Jurisdiction of Court.

a. District Court.

The district court may, in a case requiring orders to be made in relation to particular property of a decedent in which the chief justice of the county court administering the estate has an interest, not embraced in the statutory provision directing any two of the county commissioners to act in his place when he is disqualified, take jurisdiction and make the necessary orders. *Glavecke v. Tijirina*, 24 Tex. 663. See, also, *Burks v. Bennett*, 55 Tex. 237, 240.

b. County or Probate Court.

During the pendency of an administration in a county court, that court has entire supervision of the estate and has full power to protect all parties concerned; this is so even when the estate has been practically closed if the final account of the administrator has not been passed on. *Buchanan v. Bilger*, 64 Tex. 589.

Place of Death or Situs of Property.—Jurisdiction of chief justice in probate extends to property of estate wherever situate. *Pierpont v. Threlkeld*, 13 Tex. 244, 246.

Nonresident Decedent.—See the title COURTS, vol. 5, p. 317. And see ante, "Domicile of Decedent and Situs of Estate," II, B, 2, a, (5).

Where a nonresident decedent dies intestate in another state, leaving assets in Texas, and the Texas probate court grants administration on his estate, such administration is governed by

the law as it is administered by the probate court of the county granting such letters; and hence the collection of such assets can not be controlled by the courts of the domicile of the decedent. *Simpson v. Knox*, 1 Posey Unrep. Cas. 569.

Power Extends to Entire Estate.—

Under const. 1870, conferring on the district court jurisdiction for the probate of wills, granting of letters testamentary, the settling of accounts of administrators, and authority to partition and distribute estates, such court may adjust the rights of persons claiming as creditors or heirs of an estate, and enforce its decree; and such power extends to the entire estate, whether exempt from forced sale or not. *Pelham v. Murray*, 64 Tex. 477.

Power to Make Order for Preservation of Estate.—See the title COURTS, vol. 5, p. 319.

Decree Based on Judgment in District Court.—A probate court in rendering a decree based upon a judgment in a district court can not examine into alleged errors of law in such judgment, nor can the judgment be revised in the district court by certiorari to the decree of the probate court. *Yturri v. McLeod*, 26 Tex. 84.

A judgment of the district court which was void for want of service upon the defendant can not constitute the basis of a decree in the probate court. *Heirs of Yturri v. McLeod*, 26 Tex. 84.

Exclusive, Concurrent and Conflicting Jurisdiction.—See the title COURTS, vol. 5, p. 323.

The jurisdiction of the county court over the estates of deceased persons, when it has once attached to a particular estate, becomes exclusive, and the orders and judgments of that court disposing of the property of the estate are final and conclusive as between the heirs and creditors of said estate, unless appealed from or set aside by a direct proceeding instituted

at the proper time. It is too late, after administration has been had and closed, to assert lien rights against property set aside by the county court to minor children, as a homestead. Such a lien could have been asserted in the course of administration. *Tiboldi v. Palms*, 34 Tex. Civ. App. 318, 78 S. W. 726, affirmed in 97 Tex. 414.

3. Control of Independent Executor.

See ante, "Executorship Free from Control of Court," I, F.

Estate under control of independent executor is within jurisdiction of court from beginning of his control, and although he has exclusive control of settlement of estate, court may exercise its jurisdiction as to other matters. *Roy v. Whitaker*, 92 Tex. 346, 355, 48 S. W. 892, 49 S. W. 367.

The prohibition upon the power of the court arises out of the existence of a trustee to whom the testator has chosen to control the settlement of his estate, and when the trust lapses the limitation upon the exercise of judicial control ceases likewise. *Roy v. Whitaker*, 92 Tex. 346, 355, 48 S. W. 892, 49 S. W. 367.

A will conveyed the property of decedent to three trustees who were also named as executors in trust to pay out of the whole estate all the debts of the decedent. Held, that the executors had the apparent if not the real power to do every act which an executor administering an estate under will free from the control of the probate court may ordinarily do. *Mayes v. Blanton*, 67 Tex. 245, 3 S. W. 40.

As to When Jurisdiction Attaches.—See the title COURTS, vol. 5, p. 316.

4. Prevention of Fraud and Fraudulent Combinations.

See the title COURTS, vol. 5, pp. 271, 273.

Courts of equity are peculiarly bound to protect estates in course of administration from mistakes and

frauds. *Ladd v. Pleasants*, 39 Tex. 413, 417.

Administrator betraying his trust may be restrained either in probate or district court. *Sevenson v. Walker*, 3 Tex. 96.

5. Instruction and Guidance of Court.

A due regard for the rights of such persons as may deal with executors or administrators, would seem to require that those interested in estates represented by such trustees, if they be of the opinion that the management is not prudent or judicious, should invoke the control of the court having jurisdiction over the estate, which they have the right to do under the law. *Reinstein v. Smith*, 65 Tex. 247, distinguishing *McMahan & Co. v. Harbert*, 35 Tex. 452. See, also, *Adriance v. Crews*, 45 Tex. 181; *Price v. McIver*, 25 Tex. 769, 771; *Caldwell v. Young*, 21 Tex. 800, 801; *Jones v. Lewis*, 11 Tex. 359, 360; *Portis v. Cole*, 11 Tex. 157, which sustains the above proportion.

Suits by Executor for Construction of Will and Instruction as to Execution Thereof.—See the title **WILLS**.

C. POWERS, DUTIES, LIABILITIES AND VALIDITY OF ACTS GENERALLY.

The administrator of the estate of an intestate is an agent appointed by the court of the country, and his authority to act emanates from the statutes and the orders of a judicial tribunal, and these laws and orders are public, and he has no authority to make any other contract, or do any other act, than as an agent of the law. *Casey v. Turner*, 32 Tex. 64.

An administrator's duties, obligations and powers were enlarged by the act of February 5, 1840, and the principles and rules applicable to his authority when restricted to the personality must be modified to correspond with a trust embracing real as well as personal property. *Howard v. Republic*, 2 Tex. 311, 312.

The administrator becomes liable for the approved or real value of the whole estate. *Howard v. Republic*, 2 Tex. 311, 312.

Duty to Prosecute and Defend Suits in Which Succession Interested.

—It is the peculiar duty of an executor or administrator to prosecute and defend suits in which the succession is interested, during the continuance of the trust which he has assumed. *Howard v. Republic*, 2 Tex. 311, 313.

Under art. 2037, Rev. Stat., defense of suit for recovery of land belonging to estate is a duty devolving upon the administrator. *Manning v. Mayes*, 79 Tex. 653, 655, 15 S. W. 638; *Williams v. Robinson*, 56 Tex. 347; *Callaghan v. Grenet*, 66 Tex. 236, 18 S. W. 507.

Validity of Acts in General.—Acts of administrator done in the due course of administration, though under void grant, are not void. *Hurt v. Horton*, 12 Tex. 285, 289.

D. POWERS CONFERRED BY WILL.

A testator must be presumed to have intended to confer on the wife and the executors respectively the power which he expressly gave, and none other, and the death of the executors before the will is fully executed can not confer on the wife a power which the will did not give her. *Box v. Word*, 65 Tex. 159.

Full power given by will or otherwise to administer an estate, with liability to suit and power to sue, extends to both separate and community property. *Woodley v. Adams*, 55 Tex. 526, 532, distinguishing *Carroll v. Carroll*, 20 Tex. 731.

A will giving the executor control of property until the devisee's majority, gave the executor no control beyond the devisee's minority. *Newman v. Dotson*, 57 Tex. 117.

Power of Sale.—See the title **EXECUTORS' AND ADMINISTRATORS' SALES**.

E. POWERS BEFORE PROBATE OF WILL AND QUALIFICATION.

Under Statutes of Texas.—"Before probate and qualification the named executor may proceed to execute some of the provisions of the will in good faith without incurring the liability of an intermeddler or of embezzlement. The court might subsequently approve and validate his acts. In this respect his attitude is precisely that of an administrator. He derives no authority from the will itself, and acquires no title by it. * * * The common law can not apply." *Roberts v. Stuart*, 80 Tex. 379, 87, 15 S. W. 1108.

The will is not of itself without probate a sufficient authority to charge the named executor with the duty of reducing personal property to possession, and if he fail to do so before probate he would not be liable for loss. *Roberts v. Stuart*, 80 Tex. 379, 386, 15 S. W. 1108.

As to powers before probate at common law, see *Roberts v. Stuart*, 80 Tex. 379, 386, 15 S. W. 1108.

Sale of Cattle, Horses and Hogs before Qualification by Executor.—See *Stone v. Dorsett*, 18 Tex. 700, 710.

Independent Executor.—"Under the statute, an executor named in a will is not required to take the oath of office and obtain letters testamentary before he is qualified to act. He derives his authority from the will itself, and his acceptance of the trust, where no bond is required by the will, renders him competent to act, after the probate of the will." *Patten v. Cox*, 9 Tex. Civ. App. 299, 304, 19 S. W. 182.

An executor appointed under a will authorizing him to sell real estate can not act under, such authorization until the will is probated, and he has qualified under his appointment. *Coy v. Gaye* (Civ. App.), 84 S. W. 441.

Effect of Conveyance.—A convey-

ance by an executor, without compliance with the *lex rei sitæ* as to probating the will, will not be validated by a subsequent compliance therewith. *Mills v. Herndon*, 60 Tex. 353.

Administration Pro Tem.—See post, "Duties," XI, B, 2.

F. WHILE APPEAL FROM APPOINTMENT PENDING.

Where a judgment admitting a will to probate, and appointing an executor, was appealed from, as under Rev. St. 1895, art. 2262, the matter was triable *de novo*, the judgment below was annulled by the appeal, and the executor could not act nor be sued pending such appeal. *Garrett v. Garrett* (Civ. App.), 47 S. W. 76; *Moore v. Jordan*, 65 Tex. 395; *Kelly v. Settegast*, 68 Tex. 13, 2 S. W. 870.

Where an administratrix sued for the recovery of property alleged to belong to the estate, and defendant answered that deceased made a will, which had been admitted to probate, leaving the disposition of his property to defendant, but that the probate court had refused to appoint defendant administrator, and had appointed plaintiff administratrix, from which decree defendant had appealed, giving bond and security, which appeal was still pending, and that defendant held the property under the will, such facts constituted a good defense to plaintiff's action. *Stone v. Spillman's Adm'x*, 16 Tex. 432.

G. AFTER NOTICE TO GIVE NEW BOND.

See ante, "Effect of Notice to File New Bond," III, G, 2.

H. DEGREE OF CARE REQUIRED—DUE DILIGENCE.

See post, "Misappropriation, Waste or Loss of Assets," V, M, 8.

An administrator, having in the management of the estate exercised the same diligence as if the business had been his own, is not liable for

want of that degree of diligence required by the probate law of 1870. *Noble v. Jones*, 35 Tex. 692.

An administrator is charged with the duty of using reasonable care for the preservation of the property of the intestate. The finding of the court that "he used every possible effort" included ordinary care, and the testimony sustained the finding. *Roberts v. Stuart*, 80 Tex. 379, 15 S. W. 1108.

A finding of fact by the court of a date later than that shown by the testimony on which temporary letters of administration were obtained is of no importance. In this case the facts showed an earlier date than the finding, and the date was only of importance to show care by the executor for the welfare of the estate. *Roberts v. Stuart*, 80 Tex. 379, 15 S. W. 1108.

I. DELEGATION OF POWER.

"Acts which are merely mechanical or ministerial may be committed by the administrator to an agent." *Rice v. Conwill*, 35 Tex. Civ. App. 341, 342, 80 S. W. 393; *Smith v. Swan*, 2 Tex. Civ. App. 563, 567, 22 S. W. 247, affirmed in 93 Tex. 650, no op.; *Terrell v. McCown*, 91 Tex. 231, 43 S. W. 2; *Armstrong v. O'Brien*, 83 Tex. 635, 639, 19 S. W. 268.

"In matters of discretion where the very existence of the property of the estate may be at stake, the power must be exercised by the administrator. *Terrell v. McCown*, 91 Tex. 231, 43 S. W. 2." *Rice v. Conwill*, 35 Tex. Civ. App. 341, 342, 80 S. W. 393.

Though an administrator has authority to make a contract involving a matter of discretion, he can not delegate such authority to an agent. *Rice v. Conwill*, 80 S. W. 393, 35 Tex. Civ. App. 341.

Right to Take Possession of Mortgaged Chattel under Rev. Stat., Art. 3333.—Under Rev. St. art. 3333, providing that, when a person executing a chattel mortgage removes the property from the county or transfers it with-

out the mortgagee's consent, the latter may take possession and sell it for the payment of the debt, the mortgagee's legal representative, through an agent, may exercise his right to take possession of the property and sell it for the payment of the debt, when the mortgagor has removed it to another county and transferred his right therein without the mortgagee's consent, though not possessing power to appoint a substitute trustee. *Kelly v. Wimbish* (Civ. App.), 65 S. W. 386.

Power to Fix Terms of Sale.—An executrix can not delegate to an agent, employed to find a purchaser for land, discretion as to the terms of sale. *Dyer v. Winston*, 77 S. W. 227, 33 Tex. Civ. App. 412.

An executor, having a discretionary power to sell, can not delegate the power to an agent in such manner as to confer on him authority to exercise the discretion so vested in the executor. *Stevenson v. Roberts*, 25 Tex. Civ. App. 577, 64 S. W. 230; *Smith v. Swan*, 2 Tex. Civ. App. 563, 22 S. W. 247, affirmed in 93 Tex. 650, no op.; *McCown v. Terrell* (Civ. App.), 40 S. W. 54, 56, reversed in 9 Tex. 231.

Contract for Payment of Commission for Sale of Land.—An executrix has authority to specially authorize an agent to contract for payment of a commission for the sale of land for an amount fixed by her. *Dyer v. Winston*, 77 S. W. 227, 33 Tex. Civ. App. 412.

An executrix can not delegate to an agent, employed to find a purchaser for land, authority to agree, at the discretion, with a subagent, on the amount of commission the latter should receive. *Dyer v. Winston*, 77 S. W. 227, 33 Tex. Civ. App. 412.

A petition in an action to recover commission for the sale of real estate, alleging that a certain person had authority to act as agent of defendant, an executrix, and that such agent had

agreed with plaintiff for the payment of a commission, and that defendant was liable to plaintiff for the commission sued for, is insufficient, as against a special exception, to show that such person had authority to agree to pay plaintiff the stipulated compensation. *Dyer v. Winston*, 77 S. W. 227, 33 Tex. Civ. App. 412.

Ratification of Acts of Agent.—An administrator can not ratify an act done by his agent which the administrator himself has no authority to do. *Rice v. Conwill*, 80 S. W. 393, 35 Tex. Civ. App. 341.

An executrix has power to ratify and adopt as her own agreement one made by a person assuming to act for her in contracting for the payment of a commission for the sale of land. *Dyer v. Winston*, 77 S. W. 227, 33 Tex. Civ. App. 412.

Presumption That Acts of Authorized Agent Ratified.—In the absence of a statement of facts, proof that an executrix of an estate authorized her son as agent to make contracts or purchase property in the furtherance of the business of such estate under authority of the will, or ratified his acts after they were done, will be presumed, though defectively averred or omitted in the pleading of one suing upon a note or contract made by such agent of the executrix. *Ellis v. Smith Co.*, 35 Tex. Civ. App. 566, 80 S. W. 633, affirmed in 98 Tex. 615, no op.

J. ESTOPPEL AND ADMISSIONS.

The acts of an administrator may be set up against him as an estoppel in pais. *Thomas v. Brooks*, 6 Tex. 369.

Equity may hold executors bound by acts of estoppel, especially when their power is unshackled and coupled with an interest or independent. *Giddings v. Butler*, 47 Tex. 535, 545.

"No act or omission of an executor or administrator can bind those interested in the estate, unless they or the

decendent or the law authorized it. *Bigelow, Estop.* 147." *McCown v. Terrell* (Civ. App.), 40 S. W. 54, 58, reversed in 9 Tex. 231.

The admissions of an executor or administrator made before he is clothed with authority are inadmissible against himself as the representative of the heirs, devisees or creditors. *McKay v. Treadwell*, 8 Tex. 176, 181.

Effect of Judgment for Purchase Money.—Heirs of an interstate are not estopped to claim lands conveyed by void deeds because the administrators sued and recovered judgments for the purchase money, which were paid by the purchasers, the heirs not authorizing the suits. *McCown v. Terrell* (Civ. App.), 40 S. W. 54, reversed *Terrell v. McCown*, 43 S. W. 2, 91 Tex. 231.

K. PROPERTY SUBJECT TO ADMINISTRATION.

See post, "Assets or Property Subject to Payment of Debts," VII. C.

1. Title and Ownership.

a. At Common Law and under Civil Law.

(1) At Common Law.

At common law the administrator had nothing to do with the realty, this administration being confined to the personalty alone. *Graham v. Vining*, 2 Tex. 433, 435; *Howard v. Johnson*, 69 Tex. 655, 660, 7 S. W. 522; *Thompson v. Duncan*, 1 Tex. 485; *Gunter v. Fox*, 51 Tex. 383, 387; *Cochran v. Thompson*, 18 Tex. 652, 657.

Personalty.—At common law, the administrator held the legal title to the personalty of the estate and the heir the equitable. *Chubb v. Johnson*, 11 Tex. 469, 475; *Portis v. Cole*, 11 Tex. 157; *Thompson v. Duncan*, 1 Tex. 485, 488; *Graham v. Vining*, 2 Tex. 433, 439; *Howard v. Republic*, 2 Tex. 311, 312; *Gunter v. Fox*, 51 Tex. 383, 387.

(8) Under Civil Law.

"These distinctions are unknown to the civil law as it prevailed under Spanish modification in Texas. * * * All property, without distinction, was classed together." *Thompson v. Duncan*, 1 Tex. 485, 488; *Gunter v. Fox*, 51 Tex. 383, 387.

b. Under Statutes of Texas.**(1) Personal Property.****(a) In General.**

The personalty of the deceased goes to the administrator, and not to the heir. *Richardson v. Vaughn* (Civ. App.) 22 S. W. 1112.

The title to personal property of a decedent vests in the personal representative until distributed. *Richardson v. Vaughn* (Civ. App.) 22 S. W. 1112.

In an action by an executor against the sheriff for possession of property, a contention that, as plaintiff was not holding or entitled to possession of the property, he could not maintain an action for conversion thereof, can not be sustained, since such rule has no application to a case where the owner's rights are permanently injured. *Cox v. Patten* (Civ. App.), 66 S. W. 64.

(b) Pledged and Mortgaged Personalty.

Sayles' Civ. St. 1897, art. 1866, providing that the administrator of a decedent shall have the right to the possession of the estate as it existed at the death of intestate, does not authorize him to recover possession of property pledged by intestate, to the possession of which he was not entitled. *Fulton v. National Bank of Denison*, 62 S. W. 84, 26 Tex. Civ. App. 115.

A pledgee of certificates of stock is entitled to hold them as against an administrator of the pledgor, and is entitled to receive and enforce dividends or other benefits attaching thereto so long as his claim is unsatisfied. *Fulton v. National Bank of Denison*, 62 S. W. 84, 26 Tex. Civ. App. 115.

Burden of Showing.—The burden is

on a widow seeking to recover property pledged by deceased, to show that the pledgee's claim is of a character which does not take precedence of her demand for allowances. *Fulton v. National Bank*, 26 Tex. Civ. App. 115, 62 S. W. 84, affirmed in 94 Tex. 704, no op.

(c) Personalty in Hands of Heir, etc.

An administrator is entitled to recover from an heir money in his hands belonging to the estate. *Manchester v. Bursey*, 91 S. W. 817, 41 Tex. Civ. App. 271.

An heir into whose hands personal property came may, when sued by the administrator to recover the same, show that he applied the same to the payment of the debts of the estate, prior to the appointment of the administrator. *Manchester v. Bursey*, 91 S. W. 817, 41 Tex. Civ. App. 271; *Blinn v. McDonald*, 92 Tex. 604, 608, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931; *Ansley v. Baker*, 14 Tex. 607, 608. See post, "Executor De Son Tort," XIV.

(d) Personalty Sold by Distributee.

If a person dies intestate, leaving personal property, a sale of it, by one of the heirs, without administration, is unauthorized, even to pay funeral expenses and expenses of last sickness of deceased intestate. Such sale does not give the purchaser exclusive right to its possession as against other heirs. *Fairy v. State*, 18 Tex. Cr. App. 314, 320.

In an action by an administratrix to recover personal property of the deceased, it is no defense that the widow of deceased after his death sold and transferred the property to defendant in payment of a community debt, in the absence of a showing that defendant had a right superior to that of other creditors or of the minor children of deceased, or that there was other property of the estate sufficient to pay the creditors and provide for an allowance for the minor children. *Latham v. Dawson*, 89 S. W. 315, 40 Tex. Civ. App. 219.

(2) Real Property.**(a) In General.**

By the laws of Texas, the real, as well as the personal, estate of a decedent passes to his executor or administrator for administration. *Thompson v. Duncan*, 1 Tex. 485; *Graham v. Vining*, 2 Tex. 433, 439; *Howard v. Republic*, 2 Tex. 311, 312; *Fisk v. Norvel*, 9 Tex. 13; *Hearne v. Erhard*, 33 Tex. 60, 66; *Gunter v. Fox*, 51 Tex. 383, 388, overruling *Barrett v. Barrett*, 31 Tex. 344; *Walker v. Abercrombie*, 61 Tex. 69, 71; *Easterling v. Blythe*, 7 Tex. 210, 213.

By our law of descents, lands and personalty are treated pretty much in same manner, all being subject to administration. *Hearne v. Erhard*, 33 Tex. 60, 66.

The administrator is bound by his oath and by his bond to administer both the real and personal property without distinction. *Graham v. Vining*, 2 Tex. 433, 439; *Thompson v. Duncan*, 1 Tex. 485.

Under Hart. Dig. art. 1221 the whole estate of a decedent vests in his heirs, subject, with certain exceptions to the payment of decedent's debts, but on the issue of letters testamentary or of administration, the executor or administrator has a right to the possession of the estate as it existed at the death of the deceased, in trust for the disposition of the same under the provisions of the act. *Fisk v. Norvel*, 9 Tex. 13.

Executor of Purchaser of Premises Subject to Deed of Trust.—Where the executor of a deceased purchaser of premises subject to a trust deed has possession, and the heirs desire him to sell the property and divide the proceeds, the executor holds the property as such, and may sue to enjoin a sale under the trust deed. (Civ. App.) *Taylor v. Williams*, 105 S. W. 837, judgment reversed 101 Tex. 388, 108 S. W. 815.

(b) Title and Interest of Heirs and Distributees, Legatees and Devisees.**aa. In General.**

"By law the whole of an estate vests in the heirs testate or ab intestato at the death of a person deceased. It passes from them sub modo for the purposes of administration." *Patton v. Gregory*, 21 Tex. 513, 518. See to the same effect *Laas v. Seidel*, 28 Tex. Civ. App. 140, 142, 66 S. W. 871, 68 S. W. 724; *Roberts v. Stuart*, 80 Tex. 379, 387, 15 S. W. 1108; *Easterling v. Blythe*, 7 Tex. 210, 213; *Peevy v. Hurt*, 32 Tex. 146, 153; *Morris v. Halbert*, 36 Tex. 19, 20; *Stephenson v. Marsalis*, 11 Tex. Civ. App. 162, 168, 33 S. W. 383. See, also, *Barrett v. Barrett*, 31 Tex. 344, overruled by *Gunter v. Fox*, 51 Tex. 383.

Upon death of the ancestor, the legal title descends to the heir, subject to the expenses of administration and the payment of debts. *Morris v. Halbert*, 36 Tex. 19, 20; *Stephenson v. Marsalis*, 11 Tex. Civ. App. 162, 168, 33 S. W. 383; *Boyle v. Forbes*, 9 Tex. 35, 40; *Fisk v. Norvel*, 9 Tex. 13.

Title to property vests in heir subject to debts of estate. *Portis v. Cole*, 11 Tex. 157, 158; *Chandler v. Hudson*, 11 Tex. 32, 37; *Blinn v. McDonald*, 92 Tex. 604, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931.

With or without administration, the heir takes the inheritance burdened with the debts of the ancestor. *Pierce v. Logan*, 2 Posey 354, 356.

Under probate laws, whole estate vests immediately on death of ancestor in heir subject to administration only. *Ansley v. Baker*, 14 Tex. 607, 613.

Heir holds legal title to real estate as trustee for creditors until debts paid. *Peevy v. Hurt*, 32 Tex. 146, 152.

The title of the heirs or devisees is subject to the rights of the administrator or executor to subject the property to the payment of the debts of

decedent and the expenses of administration. *Laas v. Seidel*, 28 Tex. Civ. App. 140, 142, 66 S. W. 871, 68 S. W. 871, 68 S. W. 724.

Property vests in the legal representatives of an estate only in a qualified manner, and to a limited extent for a given purpose, and for all other purposes title is in the heir from the instant of decedent's death. *Walker v. Abercrombie*, 61 Tex. 69, 71.

"The title vested in the administrator, only sub modo, and for the purpose of the administration. He took only temporarily, for the benefit of creditors, if any, and the heirs. His right determined with the period of his administration." *Easterling v. Blythe*, 7 Tex. 210, 213.

After Removal of Administrator.—Title to the property of an estate vests in the heirs where the estate is vacant by the removal of the administrator, and there are no debts remaining unpaid; and they may sue and be sued in relation thereto. *Ward's Heirs v. Ward*, 1 Posey Unrep. Cas. 123.

bb. Sales and Conveyances by Heirs, etc.

The title and interest of an heir in the real and personal estate of his intestate ancestor become vested and fixed immediately upon the death of the latter; and such title and interest, though encumbered with the ancestor's debts, are none the less the subject of sale and transfer by the heir, either by a present conveyance or by bond for execution of title when partition of the estate shall be made. *Ackerman v. Smiley*, 37 Tex. 211.

There is no inhibition by law against the sale, by heirs, of their shares in an estate. Any such restriction would produce the most serious embarrassments, as years may elapse before such claims can be collected or realized. But this would be the virtual effect of a denial of jurisdiction in the county court to recognize the rights of an assignee of a distributive share of an es-

tate. *Key v. Craig*, 21 Tex. 491, 492.

Rights of Purchaser.—Purchase of land from heir pending administration is not void but merely leaves purchaser's rights subject to administration. *Heath v. Layne*, 62 Tex. 686, 693; *Mills v. Herndon*, 60 Tex. 353.

A conveyance by the heirs, of an estate which vested in them on the death of the ancestor, and which was made pending administration on the estate, vests in the purchaser whatever interest is left at the close of administration. *Rutherford v. Stamper*, 60 Tex. 447.

Estates vest in the heirs, incumbered with the debts; and an heir can sell his interest, and unless it appear that property which has been sold by the sole heir, is required to pay debts, the purchaser will be protected. *Chubb v. Johnson*, 11 Tex. 469.

Effect of Registration Laws.—"A purchaser from an heir is not precluded from availing himself of the protection which our registration laws accord to innocent purchasers when such purchase is asserted against an unregistered deed from the intestate. *Holmes v. Johns*, 56 Tex. 41, 42; *Taylor v. Harrison*, 47 Tex. 454. And the same rule has been assented to as against an unregistered will. *March v. Huyter*, 50 Tex. 243; *Ryan v. Texas, etc., R. Co.*, 64 Tex. 239, 242. It is well recognized that a will only probated elsewhere than in the state is not admissible in the courts of the state as evidence affecting the title to lands the subject of such will. *Holman v. Hopkins*, 27 Tex. 38; *Acklin v. Paschal*, 48 Tex. 147; *Mills v. Herndon*, 60 Tex. 353; *Houze v. Houze*, 16 Tex. 598; *Paschal v. Acklin*, 27 Tex. 173, 192." *Slayton v. Singleton*, 72 Tex. 209, 211, 9 S. W. 876.

Under the well-settled construction of the statute the heirs, devisees, and legatees can not make such a disposition of any part of the estate during

the period in which it is subject to administration that will defeat the subjection thereof to the claims of creditors through such administration and all persons dealing with the heir, devisee, or legatee are charged with notice of the fact that an executor or administrator may within a given time be appointed, and of his powers and duties, and therefore can not during such time be a bona fide purchaser or acquire any rights from or under them which will prevent the execution of such trust. *Cooper v. Loughlin*, 75 Tex. 524, 13 S. W. 37; *Blinn v. McDonald*, 92 Tex. 604, 46 S. W. 787, 48 S. W. 571; 50 S. W. 931, reversing 38 S. W. 384.

After Time for Administration Has Passed.—There is an intent on the face of the statute that the property in the hands of the heir, devisee, or legatee, and not any longer subject to be taken by the statutory trustee, may be passed free of such lien to a bona fide purchaser, for "the statute does not undertake to extend the lien any longer than the property is 'in their hands.' In legal contemplation it would still be 'in their hands' if the transfer were fraudulent in law, but would not be if transferred to a bona fide purchaser. The wisdom of the statute in not extending the lien any longer is apparent, for it would unduly cloud titles to allow the obligations of the ancestor which might not accrue for years, as in cases of breach of warranty, to follow the property into the hands of bona fide purchasers from the heirs, devisees, and legatees. The heir, devisee, or legatee, would doubtless be liable to the creditor for the injury done him in defeating his lien by thus disposing of the security. *Boothe v. Fiest*, 80 Tex. 141, 15 S. W. 799; *Zapp v. Johnson*, 87 Tex. 641, 30 S. W. 861." *Blinn v. McDonald*, 92 Tex. 604, 608, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931, reversing 38 S. W. 384.

Under the common law thus

amended by statute the ancestor's debts, even by speciality, were not charged as a lien on the lands, and the heir or devisee could prevent the creditor from subjecting them by transferring to a bona fide purchaser before suit. *Blinn v. McDonald*, 92 Tex. 604, 607, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931, reversing 38 S. W. 384.

If the deed be to a specified tract, described by metes and bounds, being part of a larger tract, in which the ancestor owned an undivided interest, the deed would not be void, but would be valid against the grantor, and would bind by estoppel at least his interest in the specific land conveyed. It could not prejudice the rights of the other joint owners; but if on partition the specific land should be allotted to the vendor, his deed would vest his right in the purchaser. *Rutherford v. Stamper*, 60 Tex. 447. See, also, *March v. Huyter*, 50 Tex. 243, 251; *Dorn v. Dunham*, 24 Tex. 366, 376; *Good v. Coombs*, 28 Tex. 34; *McKey v. Welch*, 22 Tex. 390, 396. See the title JOINT TENANTS AND TENANTS IN COMMON.

Where Heir and Administrator Same Person.—On the death of an ancestor, the property vests immediately in the heir or devisee, subject to the payment of the debts; and where, therefore, the same person is heir and administrator, he may give a title to the estate immediately as heir, the estate being still incumbered with debts, if any. *Chubb v. Johnson*, 11 Tex. 469.

Where a person is sole heir and administrator, and sells property of the estate without the authority of the county court, it will be considered that he sold the property as heir, and not as administrator. *Chubb v. Johnson*, 11 Tex. 469. See, also, *Myers v. Jones*, 4 Tex. Civ. App. 330, 23 S. W. 562.

Conveyance by Surviving Spouse.—In *Mitchell v. De Witt*, 20 Tex. 294, it is very clearly held that a sur-

viving wife has the right to sell her interest in the land, subject, however, to the right of the administrator of the husband to subject it to the payment of debts and the expense of administration. In that case the contest was between the purchaser from the wife and a purchaser at the administrator's sale, and the latter was held to have the superior right." *Myers v. Jones*, 4 Tex. Civ. App. 330, 332, 23 S. W. 562.

Administrator of husband can not attack sale by widow of decedent's interest in a land certificate on ground of fraud or want of consideration in its procurement. *Myers v. Jones*, 4 Tex. Civ. App. 330, 331, 23 S. W. 562.

Where, notwithstanding an estate was being administered in the probate court, the testator's widow was permitted to have possession of and conduct its affairs, and the estate was wholly solvent, a sale of assets by the widow was valid as against the executor; the value of the property sold being chargeable against the widow's share of the estate. (Civ. App.) *Matulla v. Freytag*, 104 S. W. 492, reversed, *Matula v. Same*, 101 Tex. 357, 107 S. W. 536.

The widow being sole devisee and legatee, having full control of the property received by her from the executors, had the right to make a gift of a part of it to her son. The son not having expressly assumed the payment of the claims against the estate, and it not having been alleged or shown that the gift impoverished the mother so that she was unable to pay the debts of the estate, he is not liable. *Kauffman v. Wooters*, 79 Tex. 205, 13 S. W. 549. But see *Blinn v. McDonald*, 92 Tex. 604, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931.

Claim of Purchaser for Improvements.—One who purchases land from the heir pending administration on the estate of the ancestor, and improves the same while it yet remains, in contemplation of law, assets of the estate,

has no equitable claim on account of his improvements as against a purchaser of the legal title at administrator's sale. *Heath v. Layne*, 62 Tex. 686.

Heir Can Not Repudiate without Restoring Benefits.—In 1846 A and B, as attorneys for an administrator, rendered professional services in a suit involving his intestate's title to a league of land; in 1852, C, one of the heirs, conveyed, as sole owner, the league in controversy to D, who, in part consideration, assumed the payment of the fees due A and B, and executed a mortgage on the entire league to secure the payment of the purchase money. D afterwards set aside three hundred and fifty acres of the land to A and B in payment for their services in the suit, and made a deed thereto. The vendee of A and B in 1854, conveyed to W afterwards, at a sale on foreclosure of the mortgage to C by E, the administrator on his estate, the entire league was purchased by E as C's administrator. C, during his life, recognized the fact that the lands conveyed by him were incumbered by the lien for the fee due to A and B. Held: 1. In a suit for the land by E against W, that the above facts constituted a sufficient defense; that E could not repudiate the conveyance under which W claimed, without restoring the value of the services for which the conveyance under which W claimed the land was made, and that W was subrogated to the rights of the attorneys A and B. 2. The heir can not treat the adjustment of a claim against the estate of his ancestor as a nullity, while he enjoys without offering to restore the benefit of it. *Walker v. Lawler*, 45 Tex. 532.

Recovery from Purchasers by Executor or Administrator.—As a general rule, legal representatives of estates are not to be impeded or embarrassed in their control of the as-

sets and the application of them to the payment of debts by conveyances made by heirs while they are subject to administration. To admit such defenses indiscriminately would not only complicate and embarrass administrations by such trustees themselves, but would transfer to other courts the determination of matters which the law has confided to the probate court. *Matula v. Freytag*, 101 Tex. 357, 107 S. W. 536, distinguishing *Chubb v. Johnson*, 11 Tex. 469; *Morris v. Halbert*, 36 Tex. 19.

Where the administrator before sale seeks to evict a purchaser from the heir, he should show affirmatively that the land he seeks to recover is needed for the purposes of the administration to pay debts. So held in case of a sale of a land certificate by the widow of the decedent. *Myers v. Jones*, 4 Tex. Civ. App. 330, 332, 23 S. W. 562, distinguishing *Morris v. Halbert*, 36 Tex. 19; *Mitchell v. De Witt*, 20 Tex. 294.

"In *Chubb v. Johnson*, 11 Tex. 469, the administratrix sued to recover land she had sold as sole heir while the administration was pending, and it was held she could not recover, because she neither alleged nor proved that the land would be needed to pay debts of the estate; and in answer to the suggestion that the court should presume debts from the fact of an administration still pending, it was held, that inasmuch as the administration had been pending for nearly three years at the time the sale as heir was made, the presumption would be that there were no debts." *Myers v. Jones*, 4 Tex. Civ. App. 330, 333, 23 S. W. 562.

"In *Morris v. Halbert*, 36 Tex. 19, the controversy was also between a purchaser from the administrator and a prior purchaser from the heir, and the latter was held to have the better title, upon the ground that the estate was solvent, and it was the duty of

the administrator to first appropriate all the other property, and had this been done, there would have been no necessity for the sale of the land in question. The opinion in that case perhaps goes further in some respects in placing the burden upon the purchaser from the administrator, where there has been a sale by him under orders of the proper court, than we would be disposed to approve." *Myers v. Jones*, 4 Tex. Civ. App. 330, 332, 23 S. W. 562.

Confirmation by Administrator.—In order that an administrator may confirm sale of property sold by heirs previous to grant of administration, it must appear that property belonged to decedent, that it was necessary to sell title of heirs to pay debts of ancestor, and that there are insufficient funds in hands of administrator to pay debts of estate. *Morris v. Halbert*, 36 Tex. 19, 20.

cc. Rights of Creditors of Heirs.

Creditor of heir can acquire no better right in estate than held by heir himself. *Oxsheer v. Nave*, 90 Tex. 568, 576, 40 S. W. 7.

The property of a son who died, leaving neither wife nor child, may, if there are no debts against the estate, be taken for the debts of his father. *Garrett v. McMahan*, 34 Tex. 307.

Creditor of heir becoming purchaser under judicial process, of latter's nominal interest in estate, can acquire no right of property. *Oxsheer v. Nave*, 90 Tex. 568, 576, 40 S. W. 7.

An administrator is not entitled to enjoin the sale under execution of an heir's interest in lands of the estate on the ground that it would cast a cloud on the title of the land and prevent its selling for its value at administrator's sale, since the purchaser at the execution sale would take title subject to the administration for payment of debts, and trespass to try title would afford full and adequate legal remedy to a purchaser from the

administrator. *Hahn v. Willis & Bro.*, 31 Tex. Civ. App. 643, 73 S. W. 1084, affirmed in 97 Tex. 635, no op.

(3) Community Property.

See the title HUSBAND AND WIFE.

An independent executor, appointed by will of a surviving husband to manage the testator's estate, is not restricted to administration of the testator's separate estate, but can apply the community property to payment of the community debts. Hence he could sell the same without an order of the court. *Carlton v. Goebler*, 94 Tex. 93, 98, 58 S. W. 829.

(4) Partnership Assets Where Surviving Partner Administrator.

A surviving partner administering upon the estate of the deceased partner is not the sole unconditional owner of partnership assets. *Crescent Ins. Co. v. Camp*, 71 Tex. 503, 9 S. W. 473.

Nor does such ownership exist when, or if the administrator and surviving partner should pay firm indebtedness to an amount equal to or greater than the value of the firm's assets. Such payment would give the right to reimbursement out of the assets, but would not confer complete ownership. *Crescent Ins. Co. v. Camp*, 71 Tex. 503, 9 S. W. 473.

As surviving partner, he had a lien on the partnership effects, through which he could enforce the payment of partnership debts, and the fact that he may have paid them would in effect only make him a creditor with a lien no higher in degree than had he as surviving partner. *Crescent Ins. Co. v. Camp*, 71 Tex. 503, 506, 9 S. W. 473. See the title PARTNERSHIP.

"When a surviving partner dies, not having wound up the partnership business, his executor succeeds to the administration of the partnership estate." *Carlton v. Goebler*, 94 Tex. 93, 98, 58 S. W. 829.

(5) Interests in Public Lands.

(a) In General.

By the laws regulating proceedings for the enforcement of claims to land, and by the general laws in regard to executors and administrators, an administrator can apply by suit for certificates of land due to his intestate. *Howard v. Republic*, 2 Tex. 311.

Land certificates are choses in possession and not mere choses in action, and are therefore a vendable commodity in the hands of the personal representative for the payment of debts. *Peavy v. Hurt*, 32 Tex. 146, 151.

Unconditional land certificate, no matter in whose name issued, is part of assets of estate of head of family. *Marks v. Hill*, 46 Tex. 345, 349.

Act Jan. 14, 1841 (Hart. Dig., art. 1053), prohibiting administration on estates of volunteers from foreign countries, who have fallen in battles of the republic, and also sales of lands of such decedents without the consent of the heirs, applies to the sale of headright land certificates as well as to lands. *Duncan v. Veal*, 49 Tex. 603.

(b) Headright Certificates.

The issuance of headright certificates to the administrators of persons who died before the declaration of independence has always been recognized as valid by the government, and it is too late now to question their validity. *Fishback v. Young*, 19 Tex. 515.

Power to Float.—Administrator takes located land certificate of estate as realty, and, regardless of power deceased might have had, he has no power without authority of the probate court to abandon location already made for purpose of relocating the certificate. *Jones v. Lee*, 86 Tex. 25, 50, 22 S. W. 386, 1092, affirming 20 S. W. 863, distinguishing *Poor v. Boyce*, 12 Tex. 440.

An administrator has same authority to raise a location for the purpose

of making one elsewhere that he had to apply for and obtain the certificate as to make location, but if in so doing he defraud heirs, act of removing location may be annulled. *Poor v. Boyce*, 12 Tex. 440, 447.

(6) Contracts of Decedent.

(a) General Rule.

"It is a general rule that the death of a party to a contract does not extinguish the contract if it is capable of being fulfilled by his representatives, and is not of a personal nature. And this is the rule whether the administrator or executor is named in the contract or not." *Wilcox v. Alexander* (Civ. App.), 32 S. W. 561.

(b) Executory Personal Contracts.

Administrator has no authority to fulfill executory personal contract of his intestate unless with express consent of other party to contract. *McLamore v. Heffner*, 33 Tex. 514, 516.

(c) Contracts Respecting Personalty.

While plaintiff's intestate was unconscious, defendants went to his store and persuaded a clerk who worked in the store, but who had no authority to sell at wholesale, to deliver to them certain goods in settlement of a debt. Plaintiff's intestate never recovered consciousness, and never ratified the sale made by his clerk. Held, that defendants had no title to the goods, or right to possession, and hence were wrongdoers, as against whom the possession to which plaintiff was entitled as administrator was sufficient to give him the right to sue for the goods or their value. *Bridges v. Williams*, 66 S. W. 120, 28 Tex. Civ. App. 38, rehearing denied 66 S. W. 484, 28 Tex. Civ. App. 38.

Failure of Consideration.—Being sued on notes by an administrator, defendants answered that the notes were given to plaintiff's intestate in his lifetime in consideration for a certain house and lot; that the intestate had no title, and never acquired any, nor ever made defendants a deed; that in

consequence thereof, the intestate and defendants agreed to cancel the contract; and that his administrator, the plaintiff, was not able to make title to the property. Held, that the answer set up a good defense, and it was error to sustain exceptions to it for insufficiency. *Garrison v. King*, 35 Tex. 183.

(d) Contracts Respecting Realty and Interest Therein.

aa. Contract for Location of Land.

Administrator may enforce contract for location of land certificates entered into by intestate in so far as contract had been executed in lifetime of intestate. *McLamore v. Heffner*, 33 Tex. 514, 517.

bb. Contract of Purchase of Land.

Where only part of the purchase money was paid, and a note was given for deferred payments, and a vendor's lien was retained in the deed and mortgage, and the vendee died, the estate took merely his interest, and held the same subject to the terms and conditions of the contract. *Curran v. Texas Land & Mortgage Co.*, 60 S. W. 466, 24 Tex. Civ. App. 499.

The vendor's right to rescind the sale and recover back the land upon default in payment is not affected by the death of the vendee. *Curran v. Texas, etc., Mortg. Co.*, 24 Tex. Civ. App. 499, 60 S. W. 466, affirmed in 94 Tex. 709, no op.

The death of vendee did not have the effect to take from the vendor the superior title and vest it in the estate. *Browning v. Estes*, 3 Tex. 462, 463; *Estes v. Browning*, 11 Tex. 237; *Jackson v. Ivory* (Civ. App.), 30 S. W. 716; *Herman v. Geisecke* (Civ. App.), 33 S. W. 1006, 1009; *New England Loan, etc., Co. v. Willis*, 19 Tex. Civ. App. 128, 47 S. W. 389, affirmed in 93 Tex. 736, no op.; *Curran v. Texas, etc., Mortg. Co.*, 24 Tex. Civ. App. 499, 501, 60 S. W. 466, affirmed in 94 Tex. 709, no op.

A successful bidder at a partition

sale procured the purchase money from a third person, who received the deed under an agreement to convey to the bidder on his making repayment. The bidder executed a note for the amount, and the third person executed an agreement binding him to convey on payment of the note. The time of the payment of the note was extended, and the bidder died before the expiration of the extension. Time was not of the essence of the contract. Held, that the bidders' administratrix had a reasonable time within which to pay the note and receive the deed. *Montgomery v. Montgomery* (Civ. App.), 99 S. W. 1145, affirmed in 101 Tex. 118.

Conveyance.—A deed to A, administrator of B, which recites that the grantor had previously sold the land to B, and conveys the land to A as part of B's succession, shows plainly on its face that it was made to A in trust for the heirs of B. *Blythe v. Easterling*, 20 Tex. 565, 568; *Soye v. McCallister*, 18 Tex. 80; *Soye v. Maverick*, 18 Tex. 100.

A deed to an administrator in pursuance of a contract with the intestate relates back to the time of the death, so far as regards the capacity of the heirs. *Blythe v. Easterling*, 20 Tex. 565.

And an heir who had not capacity to take at that time, can not claim under said deed, although by a change of the law such incapacity was removed before the date of the deed. *Blythe v. Easterling*, 20 Tex. 565.

cc. Sales by Decedent.

Plaintiffs' intestate agreed to sell an interest in realty. In 1838, after intestate's death and pending administration on his estate, application, in which the administrator joined, was presented to the probate court for the partition of such realty. Partition was decreed, and the administrator conveyed the interest to the party entitle to it under the contract of sale. Held, that the

decree of partition and deed pursuant thereto were ineffectual to divest intestate's estate of the legal title, as the probate court was without jurisdiction to decree specific performance of contracts for sale of realty. *McCarty v. Merry* (Civ. App.), 59 S. W. 304.

Conveyance.—Deed executed by administrator in conformity with title bond given by intestate is valid. *Holt v. Payne*, 3 Tex. 478. See *Holt v. Clemmons*, 3 Tex. 423.

Under the express provisions of Sayles' Ann. Civ. St. 1897, arts. 2152, 2153, an administrator's deed, executed under order of the county court, conveying land of a decedent to a trustee, as provided by a bond for title executed by intestate in his lifetime, was prima facie evidence of title in the trustee. *Dutton & Rutherford v. Wright & Vaughn*, 85 S. W. 1025, 38 Tex. Civ. App. 372.

Where an administrator's deed was executed under order of court, in fulfillment of decedent's bond for title, a subsequent objection, in trespass to try title, that the deed was invalid for failure to conform to the description of the land contained in the bond, was a collateral attack on the judgment, and unsustainable. *Dutton & Rutherford v. Wright & Vaughn*, 85 S. W. 1025, 38 Tex. Civ. App. 372.

Where the court records showing the evidence on which the county court acted in directing the execution of a deed by an administrator, in fulfillment of his intestate's bond for title, had been destroyed by fire, a bond for title offered in evidence, purporting to have been executed by the intestate, but differing essentially from the recitals of the judgment directing the execution of the deed, as stated therein, was insufficient to show that it was the bond on which the court acted, or rebut the presumption that the court had sufficient evidence before it on which to render the judgment on which

the deed was executed. *Dutton & Rutherford v. Wright & Vaughn*, 85 S. W. 1025, 38 Tex. Civ. App. 372.

The legal representatives of M., deceased, executed a deed as such representatives to make title to the grantee M. and wife, reciting a decree of the probate court empowering such representatives to make title to the grantee according to a contract of deceased, and the receipt by them of the agreed consideration. Held, that though the decree was void, so that the deed was not binding on the heirs of M., the grantee had the superior title, if M. had contracted to convey the land to him, and he had paid the purchase money to M.'s legal representatives, of which facts the recitals in the deed as well as the fact that for 60 years thereafter no one claiming under M. asserted claim to the land, but the grantee continuously asserted claim thereto and paid taxes thereon, are evidence. *Cope v. Blount*, 91 S. W. 615, 38 Tex. Civ. App. 516.

A grantee executed an instrument binding him to reconvey. His independent executrix, joined by her husband, executed a deed of reconveyance, which the parties believed was valid, and a satisfaction of the obligation to reconvey. For many years the validity of the reconveyance was not contested. Held, that the failure of the original grantor to bring suit to compel specific performance was excused, and the agreement to reconvey was not a stale demand. *McAllen v. Raphael* (Civ. App.), 96 S. W. 760, affirmed in 101 Tex. 637, no op.

dd. Lease.

An ordinary contract of lease will not, under the rule, be such a personal contract as would be annulled by the death of the lessee. *Wilcox v. Alexander* (Civ. App.), 32 S. W. 561.

On the death of a lessee his administrator is bound to perform the conditions of the lease. *Wilcox v. Alexander* (Civ. App.), 32 S. W. 561.

(f) Rescission and Cancellation.

Where a vendor has rightfully abandoned a contract for the conveyance of land, having the right to rescind, such contract is at an end, and can not be revived by the action of his administrator in treating it as still in force. *Todd v. Caldwell*, 10 Tex. 236.

Administrator can not rescind contract of sale of land made by his intestate without restoring purchase money received by decedent. *Harris v. Catlin*, 37 Tex. 581, 583, following *Thomas v. Beaton*, 25 Tex. Supp. 318.

Contract by Which a Debt of Decedent Assumed by Grantee.—See post, "Rescission and Cancellation," V, K, 1, b, (6), (f).

(g) Specific Performance.

See the title SPECIFIC PERFORMANCE.

c. Under Will.

Where by the terms of a will the testator's estate was devised to his executors in trust, with full power to sell and dispose of it for certain purposes, the balance of it to remain in their possession for five years, with power to rent and make repairs, when it was to be divided among certain devisees, the executors took the full legal title, although it was in trust. *Matthews v. Darnell*, 27 Tex. Civ. App. 181, 65 S. W. 890, affirmed (see 95 Tex. 682, no op.).

Limitations by reason of adverse possession of the land by defendants for the five years during which the title and consequent right of action was in the executors, could be pleaded as a defense in an action by a devisee for recovery to the land, and the coverture of the devisee did not entitle her to avoid such defense. *Matthews v. Darnell*, 27 Tex. Civ. App. 181, 65 S. W. 890, affirmed (see 95 Tex. 682, no op.).

"The executors took the whole estate in trust for others, and not any part of it for themselves, and the ad-

verse possession of the land in controversy gave them the right of action as trustees. *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 88 Tex. 468, 27 S. W. 100, affirming 27 S. W. 100." *Matthews v. Darnell*, 27 Tex. Civ. App. 181, 182, 65 S. W. 890, affirmed (see 95 Tex. 682, no op.).

2. Possession and Use.

a. In General.

Upon the issuance of letters testamentary or of administration upon an estate the executor or administrator has the right to the possession of the estate, etc., or against the heirs or legatees. Rev. Stat., art. 1817; *Roberts v. Stuart*, 80 Tex. 379, 387, 15 S. W. 1108; *Laas v. Seidel*, 28 Tex. Civ. App. 140, 142, 66 S. W. 871, 68 S. W. 724.

Administrator is entitled to possession of estate for payment of debts under such regulations as law prescribes. *Chubb v. Johnson*, 11 Tex. 469, 475. See *Portis v. Cole*, 11 Tex. 157.

Administrator has right to possession of estate as it existed at death of intestate. *Ansley v. Baker*, 14 Tex. 607, 613.

Whole estate goes into the hands of the executor or administrator in trust. *Anderson v. Stewart*, 15 Tex. 285, 288.

Though the sole devise in a will has lapsed by the death of the devisee before testator's death, an independent executor, appointed by the will, is entitled to the custody of the estate for the purpose of paying the debts. *Moore v. Bryant*, 10 Tex. Civ. App. 131, 31 S. W. 223.

By act of 1840, the common-law rule is changed, and executor is given care and control of entire estate, real as well as personal. *Howard v. Republic*, 2 Tex. 311, 313.

b. Rents and Profits.

Where the estate is solvent, and the family, one of whom was administrator, cultivates the homestead for the benefit of the estate, the widow not dissenting, she can not afterwards present any claim for the use and occu-

pation of the property unless she shows that the adult members of the family have misapplied the proceeds or converted them to their own use. *James v. Thompson*, 14 Tex. 463.

If subtenant of a life tenant rents only so many acres to make a crop on, with no right to retain the land thereafter, life tenant's administrator has right to all rent reserved by the contract, but if use of dwellings and other valuable rights are embraced in rent contract, which would pass to reversion on life tenant's death, administrator is entitled to full amount of rent contract, less fair proportionate value of premises unoccupied by the crops, estimated from death of life tenant to end of contract rental term. *Reed v. McGouirk* (Civ. App.), 35 S. W. 527, 528.

Surviving wife is liable to deceased husband's minor heirs for reasonable rent of improved property occupied by her as a homestead under improper order of probate court. *Linch v. Broad*, 70 Tex. 92, 97, 6 S. W. 751.

Liability.—Administrator is not responsible for rents of property taken from his possession under order of court. *Johnson v. Wilcox*, 53 Tex. 413, 421.

Under Rev. St. art. 2053, an administrator who rented property without authority of the probate court became responsible to the estate for the reasonable value of the rent. *Oglesby v. Forman*, 77 Tex. 647, 14 S. W. 244.

Whether a person is individually, or as administratrix of her deceased husband, liable for the use and occupation of the premises of the decedent, is a question of fact to be determined by the jury; and it is error to instruct the jury that they might find a verdict against the defendant individually, unless they believed she occupied and carried on the plantation for the benefit of the estate, and had accounted for the profits arising from its cultivation. *Patrick v. Roach*, 27 Tex. 579.

Recovery.—That the defendant paid the rent demanded to a guardian appointed in another county, where the intestate died, there being no debtors nor creditors of the estate, and the heirs being minors, is a defense which should be allowed to be made to a suit by an administrator not appointed until six years after the death of the intestate. *Homuth v. Zapp*, 20 Tex. 807.

During the administration of a decedent's estate and while there is a necessity for further administration, the administrator is alone entitled to sue for and recover rents accruing from the use of the decedent's real estate which are to be administered as assets under the supervision of the county court. *Smart v. Panther*, 42 Tex. Civ. App. 262, 95 S. W. 679.

3. Abandonment of Lands of Estate.

a. Putting Another in Possession.

Administrator has no right to put another in possession of lands of his intestate. *Barrett v. Barrett*, 31 Tex. 344, 346.

b. Establishment of Boundary.

A provision in a will, authorizing the executor to do all business that may belong in any manner to the testator's estate as executor, does not authorize him to establish a boundary line to the testator's land different from the true one. *Lagow v. Glover*, 77 Tex. 448, 14 S. W. 141.

4. Power to Claim and Hold Adversely to Estate.

Ordinarily an administrator or executor can not claim to hold the property of the estate adversely. *Bradshaw v. Mayfield*, 18 Tex. 21.

The action of an executor in placing upon the inventory certain land owned by the testator warrants a finding that his subsequent possession of the land was not adverse to the estate, although he was one of the grantees in a deed of it by the testator. *McCelvey v. McCelvey*, 15 Tex. Civ. App. 105, 38 S. W. 473.

Where the executor received the possession of land of his testator from the temporary administrator, and after that there was no change in the attitude towards the estate of the executor and the other minor defendants, who lived on the land with him, such facts warranted a finding that their possession was not adverse. *McCelvey v. McCelvey*, 15 Tex. Civ. App. 105, 38 S. W. 473.

Where the wife claims property before her husband's death, which property is in the husband's possession as usual in the case of husband and wife, and the husband dies and the wife administers on his estate, the facts of administration by her, does not deprive her altogether of the right to claim that she possessed said property adversely to the estate while administratrix; but it must be notorious that she makes such individual, adverse claim, and be brought home to the knowledge of those interested, or the circumstances must be such that it might have been known, had any degree of the diligence which persons are required to exercise in their own affairs, been used; but as against minor heirs (especially where they have no guardian), the possession could not be deemed as adverse. *Bradshaw v. Mayfield*, 18 Tex. 21.

"Under the facts and presumptions it could not be well presumed that she was holding as head of the family, or in any other trust but that of administrator. Upon the facts, she either held for herself or for the estate, and it was for the jury to find the capacity in which she did hold." *Bradshaw v. Mayfield*, 18 Tex. 21, 27.

L. DISCOVERY AND COLLECTION.

1. Duty and Authority.

a. In General.

Administrator may enforce claims of estate to property and obtain possession of it. *Herrington v. Williams*, 31 Tex. 448, 463.

Estate of Wife by Administrator of Husband.—Where the husband and wife are both deceased, and administration is first taken out on the estate of the wife, and the community property reduced into possession by the administrator, it would admit of much doubt whether the administrator of the husband, on a subsequent grant, could claim control over said property. *Grande v. Herrera*, 15 Tex. 533.

Debts Due from Executor or Administrator.—See post, "Set-Off and Counterclaim," V, S, 11.

b. Duty to Collect by Suit.

An executor or administrator has the right to bring actions for the recovery of the real estate of decedent. *Graham v. Vining*, 2 Tex. 433, following *Thompson v. Duncan*, 1 Tex. 485; *Bogges v. Brownson*, 59 Tex. 417; *Guilford v. Love*, 49 Tex. 715; *Gunter v. Fox*, 51 Tex. 383; *Howard v. Republic*, 2 Tex. 311; *Shannon v. Taylor*, 16 Tex. 413; *Owen v. Shaw*, 20 Tex. 81; *Millican v. Millican*, 24 Tex. 426, 441.

Administrator is bound to bring suit for lands, belonging to estate, in adverse possession of others. *Barrett v. Barrett*, 31 Tex. 344, 345.

The courts have placed the right of the administrator to sue upon the ground that his undertaking is to administer all the estate. *Bogges v. Brownson*, 59 Tex. 417, 420; *Graham v. Vining*, 2 Tex. 433.

The legal obligation of an administrator to return an inventory of the whole estate, and administer the same faithfully, without any distinction between real and personal property, invests him, as a necessary consequence, with the power to sue for the recovery of lands. *Howard v. Republic*, 2 Tex. 311, 314; *Thompson v. Duncan*, 1 Tex. 485.

If any land be due a deceased intestate under the laws of the country, the administrator is authorized to sue

the government for the same, as well from the special laws permitting such suits to be brought as from the powers conferred by general laws on executors and administrators. *Howard v. Republic*, 2 Tex. 311.

Defendants had no title to goods nor right of possession, and hence were wrongdoers, as against whom the possession to which plaintiff was entitled as administrator was sufficient to give him the right to sue for the goods or their value. *Bridges v. Williams*, 28 Tex. Civ. App. 38, 66 S. W. 120.

Husband as Administrator of Wife.

—A husband and wife executed a bond to convey title, but the wife's acknowledgment was fatally defective. The obligee of the bond subsequently assigned it to one through whom defendant claimed, and the husband became surety for his performance of the contract arising therefrom. Held, that any cause of action which might arise from this contract of suretyship could not affect the husband's right to recover the land, as temporary administrator of his wife, nor could such claim be set up against the husband in such action. *Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027.

In an action of trespass to try title prosecuted after his wife's death for her separate property as her administrator, the defendant could not defeat the action or obtain any relief upon a personal obligation of the husband touching the land and made to a remote vendor of the defendant. *Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027.

2. Liability for Failure to Collect.

a. General Rule.

"The general rule is well established that an executor or administrator shall not be charged with any other goods as assets than those which come to his hands." *Townsend v. Munger*, 9 Tex. 300, 312.

Property Fraudulently Conveyed.—

If the administrator of a fraudulent

vendor neglects to use the appropriate means of subjecting property fraudulently conveyed by his intestate to the payment of his debts, it lays the foundation for a suit against him on the part of his creditors. *Danzey v. Smith*, 4 Tex. 411. This is obiter. The case of *Danzey v. Smith*, 4 Tex. 411, is denied in *Cobb v. Norwood*, 11 Tex. 556, 559, and in *Avery v. Avery*, 12 Tex. 54, 57. See post, "Property Fraudulently or Voluntarily Conveyed by Decedent," VII, C, 22, a, (4).

b. Degree of Care Required.

See ante, "Degree of Care Required—Due Diligence," V, H.

c. Allowing Cause of Action to Be Barred.

"If an administrator has either been so faithless or negligent that he suffered a good cause of action to be barred, by which the estate he is representing is injured, * * * he must account to those interested in the estate as best he may." *Thomas v. Brooks*, 6 Tex. 369, 370; *Swenson v. Walker*, 3 Tex. 93.

3. Receiving Payment.

a. Authority to Receive.

War Certificate.—Where the state treasurer paid the amount of a war certificate to the administrator of the person entitled thereto, the heirs were not entitled to maintain suit for the recovery of the certificate or payment thereof, since payment to the administrator was a satisfaction of the claim. *Roan v. Raymond*, 15 Tex. 78.

b. Authority as to Medium or Mode.

(1) General Rule.

Administrator has no authority to accept anything but lawful money in payment of debt due his intestate. *Casey v. Turner*, 32 Tex. 64, 65; *Kleberg v. Bonds*, 31 Tex. 611, 612; *Scott v. Atchison*, 38 Tex. 384, 394; *Scott v. Atchison*, 36 Tex. 76.

An administrator has no authority to take a note due to him in his fiduciary capacity, for a consideration mov-

ing from the estate under his charge, that is payable in anything but lawful money. *Casey v. Turner*, 32 Tex. 64.

(2) Receiving Payment in Something Other than Money.

Administrators can not change character of trust funds held by them without order of court of equity. *Scott v. Atchison*, 38 Tex. 384, 390; *Scott v. Atchison*, 36 Tex. 76.

Powers to Make a Novation.—The rule that an administrator or trustee can not make a novation of an old debt by accepting in lieu thereof another obligation, without authority of a court having jurisdiction over trusts, etc., is subject to the rules governing negotiable paper. *Atcheson v. Scott*, 51 Tex. 213.

An administrator holding note payable to himself can accept, without authority of equity court, the obligation of another in lieu thereof, where such other is ignorant of the fiduciary nature of debt. *Atcheson v. Scott*, 51 Tex. 213, 221.

An administrator having no power to give a valid consent to accept a confederate money contract as a novation of a liability due to the estate, the original liability is not extinguished by such novation. *Scott v. Atchison*, 36 Tex. 76, 83, following *Kleberg v. Bonds*, 31 Tex. 611, 612. See *Ranson v. Alexander*, 31 Tex. 443. See the title NOVATION.

Accepting Substitute for Note.—Unauthorized act of administrator in surrendering note, and accepting a substitute therefore is conversion of estate's assets. *Chapman v. Brite*, 4 Tex. Civ. App. 506, 512, 23 S. W. 514.

An administrator who, without authority from the county court, surrenders a note belonging to the estate, and substitutes another in its stead, executed by only one of the parties to the original note, is guilty of a conversion of the assets of the estate; and his liability and that of his sureties for such misappropriation can not be

discharged by showing that the new note is in existence, and has not been paid. *Chapman v. Brite*, 4 Tex. Civ. App. 506, 23 S. W. 514.

An agreement by an attorney of an executrix to surrender a note due the estate in consideration of the transferee's note, then given, to pay the amount mentioned in the surrendered note on a certain contingency, does not discharge the first note, as an executor can not change the character of the trust fund held by him without the order of the court having chancery jurisdiction. *Scott v. Atchison*, 38 Tex. 384.

Bonds, Notes and Accounts of Third Persons.—An administrator can not receive notes and accounts on third parties in payment of a debt due the estate without a proper order for that purpose from the county court. *Trammell v. Swan*, 25 Tex. 473.

And the doctrine of estoppel in pais will not avail the party giving such notes or accounts as payment, as a defense against the debt due the estate, beyond the amount of money which may have been realized from them. *Trammell v. Swan*, 25 Tex. 473, 474.

Under Pasch. Dig. art. 1337, an administrator has no power to accept a bond of third parties in satisfaction of a debt due the estate, unless he has authority from the probate court so to do. *Edmonson v. Garnett*, 33 Tex. 250, following *Hamilton v. Pleasants*, 31 Tex. 638; *Trammell v. Swan*, 25 Tex. 473.

(3) Payment in Confederate Money.

Payment to executor, or administrator in confederate money does not discharge the debt. *Scott v. Atchison*, 38 Tex. 384, 392; *Scott v. Atchison*, 36 Tex. 76; *Kleberg v. Bonds*, 31 Tex. 611, 612.

Where an administrator has received a debt due the estate in confederate money, and surrendered the evidence of debt, such transaction is not viewed

by the court as an executed contract, but the debt still remains due, and may be collected by process of law. *Kleberg v. Bonds*, 31 Tex. 611; *Scott v. Atchison*, 38 Tex. 384, 394; *Scott v. Atchison*, 36 Tex. 76. See, also, *Ransom v. Alexander*, 31 Tex. 443.

A vendee of land, as part of the consideration, agreed to pay a note of the vendor which was expressly secured by a lien on the land. The attorney of the administrator of the payee's estate agreed with the vendee to surrender the note, taking the latter's note secured by a trust deed, and payable after peace was ratified between the United States and the confederate states in legal-tender currency of the latter. His note was afterwards paid to the administrator in confederate money. Held, that the vendor's debt was not extinguished. *Scott v. Atchison*, 38 Tex. 384.

Where wife is sole heir and executrix of husband's estate she is bound by her receipt for payment in confederate money of debt due husband who died after such payment. *Allen v. Baker*, 39 Tex. 220, 224.

Liability of Executor.—Executor is not liable for accepting confederate money. *Kenney v. Briere*, 45 Tex. 305, 308. But see contra *Kleberg v. Bonds*, 31 Tex. 611, 612.

(4) By Set-Off.

See post, "Set-Off and Counter-claims," V. S. 11.

An executor has power to accept claims against an estate in discharge of claims accruing after the testator's death, and is entitled to set off the one against the other. *Dickenson v. McDermontt's Ex'rs*, 13 Tex. 248.

Agreements to make such set-off will be enforced. *Dickenson v. McDermott*, 13 Tex. 248, 252.

Where solvency of estate is beyond dispute, executor may be forced to admit claim against estate in set-off of debt contracted after debt of testator.

Dickenson v. McDermott, 13 Tex. 248, 252; *Hall v. Hall*, 11 Tex. 526, 555.

An off-set against a claim against an estate which the executor allowed without qualification is not valid as against a purchaser for value, without notice of the off-set. *Selkirk v. McCormick*, 33 Tex. 136, 139.

c. Amount.

Receipt by administrator of true amount due an estate will be approved, although the debt had been originally inventoried at a higher figure. *Wright v. Pate* (Sup.), 1 S. W. 661, 662.

d. Liability.

Receiving Confederate Money.—See ante, "Payment in Confederate Money," V, L, 3, b, (3).

4. Arbitration and Compromise.

An executor or administrator may compromise a doubtful claim in favor of his decedent's estate. *Wright v. Pate* (Sup.), 1 S. W. 661.

An administrator has no power to submit to arbitration claims in favor of his intestate. *Johnson's Adm'rs v. Cheney*, 17 Tex. 336.

M. CARE, MANAGEMENT AND PRESERVATION.

1. Statutory Provisions.

Article 1329 Pasch. Dig., providing for care of estate in hands of administrator, while it enjoins upon him exercise of degree of care that a prudent man would exercise in preserving his own property, confers no power such as a prudent man would have over his own property. *Jones v. Lee*, 86 Tex. 25, 50, 22 S. W. 386, 1092, affirming 20 S. W. 863.

2. Contracts.

a. Powers.

Power to Create Debt against Estate.—An administrator has no power to create a debt which will bind the estate upon which he administers, except in such cases as are expressly provided for by statute. *McMahan v. Harbert*, 35 Tex. 451, distinguishing *Montgomery v. Culton*, 18 Tex. 736,

and *Montgomery v. Nash*, 23 Tex. 157. See to the same effect *McKinney v. Peters*, *Dallam* 545; *Price v. McIver*, 25 Tex. 769. See, also, *Francis v. Northcote*, 6 Tex. 185.

In relation to debts incurred by an administrator against an estate, the law contemplates that he will have incurred the expense, by the payment of the money, or by becoming personally responsible to a third person. *Andrus v. Pettus*, 36 Tex. 108, 111; *Price v. McIver*, 25 Tex. 769, 770.

b. Requisites and Validity.

(1) Consideration.

(a) In General.

A contract by an executor or administrator must have a valid consideration to support it. *Perry v. Booth*, 7 Tex. 493, 499.

(b) Obligations Payable in Confederate Money.

Executory contracts made by executors or trustees, and payable in confederate notes, may be enforced for the use of the beneficiaries; but the defendant may reduce the recovery to the actual value of the property or other consideration for which the obligations were given. *Shearon v. Henderson*, 38 Tex. 245, overruling *Smith v. Nelson*, 34 Tex. 516, and following *Hamilton v. Pleasants*, 31 Tex. 638, 641; *Trammel v. Philleo*, 33 Tex. 393; *Thompson v. Bohannon*, 38 Tex. 241; *Lacey v. Clements*, 36 Tex. 661, 665.

(2) Fraud.

"An administrator, although he stands as the representative of the estate, has no more right to enforce a contract obtained by his fraud than would be the case if the contract was made in his own interest." *Cross v. Freeman*, 19 Tex. Civ. App. 428, 430, 47 S. W. 473.

Where an administrator by his false representations, procured the execution of a contract, the defendant can set up this fact in avoidance thereof; and the rule of estoppel that ordinarily operates against a tenant in de-

priving him of the right to deny his landlord's title would not apply in such a case. *Cross v. Freeman*, 19 Tex. Civ. App. 428, 430, 47 S. W. 473.

c. Personal Liability on Unauthorized Contract.

Administrator making unauthorized contract in representative capacity can not be bound personally. *Perry v. Booth*, 7 Tex. 493, 499.

Agreement to Pay Debt Barred by Statute.—See post, "Contracts to Pay Debts of Estate," V, M, 2, d, (3), (e).

d. Particular Contracts.

(1) Bills and Notes.

See the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 966.

Where a note was in fact executed by an executrix for the benefit of the estate, though it did not disclose the fact on its face, and the money secured by the execution of the note was used in the interest of the estate, the executrix was liable thereon in her representative capacity. *Ellis v. Littlefield*, 93 S. W. 171, 41 Tex. Civ. App. 318.

An executor or administrator may assign a note made to him as such for a debt due to his testator or intestate. *Gayle v. Ennis*, 1 Tex. 184. See the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 896.

(2) Agreement to Waive Right of Appeal.

Independent executors may bind their estate by an agreement to waive right of appeal in consideration of staying of execution and order of sale on the judgment. Query, has an ordinary executor such power. *Johnson v. Halley*, 8 Tex. Civ. App. 137, 138, 27 S. W. 750, affirmed in 93 Tex. 665, no op.

(3) Contracts for Services, Labor, etc.

(a) In General.

A contract by the widow for labor will not bind the estate of the deceased husband, although done for the benefit of the estate. *Halton v. Simmell*, 43 Tex. 585.

(b) Agent to Sell Real Estate.

An executrix has authority to employ an agent to find a purchaser for land, and to agree to pay a commission therefor. *Dyer v. Winston*, 77 S. W. 227, 33 Tex. Civ. App. 412.

Where a testator's will gives his executors power to sell his real estate, they can employ an agent to procure a purchaser for them, and the estate is liable for the agent's commissions; Rev. St. art. 2192, providing that executors shall be allowed all reasonable expenses and attorneys' fees necessarily incurred by them in the management of the estate, or in the course of administration. *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268. See ante, "Delegation of Power," V, I.

(c) Contract for Location of Land.

An administrator, under proper orders, and with the approval of the court, can make a valid locative contract, and give the locator part of the land for services in locating the certificate. *Halbert v. De Bode* (Civ. App.), 28 S. W. 58; *Murrell v. Wright*, 78 Tex. 519, 15 S. W. 156; *Wren v. Harris*, 78 Tex. 349, 14 S. W. 696; *Halbert v. Carroll* (Civ. App.), 25 S. W. 1102; *Baker v. Hamblen* (Civ. App.), 85 S. W. 467, 468; *Galbraith v. Howard*, 11 Tex. Civ. App. 230, 32 S. W. 803, affirmed in 93 Tex. 661, no op.; *Williams v. Howard*, 10 Tex. Civ. App. 527, 31 S. W. 835, affirmed in 93 Tex. 677, no op.; *Jack v. Cassin*, 9 Tex. Civ. App. 228, 230, 28 S. W. 832; *Williams v. Howard*, 10 Tex. Civ. App. 527, 534, 31 S. W. 835, affirmed in 93 Tex. 677, no op.; *Wren v. Harris*, 78 Tex. 349, 14 S. W. 696.

Where a league and labor certificate is included in the estate of an intestate, his administrator may, with the court's approval, contract for its location on shares. *Williams v. Howard*, 10 Tex. Civ. App. 527, 31 S. W. 835; *Jack v. Cassin*, 9 Tex. Civ. App. 228, 230, 28 S. W. 832.

Parol Contract.—An administrator is bound by an oral contract with the third person for the location of a land certificate belonging to decedent's estate by which such third person is to receive a part of the land located as compensation for his services and expenses. *Jack v. Cassin*, 9 Tex. Civ. App. 228, 28 S. W. 832.

Parol contract by independent executor with land locator binds heirs upon performance by locator. *Murrell v. Wright*, 78 Tex. 519, 524, 15 S. W. 156.

Independent Executor.—An executor, authorized by will to sell at public or private sale such part of the personal property as he may deem best, may employ another to locate a land certificate belonging to the estate, giving him one-half of the land for locating the certificate, and paying the expense of obtaining a patent. *Murrell v. Wright*, 78 Tex. 519, 15 S. W. 156; *Williams v. Howard*, 10 Tex. Civ. App. 527, 533, 31 S. W. 835, affirmed in 93 Tex. 677, no op.

Power of Administrator of Husband to Bind Community Interest.—An administrator of the husband can contract for the location of a land certificate on shares so as to bind the community interest of the wife. *Williams v. Howard*. (Civ. App.), 31 S. W. 835, followed *Galbraith v. Howard & Hume*, 11 Tex. Civ. App. 230, 32 S. W. 803.

Power of Court to Authorize Conveyance.—The county court had power in 1861, by virtue of its general probate jurisdiction, to authorize the necessary conveyance to complete a contract made by an administrator for the location of a land certificate on shares, though Act 1848 (Pasch. Dig. art. 1313) only gave it jurisdiction to carry out a contract made by deceased. *Williams v. Howard*, 10 Tex. Civ. App. 527, 31 S. W. 835.

Operation of Administrator's Deed to Location.—A contract was made by an administrator, in the course of the

administration, with A., for the location of land under a certificate, under which contract A. was to receive a portion of the land located. The contract was approved by the court, and after the location of the certificate a partition deed was made to A. by the administrator under an order of the court. Held, that the deed vested title in A. *Halbert v. Carroll* (Civ. App.), 25 S. W. 1102, citing *Murrell v. Wright*, 78 Tex. 519, 15 S. W. 156; *Wren v. Harris*, 78 Tex. 349, 14 S. W. 696.

(d) Employment of Attorney.

An administrator may employ an attorney. *Teal v. Terrell*, 48 Tex. 491, 509.

If a party employs an attorney to prosecute a suit in his behalf as an administrator, he will be personally responsible for the attorney's fee, unless it is otherwise stipulated in the contract. *McGloin's Ex'rs v. Vanderlip*, 27 Tex. 366; *Andrus v. Pettus*, 36 Tex. 108; *Caldwell v. Young*, 21 Tex. 800.

There being no special contract, the attorney has his choice to demand his compensation either of the administrator individually, or of the estate. *Andrus v. Pettus*, 36 Tex. 108; *Caldwell v. Young*, 21 Tex. 800.

The personal liability of the administrator to the attorney for the fee is not affected by the fact that he has no pecuniary interest in the suit wherein he employs the attorney. *McGloin v. Vanderlip*, 27 Tex. 366.

Nor has the statute of frauds any application in such case. *McGloin v. Vanderlip*, 27 Tex. 366.

An administrator may employ an attorney, but he has not authority to convey lands of the intestate in payment of fees of an attorney whom he has employed; and the sanction of the probate court will not sustain such a transaction. *Teal v. Terrell*, 48 Tex. 491.

Attorney's Fees and Costs.—See post, "Attorney's Fees and Costs of Litigation," VII, B, 5.

(e) Contract to Pay Debts of Estate.

Where a note for a large amount, which was barred by the statute of limitations, had been presented to the administratrix and been rejected, and then sued, the creditor and administratrix agreed that the administratrix should desist from any further defense against said suit; that the administratrix should apply for and obtain an order of sale of all the property of the estate, including notes, accounts, etc.; that the creditor should bid and secure at the sale the sum of \$2,000, or a sum sufficient to pay all the other debts of the estate and the expenses of administration; that the administratrix, after paying the other debts and expenses of administration, should apply the balance of proceeds of that and all previous sales to the note aforesaid, which the creditor was to receive in full satisfaction thereof; that the creditor should dismiss his suit so soon as the sale was made; and that the note should be delivered to the administratrix, to be used by her as a voucher in the settlement of her account. It was held that the administratrix had no authority to make such a contract, and that she was not bound in her personal capacity, because she did not contract personally, and because the promise was without consideration; the claim being against another, and being barred. *Perry v. Booth*, 7 Tex. 493.

(4) Contracts Respecting Real Estate.**(a) Contracts for Repairs and Improvements.**

Rev. St. 1895, art. 1983, authorizes administrators to keep the buildings of the estate in tenantable repair; and article 1984 provides that the administrator shall carry on a plantation belonging to the estate, or rent the same. Held, that an administrator has no authority to contract with a tenant of a farm belonging to the estate to pay him for improvements consisting of ditches, etc., lumber, paint, and paper-

ing, for building barns, or assisting the administrator in selling lands belonging to the estate. *Rice v. Conwill*, 80 S. W. 393, 35 Tex. Civ. App. 341.

The only power conferred upon administrators, in connection with the repair of improvements on estates, is to keep the buildings in tenantable repair (Rev. Stat., art. 1983) and under a lease contract an administrator could not bind the estate for improvements made by the lessee. *Rice v. Conwill*, 35 Tex. Civ. App. 341, 80 S. W. 393.

(b) Lease by Executor and Administrator.

In ante, "Rents and Profits," V, K, 2, b.

(c) Mortgage.**Executors under Control of Court.**

—Executors have no power to mortgage land of their testator to secure a debt due from his estate. *Smithwick v. Kelly*, 79 Tex. 564, 15 S. W. 486.

A sale of property under a judgment of the district court foreclosing a mortgage executed by an executor without authority of law, does not pass any title to the purchaser. *Smithwick v. Kelly*, 79 Tex. 564, 15 S. W. 486.

Where an agent controlling two judgments against an estate for different parties, received a conveyance from the administrator in trust to sell and apply the proceeds of sale to their payment, neither creditor acquired under the trust deed anything more than a lien upon the land and a right to demand its sale in satisfaction of his debt. *Stephenson v. Martin*, 68 Tex. 483.

Power to Sell.—Power given by will to executors to sell land does not authorize them to mortgage land or execute deed of trust. *Willis v. Smith*, 66 Tex. 31, 43, 17 S. W. 247; *Stephenson v. Roberts*, 25 Tex. Civ. App. 577, 64 S. W. 230; *Faulk v. Dashiell*, 62 Tex. 642. See the titles POWERS; WILLS.

Under a power to sell lands for the payment of debts, a mortgage, may be

given to raise money for that purpose, unless it be the clear intention of the testator, in directing the sale, that his real estate should be absolutely converted *Faulk v. Dashiell*, 62 Tex. 642, 643; *Prieto v. Leonards*, 32 Tex. Civ. App. 205, 209, 74 S. W. 41, affirmed in 97 Tex. 644, no op.; *Stevenson v. Roberts*, 25 Tex. Civ. App. 577, 64 S. W. 230.

"In the case of *Quiesenberry v. Watkins*, etc., *Mortg. Co.*, 92 Tex. 247, 47 S. W. 708, it was held that the power 'to sell and dispose of the property was controlled by another clause of the will which had the effect to prescribe that the sale should be only one that dispossessed the executor of the title to the land.' The case of *Faulk v. Dashiell* (62 Tex. 642, 643) was cited, and its force and authority was not questioned." *Prieto v. Leonards*, 32 Tex. Civ. App. 205, 209, 74 S. W. 41, affirmed in 97 Tex. 644, no op. And see *Stevenson v. Roberts*, 25 Tex. Civ. App. 577, 64 S. W. 230.

Power to Sell, Exchange and Dispose.—Where an executor was authorized, under a will, to manage and control the estate without the intervention of the courts, and in his discretion, and for the interest of the testator's children, "to sell, exchange, and dispose" of it as he may deem necessary for such interest, he has authority to incumber the estate by a deed of trust, and to authorize the trustee, on default in payment of the borrowed money, to sell the land. *Faulk v. Dashiell*, 62 Tex. 642; *Stevenson v. Roberts*, 25 Tex. Civ. App. 577, 64 S. W. 230; *Prieto v. Leonards*, 32 Tex. Civ. App. 205, 209, 74 S. W. 41, affirmed in 97 Tex. 644, no op. See, also, *Orr v. O'Brien*, 55 Tex. 149, 155; *Danish v. Disbrow*, 51 Tex. 235.

Deed of trust to secure loan by executor acting under power, when signed and acknowledged as such executor, it appearing that executor had no interest other than as execu-

tor in property, held to operate upon right and title of estate of testator. *Faulk v. Dashiell*, 62 Tex. 642, 646.

Where executor having general power to sell, exchange and dispose of estate as he may deem necessary for interest of testator's children, executes mortgage, mortgagee is not bound to ascertain necessity for loan to executor nor to see to application of money. *Faulk v. Dashiell*, 62 Tex. 642, 650; *Prieto v. Leonards*, 32 Tex. Civ. App. 205, 209, 74 S. W. 41, affirmed in 97 Tex. 644, no op.

Though there be no specific direction for sale of estate but only trust to pay debts, trustee may raise required amount by sale or mortgage, without a decree. *Faulk v. Dashiell*, 62 Tex. 642, 650.

Independent Executor.—An independent executrix has power, under Rev. Stat., art. 1867, to mortgage the lands of testator when necessary to pay his debts, though the land is specifically devised. *Stevenson v. Roberts*, 25 Tex. Civ. App. 577, 64 S. W. 230, distinguishing *McDonough v. Cross*, 40 Tex. 251, 280; *Roy v. Whitaker*, 92 Tex. 346, 355, 48 S. W. 892, 49 S. W. 367; *Faulk v. Dashiell*, 62 Tex. 642; *Terrell v. McCown*, 91 Tex. 231, 244, 43 S. W. 2.

Plaintiffs' father appointed his wife as independent executrix. He left certain real estate to her for life, remainder to plaintiffs, and directed that certain other property, real and personal, be sold to pay his debts and specific legacies. Without selling the real property designated, the executrix mortgaged it, with a portion of that devised to plaintiffs, to secure such debts. Held, under Rev. St. art. 1867, providing that the powers of executors shall be governed by the principles of the common law when not in conflict with the state statutes, that the mortgage was valid, since the devise to plaintiffs was necessarily subject to necessity to sell the land

to pay debts, and the rule of common law that a power to sell includes a power to mortgage is not changed by sections 1869, 1995, 2007, or 2009, or any other provision of the statutes. *Stevenson v. Roberts*, 64 S. W. 230, 25 Tex. Civ. App. 577.

(d) Sale.

See the title EXECUTORS' AND ADMINISTRATORS' SALES.

(5) Pledge of Personality.

"In *Williams*, Ex'rs, p. 803, it is said that, when an executor with authority to pledge the assets of the estate does so, the pledgee may sell the things pledged, if they are not redeemed within the proper time." *Stevenson v. Roberts*, 25 Tex. Civ. App. 577, 64 S. W. 230.

(6) Suits.

Administrator may sue upon a contract, made with him as administrator, in his own name. *Gayle v. Ennis*, 1 Tex. 184, 189.

An executor or administrator may sue in his individual capacity on a note payable to him as administrator. *Gayle v. Ennis*, 1 Tex. 184; *Moss v. Witcher*, 35 Tex. 388; *Spann v. Glass*, 35 Tex. 761.

Judgment.—Where a partition of land belonging to an estate is made by probate court between a locator of the land and the estate, the heirs of which are unknown, the fact that such heirs are not made parties to the proceeding will not render the judgment therein void. *Williams v. Howard*, 10 Tex. Civ. App. 527, 31 S. W. 835, affirmed in 93 Tex. 677, no op.; *Guildford v. Love*, 49 Tex. 715, 732.

3. Continuing Business and Managing Plantation of Deceased.

a. Under Power Conferred by Will.

A testator may authorize his executor to continue his business. *Primm v. Mensing Bros. & Co.*, 14 Tex. Civ. App. 395, 38 S. W. 382; *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252, 263, 83 S. W. 6.

Executors authorized to carry on a plantation have power to incur indebtedness for supplies for the tenants to enable them to make crops. *Primm v. Mensing*, 38 S. W. 382, 14 Tex. Civ. App. 395.

Rev. St. 1895, arts. 1984, 2009, authorize the prosecution of a testator's business after his death, subject to the control of the probate court. Held, that where claims were incurred in the continuation of a testator's business according to his will, and the control of the probate court was not invoked, the estate will be liable therefor. *McMillan v. Hendricks' Estate* (Civ. App.), 46 S. W. 859.

Partnership.—"A partner, too, may by his will provide that the partnership shall continue notwithstanding his death; and if it be consented to by the surviving partner, it becomes obligatory, just as it would if the testator, being a sole trader, had provided for the continuance of his trade by his executor after his death." *Altgelt v. Sullivan & Co.* (Civ. App.), 79 S. W. 333, 337.

Executory Personal Contracts.—See ante, "Executory Personal Contracts," V, K, 1, b, (6), (b).

b. In Absence of Power under Will.

(1) Prior to Statute of 1879.

"Before the adoption of the Revised Statutes of 1879, the common law prescribed the powers of executors and administrators in reference to both individual and partnership business of the testator or intestate, and, except by authority conferred by will or partnership contract, neither class of business could be continued by an executor or administrator." *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252, 263, 83 S. W. 6, reversing 79 S. W. 582.

Partnership.—Executor can not bind estate of deceased partner by participation in business. *Alexander v. Lewis*, 47 Tex. 481, 489. See post, "Partnership Business," V, M, 3, b, (2), (e).

(2) Subsequent to Statute of 1879.**(a) In General.**

Under the express provisions of Sayles' Ann. Civ. St. 1897, art. 1984, an administrator has authority to carry on a business belonging to the estate. *Altgelt v. Oliver Bros.* (Civ. App.), 86 S. W. 28; *Altgelt v. Sullivan & Co.* (Civ. App.), 79 S. W. 333; *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252, 83 S. W. 6.

Rev. St. 1895, art. 1984, providing that if there be a business belonging to the estate, and the disposition thereof is not directed by will, and if the same be not required to be at once sold for the payment of debts, it shall be the duty of the executor or administrator to carry on the business or rent the same, as shall appear to be most for the interest of the estate, does not repeal article 1867, providing that the rights, powers, and duties of executors and administrators shall be governed by the principles of the common law where the same do not conflict with any provision of the statute. Judgment (Civ. App.), 79 S. W. 582, reversed. *Altgelt v. Alamo Nat. Bank*, 83 S. W. 6, 98 Tex. 252.

(b) Power to Borrow Money and Execute Evidence of Debt.

Under Rev. St. 1895, art. 1984, an independent executor appointed by a will providing that no bond shall be required of him, and declaring that no other action shall be had in the county court or in any other court in relation to the settlement of the estate than the probating of the will, and containing no direction either for carrying on or for discontinuing testatrix's business, may decide to carry on the business, and may borrow money for the purpose of carrying on the business, and execute notes therefor. (Civ. App.), *Altgelt v. Alamo Nat. Bank*, 79 S. W. 582, judgment reversed 83 S. W. 6, 98 Tex. 252.

Duties of Lender to Inquire Whether Business Profitable.—One furnishing

money to an independent executor carrying on decedent's business is not called on to inquire whether the business is carried on by the executor at a loss or a profit. (Civ. App.), *Altgelt v. Alamo Nat. Bank*, 79 S. W. 582, judgment reversed 83 S. W. 6, 98 Tex. 252.

Duty to See to Appropriation of Money Loaned.—One knowing that a person, as independent executor of a decedent, was, as authorized by law, carrying on decedent's business, was not required, on furnishing money to him as such executor, to see that he appropriated the same to the business; there being nothing to show that the creditor knew that the executor was misappropriating the money. (Civ. App.), *Altgelt v. Alamo Nat. Bank*, 79 S. W. 582, judgment reversed 83 S. W. 6, 98 Tex. 252.

Notes Executed before Qualification and Subsequently Ratified.—A note executed by an independent executor for the purpose of raising money to carry on decedent's business is valid, though executed before the executor qualified, where subsequent thereto he paid interest thereon, and recognized its validity. (Civ. App.), *Altgelt v. Alamo Nat. Bank*, 79 S. W. 582, judgment reversed 83 S. W. 6, 98 Tex. 252.

Renewal Notes.—An independent executor who borrows money to carry on the decedent's business, and executes notes therefor, may give renewal notes in lieu of the originals. (Civ. App.), *Altgelt v. Alamo Nat. Bank*, 79 S. W. 582, judgment reversed 83 S. W. 6, 98 Tex. 252.

Money for Running Plantation.—See post, "Managing Plantation," V, M, 3, b, (2), (c).

Note Executed in Carrying on Partnership Business.—See post, "Partnership Business," V, M, 3, b, (2), (c).

(c) Managing Plantation.

Under §§ 1931, 1932, Rev. Stat., executors and administrators have extreme powers and discretion in the

management of plantations belonging to estates. It is their duty to carry on the intestate's plantation, unless there is good reason for not doing so. *Reinstein v. Smith*, 65 Tex. 247, 250.

Use of Work Stock.—Under Rev. St. 1895, art. 1984, authorizing the administrators to operate the plantation of the estate, they may, for such purpose, use the work stock belonging to the estate. *R. E. Stafford & Co. v. Dunovant's Estate* (Civ. App.), 81 S. W. 65.

Construction of Order of Court.—The portion of an order of the county court for operation by the administrators of the plantation of the estate, which authorizes them to use the "live stock" of the estate for such purpose, is not to be construed as a postponement of a creditor's right to enforcement of her lien existing on a portion of such live stock; no application to such court for an order for sale thereof having been made. *R. E. Stafford & Co. v. Dunovant's Estate* (Civ. App.), 81 S. W. 65.

Liability of Estate for Advances and Labor.—Widow who expends money for labor for benefit of husband's estate may compel payment from assets. *Halton v. Simmell*, 43 Tex. 585, 586.

One who has furnished money or goods to an executor or administrator, upon the credit of an estate, to carry on plantations belonging to the estate, is entitled to look to the estate for reimbursement. *Reinstein v. Smith*, 65 Tex. 247, 251.

H., a planter, died intestate in 1865, having been in the habit of transacting his business with M. & Co. as his commission merchants. After his death, his administrator conducted the plantation by order of the probate court, and continued its business transactions with M. & Co., and incurred a large indebtedness to them for plantation supplies. The administrator was removed, and administrators de bonis non appointed. M. & Co. sued the ad-

ministrators de bonis non for the indebtedness, setting forth the above facts, and further alleging that the supplies were furnished for the benefit and on the credit of the estate alone, were required by its necessities, and were used by it; that there were but few debts against the estate, and the administration was carried on in the interest of the heirs, and not of creditors; and that the claim had been presented to the defendants, who admitted its justness and offered to pay it in other claims. Held, that a demurrer to the plaintiff's petition was properly sustained. The indebtedness was one for which the estate could not be made liable by the administrator, even though he acted under the authority of the probate court. But if the suit had been against the heirs, with proof that they approbated the creation of the debt, and profited by it, an equitable liability to pay it might have been established against them, as in the case of *Montgomery v. Cuiton*, 18 Tex. 736. *McMahan & Co. v. Harbert*, 35 Tex. 451. See *Francis v. Northcote*, 6 Tex. 185.

Remedy for Abuse of Power.—In case of abuse by the administrators of the right to make proper use of mortgaged live stock in the operation of the plantation of the estate, conferred by an order of the county court, the remedy is by proper proceedings in the county court, and not by certiorari and trial de novo of the application of the administrators on which the order was made. *R. E. Stafford & Co. v. Dunovant's Estate* (Civ. App.), 81 S. W. 65.

(d) Mercantile Business.

Rev. St. art. 1931, empowering an executor, in certain contingencies, to carry on a plantation, manufactory, or business left by his testator, must be construed to include a mercantile business. Where the executor is free from the control of the county court, i. e., an independent executor, it is the duty

to determine, from the lights before him, whether the estate will be benefited by continuing the business; and, if he uses a reasonable discretion, his estate is not chargeable with loss incurred in carrying on such business. *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75.

A testator who at the time of his death was engaged in a mercantile business in San Antonio, constituted by will his sister, who resided in France, as testamentary executrix, exempting her from giving bond. By a subsequent clause he provided: "As soon as my death is assured, I will that my mercantile business shall be immediately brought to a stop, and my store closed and shut up." He charged with the duty of closing his store, a friend residing in San Antonio, requiring him to make haste to secure his books and to notify his executrix. Held, that the requirement to stop the mercantile business and close the store was provisional, and was not intended to direct the closing of the store and suspension of the mercantile business, beyond the period when the executrix should arrive and undertake the discharge of the trust. The executrix thus exempt from giving bond, or her successor, being in like manner exempt under the provisions of the will, had the right to continue the mercantile business of the testator, if thought best for the interest of the estate. *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75.

Employment of Agent to Purchase Goods.—Under Sayles' Ann. Civ. St. 1897, art. 1984, authorizing an administrator to carry on a business belonging to the estate, and under an order expressly authorizing a temporary administrator to conduct a hardware business by buying and selling merchandise so that the stock should not deteriorate, the administrator had authority to employ an agent to purchase goods for the business, and to bind the

estate for compensation for the agent. *Altgelt v. Oliver Bros.* (Civ. App.), 86 S. W. 28.

(e) Partnership Business.

Rev. St. 1895, art. 1867, provides that the "rights, powers, and duties of executors and administrators shall be governed by the principles of the common law where the same do not conflict with any provisions of the statute." Held, that as, by the common law, the death of a partner dissolves the partnership, and imposes on the surviving partner the duty of closing up the business, paying debts, and accounting to the personal representatives or heirs of the deceased partner, the executor of a deceased partner has no authority to continue the business of the partnership. Judgment (Civ. App.), 79 S. W. 582, reversed. *Altgelt v. Alamo Nat. Bank*, 83 S. W. 6, 98 Tex. 252, following *Rogers v. Flournoy*, 21 Tex. Civ. App. 536, 558, 54 S. W. 386, affirmed in 93 Tex. 649, no op.

Article 1984 of the Revised Statutes, in providing for continuing a business belonging to the estate by the executor, did not repeal the common law as to partnership so as to authorize the executor to continue a business carried on by decedent in partnership with others. *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252, 83 S. W. 6, reversing 79 S. W. 582.

Rev. St. 1895, art. 1984, providing that if there be a business belonging to the estate, and the disposition thereof is not directed by will, and if the same be not required to be at once sold for the payment of debts, it shall be the duty of the executor or administrator to carry on the business or rent the same, as shall appear to be most for the interest of the estate, does not authorize the executor to continue a business in which the deceased was a partner. Judgment (Civ. App.), 79 S. W. 582, reversed. *Altgelt v. Alamo Nat. Bank*, 83 S. W. 6, 98 Tex. 252.

The language "business belonging to the estate" does not include partnership business. *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252, 263, 265, 83 S. W. 6, 12.

The provision in a will, "And I further direct that my executor have ample time to pay debts and wind up my estate before the same is divided among the legatees, * * * and I further direct that when my executor gets my estate in condition to divide and partition, that he file an application" with the county judge, does not authorize the executor, though authorized to act as independent executor, to continue a partnership in which decedent was a partner. *Altgelt v. D. Sullivan & Co. (Civ. App.)*, 79 S. W. 333, reversed on another point 83 S. W. 6, 98 Tex. 252.

An independent executor has no power to continue, as such executor, a partnership business conducted by decedent, unless authorized to do so by the terms of the will; and where his decedent, E., had carried on a business under the name of E. & Co., which her independent executor continued under the same style after her death, and there was evidence tending to show that E. was not its sole owner, others being interested as partners with her, it was error to hold the estate liable on notes executed by the independent executor, in the name of E. & Co., in carrying on such business, without a finding that there was not, in fact, any such partnership. *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252, 83 S. W. 6, reversing 79 S. W. 582.

There being no agreement by the partners for continuing the business upon the death of one of them, nor authority given by will of the deceased for its continuance by the executor the estate could not be held liable upon notes given by such executor in carrying it on. *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252, 83 S. W. 6, reversing 79 S. W. 582.

4. Investments and Loans.

Obligations Payable in Confederate Money.—See ante, "Consideration," V, M. 2, b, (1).

5. Individual Interest in Transaction or Contract.

a. In General.

Administrator can derive no advantage from manner in which he transacts the business or manages assets of the estate. *Erschine v. De La Baum*, 3 Tex. 406, 414.

b. Effect of Power of Sale Mortgage.

The right of the mortgagee to buy at his own sale, when the mortgage has a power to sell, does not include the right of the mortgagee, while administering the property prior to the foreclosure sale, to deal with the trust property otherwise than as a trustee. *McShan v. Myers*, 1 Posey Unrep. Cas. 100. *Howard v. Davis*, 6 Tex. 174, 184.

c. Payment of Individual Indebtedness with Funds of Estate.

An administrator has no power to assign claims due the estate in satisfaction of his individual debts. *Bledsoe v. White*, 42 Tex. 130.

Where an administrator fraudulently transfers a note belonging to the estate to third persons in payment of his individual indebtedness, the proceeds of the note can be recovered from them by the administrator *de bonis non*, and the sureties of the first administrator and the maker of the note, who paid it to the wrong party, are not necessary parties defendant even though they may also be liable. *Ullman v. Verne*, 68 Tex. 414, 4 S. W. 548.

Where an administrator *de bonis non* sues a third person to recover the proceeds of a note fraudulently transferred to him by the first administrator in payment of the latter's individual indebtedness, the defendant's claim that the share of the first administrator as an heir of the decedent should be deducted from the amount sued for can only be sustained upon pleading

and proof that there would have been a surplus of the estate after payment of debts. *Ullman v. Verne*, 68 Tex. 414, 4 S. W. 548.

In a suit against an attorney for funds collected on a note, the property of an estate, payable to the administrator or bearer, such attorney can not plead that such note had been assigned to him by the administrator in payment of a debt owed by the administrator to the attorney. *Bledsoe v. White*, 42 Tex. 130.

d. Taking Property at Appraised Value.

An executor or an administrator can not take any part of the estate property at its appraised value. *Chifflet v. Willis & Bro.*, 74 Tex. 245, 252, 11 S. W. 1105; *Crescent Ins. Co. v. Camp*, 71 Tex. 503, 506, 9 S. W. 473.

Under the statute which positively forbids an administrator's taking property of the estate at its appraised value, where the administratrix files an exhibit containing an item for property converted to her own use, it is not proper to accept the report and charge her with its appraised value, but she should be required to show its application, and, if it has been misapplied, she should be removed and proceeded against on her bond for the value of the property and interest and profits. *Chifflet v. Willis*, 74 Tex. 245, 11 S. W. 1105.

e. Purchase by Executor or Administrator at His Own Sale.

See the title EXECUTORS' AND ADMINISTRATORS' SALES.

f. Purchase from Heirs.

See post, "Purchase from Heirs, Devisees, etc." V, O, 5.

g. Purchase from Decedent's Vendee.

An administrator of a deceased vendor may purchase from the vendee the land conveyed to him; the vendor's estate, having no interest therein. *Davis v. Ragland*, 42 Tex. Civ. App. 400, 93 S. W. 1099.

h. Purchase of Claims against Estate.

An administrator can not purchase for his own use, directly or indirectly, any claim against his decedent's estate. He can derive no advantage from purchasing debts against the estate. *Crescent Ins. Co. v. Camp*, 71 Tex. 503, 506, 9 S. W. 473; *Erskine v. De La Baum*, 3 Tex. 406, 423.

A person who, in view of taking the administration of an estate purchases claims against the estate at a discount, is only entitled to credit for the amount actually paid. *Chevallier v. Wilson*, 1 Tex. 161.

i. Remedy.

When the property of an estate is misappropriated and invested in a mercantile enterprise without authority of law, the remedy is not to require the administrator to file an account showing the condition of the business, but to remove the administrator and appoint one who should sue to recover the value of the property so converted, and if the investment yielded profits then also for its profits. If the property converted be money or claims due the estate, then ample remedy may be found in the administrator's bond; but if property subject to appraisal has been converted and can not be returned the administrator should be removed. *Chifflet v. Willis & Bros.*, 74 Tex. 245, 11 S. W. 1105.

6. Advances by Executor or Administrator.

If an administrator advances money toward claims or expenses allowed by law, and funds come to his hands after such payment, he can retain sufficient funds to reimburse him. *Dunson v. Payne*, 44 Tex. 539; *Lewis v. Nichols*, 38 Tex. 54, 60; *Hicks v. Morris*, 57 Tex. 658; *Gray v. Cockrell*, 20 Tex. Civ. App. 324, 329, 49 S. W. 247.

In Compromise of Claim.—When an executor makes a valid compromise of a debt against the estate of his testator, by giving to the creditor property which belonged to the executor

in his individual right, he is entitled to be subrogated to the rights of the creditor, and will be entitled to share the assets pro rata. *Lewis v. Nichols*, 38 Tex. 54.

Contribution from Cotenants.—

Where the defendant, claiming to be sole heir, had paid from his private means to protect the estate, the fact that he was administrator, and might have paid from the funds of the estate and been allowed credit in its settlement, did not preclude him from calling on his cotenants for contribution when they sought partition. *Hanrick v. Gurley*, 93 Tex. 458, 55 S. W. 119, 54 S. W. 347, 56 S. W. 330, affirming in part and reversing in part 48 S. W. 994.

The right of the defendant, on partition, to have contribution from his cotenants for expenses incurred by him as administrator in protecting the property, was not limited to those paid on account of the particular land sought to be partitioned, but might include all expenses made for the general benefit. *Hanrick v. Gurley*, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330, affirming in part and reversing in part 48 S. W. 994.

7. Expenditures.

a. General Rule.

Provision is made for the allowance to executors or administrators by the chief justice of all reasonable expenses necessarily incurred by them in the preservation, safe-keeping, and management of the estate. *Armstrong v. O'Brine*, 83 Tex. 635, 639, 19 S. W. 268; *Adriance v. Crews*, 45 Tex. 181, 182.

"This provision comprises the only debts which the executor or administrator can create against the estate. And it contemplates that he will have incurred the expense by the payment of money or by becoming personally responsible to third persons. On general principles of equity it has been held that the estate may be held re-

sponsible to third persons with whom the administrator has created debts properly chargeable against the estate. But to enable a third person to hold the estate so responsible, he must take upon himself the burden of proving that it was a reasonable expense incurred for the benefit of the estate, in the same manner as the administrator must have done, had he incurred the expense and presented his claim for allowance by the chief justice.

* * * 'The giving of the note by the executor did not bind the estate.'" *Adriance v. Crews*, 45 Tex. 181, 182, quoting from *Price v. McIver*, 25 Tex. 769, 772, as stating the result of *Caldwell v. Young*, 21 Tex. 800; *Davenport v. Lawrence*, 19 Tex. 317; *Young v. Smith*, 22 Tex. 345, 347; *Jones v. Lewis*, 11 Tex. 359, 364, and *Portis v. Cole*, 11 Tex. 157.

An executrix has authority to incur reasonable and proper expense in the management and disposition of the estate in accordance with the terms of the will. *Dyer v. Winston*, 77 S. W. 227, 33 Tex. Civ. App. 412.

b. Attorney's Fees and Court Costs.

Executor will be allowed all reasonable attorney fees that may be necessarily incurred by them in the course of the administration. *Armstrong v. O'Brien*, 83 Tex. 635, 639, 19 S. W. 268. See ante, "Employment of Attorney," V, M, 2, d, (3), (d).

The estate of a deceased person is liable to an attorney for the reasonable value of professional services necessarily rendered at the instance of the administrator for the benefit of the estate. *Jones v. Lewis*, 11 Tex. 359.

An ordinary administrator can stipulate only for reasonable attorney's fees or compensation for services obtained in administering the estate and can not contract for the prosecution of claims giving a stipulated share of the sum which may be realized. Aliter in case of the survivor administering the community property. *James v.*

Turner, 78 Tex. 241, 14 S. W. 574. See the title HUSBAND AND WIFE.

Hart. Dig. art. 1188, providing that all reasonable attorney's fees necessarily incurred by an administrator in the course of administration shall be allowed, does not prevent an administrator from contracting for attorney's services in an action against the estate, for which the attorney may sue the administrator in his representative capacity. *Portis v. Cole*, 11 Tex. 157.

An attorney at law can maintain an action against an administrator in his representative capacity, upon a reasonable contract for professional services in a case where such services were necessary. *Caldwell v. Young*, 21 Tex. 800; *Price v. McIver*, 25 Tex. 769; *Jones v. Lewis*, 11 Tex. 359; *Portis v. Cole*, 11 Tex. 157.

An executor was entitled in his account to charge a reasonable fee paid to attorneys for defending an action brought for the purpose of attacking testator's title to the land devised and for damages. *Ackermann v. Ackermann* (Civ. App.), 99 S. W. 889.

Where testator devised his real estate, share and share alike, and gave one of the devisees a legacy, but did not leave sufficient personal property to liquidate it, and such devisee refused to sign a deed conveying a parcel of the real estate until the others agreed to give her a lien on another parcel for her legacy, and thereafter some of the devisees sued, attacking the claim of the devisee in question, it was the duty of the executor to defend against the action and employ counsel at the expense of the estate, and this, notwithstanding the fact that such devisee had employed counsel. *Ackermann v. Ackermann* (Civ. App.), 99 S. W. 889.

The temporary administrator is not entitled to an allowance for his attorney representing him on appeal by the heirs of the decedent to the district court from the order of the probate court fixing the compensation of the

administrator. *Bell v. Goss*, 76 S. W. 315, 33 Tex. Civ. App. 158.

The costs incurred in an abandoned effort to administer upon an estate are chargeable to the person incurring them and not against the decedent's estate. *Duncan v. Veal*, 49 Tex. 603; *Marks v. Hill*, 46 Tex. 345.

Costs of Defending or Prosecuting Title to Land.—All expenses necessarily incurred by an administrator in prosecuting or defending the title of the estate for taxes and court costs were properly chargeable against the whole estate; and, if the administrator has not been reimbursed for such expenditures, he has the right to have them taken into account in a proceeding distribution of the estate. *Eckford v. Knox*, 67 Tex. 200, 2 S. W. 372; *Hanrick v. Gurley*, 93 Tex. 458, 476, 55 S. W. 119, 54 S. W. 347, 56 S. W. 330, affirming in part and reversing in part 48 S. W. 994.

Fees for Prosecution—Indian Depredation Claims.—Where intestate had certain claims against the government for depredations committed by Indians, his administrator had no power to pay to any person out of the sum collected from the United States an amount exceeding 15 per cent of the amount allowed by the court of claims for expenses and fees in procuring such allowance. *Friend v. Boren*, 43 Tex. Civ. App. 33, 95 S. W. 711, affirmed in 101 Tex. 636, no op., applying *Lynch v. Pollard*, 26 Tex. Civ. App. 103, 62 S. W. 945.

Recovery of Excess Fees.—Administratrix can not sue under act regulating fees of office, in individual capacity, for excess fees paid as administratrix. *Orton v. Engledow*, 8 Tex. 206, 209.

c. Taxes.

An independent executor, who is in possession of land left by deceased, and who has paid the taxes thereon, is entitled to be reimbursed therefor before the land can be recovered by the

heirs. *Moore v. Bryant*, 10 Tex. Civ. App. 131, 31 S. W. 223.

1. Misappropriation, Waste or Loss of Assets.

a. General Rule.

General executors and administrators are liable for all assets that have come into possession, or that might have been reduced to possession by the use of ordinary care. *Roberts v. Stuart*, 80 Tex. 379, 15 S. W. 1108. See ante, "Degree of Care Required—Due Diligence," V, H.

An executor can not be charged in his account for an outstanding debt due the deceased which he did not collect, where its noncollection was not due to gross negligence, and was not collusive, fraudulent, or unreasonable, since an executor can only be charged with acts and assets which have or should have come to his hands in the exercise of reasonable diligence. *Townsend v. Munger*, 9 Tex. 300.

That property was lost or squandered in the course of the administration is a ground of complaint against the administrator in the probate court, or in direct proceedings for the revision of such errors. *Baker v. De Zavalla*, 1 Posey Unrep. Cas. 621.

Effect of Misappropriation and Extent of Liability.—If an administrator, having possession of the personal effects of his intestate, abuses his trust, and uses such property as his own, he thereby renders himself and his securities liable to the heirs, creditors, and other persons interested in the estate. *Evans v. Oakley*, 2 Tex. 182.

In such a case, the person to whom such property may have been illegally transferred and delivered is not, ordinarily, liable for the same or its value at the suit of the heirs. Their remedy must be against the administrator and the securities on his official bond. *Evans v. Oakley*, 2 Tex. 182.

Liability for Interest.—See post, "Interest," V, M, 9.

b. Loss before Qualification.

An executor is not liable for the loss of property before his qualification, unless he had such property then in possession. *Roberts v. Stuart*, 80 Tex. 379, 15 S. W. 1108.

Executor is not liable for assets which never came into his control, but were stolen before he qualified, and which he has used due diligence to recover. *Roberts v. Stuart*, 80 Tex. 379, 387, 15 S. W. 1108.

See testimony held to support a finding as a fact the theft of certain articles before letters of temporary administration had been obtained, and negating the allegation that the testatrix died in possession of the property sued for. *Roberts v. Stuart*, 80 Tex. 379, 15 S. W. 1108.

c. Recovery by Administrator d. b. n.

See post, "Powers and Duties," XII, C.

9. Interest.

Executors and administrators are not chargeable with interest on assets in their hands as of course; but there must be special circumstances to warrant such a charge. *Davis v. Thorn*, 6 Tex. 482.

Under the probate laws, provided for speedy settlement of estates, an administrator is not liable, in the absence of statutory provision, for interest on funds in his hands, unless he actually loans such funds, and receives interest. *Stonebraker v. Friar*, 70 Tex. 202, 7 S. W. 799.

Section 173 of the probate law of 1870 provides, "that the court shall exercise equitable control in making executors or administrators accountable for interest accruing to the estate;" and it appearing to the supreme court that this power was equitably exercised in the present cause by the court below, it declines disturbing the judgment. *Noble v. Jones*, 35 Tex. 692.

Payment into Court.—In a suit against an administrator he may save interest

by tendering into court the money remaining in his hands; but if he resists the proceedings of one entitled thereto, it is proper to charge him with interest from the time the money should have been paid over, or demand made. *Simpson v. Knox*, 1 Posey 569.

Failure to Deliver Funds to Heirs or Pay Legacies.—Where an administrator fails to deliver money to the heirs, or to account for it in any way for 10 years, it is not error to charge him with interest thereon from the time he received it. *McKinney v. Nunn*, 82 Tex. 44, 17 S. W. 516.

Executrix would be liable for interest on legacy from time when, in prudent management of estate, she could safely pay legacy. *Hawkins v. Forrest*, 1 Posey 167, 174.

Delay to Pay Debts.—An executrix will be chargeable with interest from the time when, in the prudent management of the estate, and in view of its debts and conditions, and after demands made on her, she can pay it with out risk. *Hawkins v. Forrest*, 1 Posey Unrep. Cas. 167.

An administrator will be chargeable with interest accruing on claims against the estate which have been approved, if he have funds and neglect to take proper steps to have the funds applied to the discharge of the claims. *Finley v. Carothers*, 9 Tex. 517.

Funds Misappropriated or Used for Individual Benefit.—Where an administrator failed to account for a large sum of money belonging to the estate, which he had in his hands from September 6, 1877, until April 2, 1903, and, though denying that he loaned funds belonging to the estate, he testified that he loaned his own money at high rates of interest, it was proper for the court to charge him interest on the funds of the estate so misappropriated at the highest legal rate. *Thomas v. Hawpe*, 80 S. W. 129, 35 Tex. Civ. App. 311.

10. Torts.

a. In General.

Administrator can not render the estate responsible in damages for torts, but is bound to deal fairly with third persons, regarding estate. *Able v. Chandler*, 12 Tex. 92.

b. Fraud and Illegality.

See ante, "Fraud," V, M, 2, b, (2).

An administrator, in the performance of his duties, is bound to act fairly, and not fraudulently; and the estate can not be permitted to derive any unjust or unconscientious advantage from his unauthorized fraudulent conduct or representations. *Able v. Chandler*, 12 Tex. 88; *Crayton v. Munger*, 9 Tex. 285.

The fact that an administratrix is suing in a representative capacity can not confer on her any right to commit a fraud on an innocent person, and then shelter herself from the consequences of such fraud under the pretext of acting in a fiduciary capacity. *Swenson v. Walker*, 3 Tex. 93, 99. See the title ESTOPPEL, vol. 6, p. 992.

"An administrator, it is true, can not create a charge upon the estate he represents by his illegal or fraudulent acts; and it is equally true that the estate can not derive benefit, or obtain a legal advantage as against innocent third persons, by means of such acts. The estate can neither be charged nor can it charge others by means of the illegal or fraudulent acts of its legal representatives. That an administrator in his representative capacity can not derive benefits from frauds committed by him in that or any other capacity is a proposition too plain to require illustration. It is (says Judge Story in his Commentaries on Equity Jurisprudence) manifestly a result of natural justice that a party ought not to be permitted to avail himself of any agreement, deed, or other instrument, procured by his own fraud, or by his own violation of legal duty, or public policy, to the prejudice of an innocent

party. (2 Story, Eq., § 695.) It would, indeed, be a monstrous doctrine to hold that estates may speculate upon the fraudulent acts of their legal representatives." *Crayton v. Munger*, 9 Tex. 285, 292.

Where a note secured by a mortgage of property belonging to an estate was paid off and discharged in money by the executor, and the mortgagee released her lien, it discharged the estate from further liability to her, and it is not responsible to her for alleged fraudulent acts of the executor in aiding attorneys in lending the money for her on inadequate security, so that, in the event of her failing to realize the amount of her second loan, she could be reinstated in her rights under the first mortgage so paid and discharged. *Coutlett v. United States Mortg. Co. of Scotland*, 58 S. W. 997, 94 Tex. 164.

c. Conversion or Retention of Property of Third Person.

(1) In General.

"Where an administrator obtains and converts property belonging to another under the belief that it belongs to the estate of his intestate, he is liable, in his representative as well as in his individual capacity, to the owner for the value of the property; and, when sued in his representative capacity, the sureties are liable on his official bond, if his liability is established. *Schmitt v. Jacques*, 26 Tex. Civ. App. 125, 62 S. W. 956, affirmed in 94 Tex. 707, no op.; *Clapp v. Walters*, 2 Tex. 130." *Hill v. Escort*, 38 Tex. Civ. App. 487, 86 S. W. 367, 368.

Where an administrator obtained and converted a bank deposit given by his intestate to plaintiff, the administrator was liable therefor both in his representative and individual capacity. *Hill v. Escort*, 86 S. W. 367, 38 Tex. Civ. App. 487.

If A grant his goods to B in fraud of creditors, B can recover the goods from A's administrator on the ground, among others, that the deed was void

only as against creditors; but that it remained good as against the party himself, and his executors and administrators. *Hoeser v. Kraeka*, 29 Tex. 450.

(2) Actions.

(a) Personal or Representative Capacity.

Where property has come into the possession of an executor or administrator, he may be sued therefor by a person claiming a better title, either in his individual or representative capacity. *Clapp v. Walters*, 2 Tex. 130.

Administration Void.—Where an administrator is sued by a stranger for the recovery of land, proof of title in the administrator's intestate is a good defense to the action, though the administration is void. *Victory v. Stroud*, 15 Tex. 373.

(b) Form of Action.

Trespass to Try Title.—See post, "Parties," V, M, 10, c, (2), (d); "Parties," VIII, D. See the title TRESPASS TO TRY TITLE AND EJECTMENT.

Action of Detinue.—See *Robbins v. Walters*, 2 Tex. 130, 137.

Exceptions Not Taken below.—A petition which does not aver the facts of the possession in the intestate and in his representative; if exception be taken at the proper time on account of such omissions, must be adjudged insufficient to sustain the action. And advantage can be claimed in the appellate court, if all the fact in proof are sent up, and there had been no proof of such possession. In the absence of such statement of facts, and the want of such proof not otherwise appearing, the appellate court is bound to presume the evidence was sufficient to sustain the action. The court is not left to the influence of this rule in support of the verdict; where the record shows that possession and demand was admitted. The admission must be understood to be such demand and possession as would sustain the action. *Robbins v. Walters*, 2 Tex. 130, 137.

Venue.—A plea to the jurisdiction by executors in trespass to try title, that they live in another county than that in which suit is brought, and administered the estate there, is bad. *Terry v. Cutler*, 4 Tex. Civ. App. 570, 23 S. W. 539.

(c) Time to Sue and Limitations.

Rev. Stat., art. 3218, providing that on the death of a person against whom there may be "cause of action" limitations shall cease to run for a year, or until the qualification of an executor or administrator for the deceased, applies to actions for the recovery of land. *Wynne v. Parke* (Civ. App.), 32 S. W. 726, reversed on another point in 89 Tex. 413, 34 S. W. 907.

(d) Parties.

The heirs are not necessary parties to a suit against an administrator for land claimed by him as property of the estate. *Gunter v. Fox*, 51 Tex. 383, overruling *Barrett v. Barrett*, 31 Tex. 344.

Under Probate Act, 1870, § 160, providing that section 229 shall not apply to independent-executors, the rule that in a suit against an independent executor to contest the title of the estate to land the heirs and devisees need not be made parties defendant was not changed by section 229, requiring such persons to be made parties defendant in such suits. *Wood v. Mistretta*, 49 S. W. 236, 20 Tex. Civ. App. 236.

A suit to correct a mistake in a sale of a land certificate by an executor is not a suit to contest the title of the estate to land, within Probate Act 1870, § 229, requiring the executor and heirs and devisees to be made parties to suits contesting the estate's title to land. *Wood v. Mistretta*, 49 S. W. 236, 20 Tex. Civ. App. 236.

Action or Contract Respecting Location of Land Certificate.—Heirs of decedent were not necessary parties to action against administrator to enforce administrator's contract respecting location of land certificate of estate.

Jack v. Cassin, 9 Tex. Civ. 228, 230, 28 S. W. 832.

In an action to establish a right of way across the land of a decedent, the heirs or devisees should be made parties defendant. *Dwyer v. Olivari* (Sup.), 16 S. W. 800.

(e) Pleading.

In an action by a donee of a savings bank deposit against the donor's administrator, a petition alleging that the deposit was not the property of the deceased, but was and is the separate property of plaintiff, given and delivered to her by deceased, who was her father, prior to his death, sufficiently alleged plaintiff's ownership. *Hill v. Escort*, 38 Tex. Civ. App. 487, 86 S. W. 367.

In an action by a donee of a bank deposit against the donor's administrator to recover the same, it was not necessary that plaintiff should have pleaded the writing by which she acquired title in order to prove it. *Hill v. Escort*, 38 Tex. Civ. App. 487, 86 S. W. 367.

(f) Verdict.

In an action against an independent executrix and the heirs of a decedent claiming land in controversy, a verdict against the executrix binds the heirs, though it does not mention them. *Kalteyer v. Wipff* (Civ. App.), 49 S. W. 1055.

(g) Judgment.

On a recovery of land against one claiming it both in her own right and as independent executrix of her son's estate, judgment recovered for rents should run against her, not only as executrix, but personally. *Penn v. Case*, 36 Tex. Civ. App. 4, 81 S. W. 349, affirmed 98 Tex. 628, no op.

An order in the probate court declaring "that D is entitled to one-half of said league of land," evidences an adjudication in the court upon the subject; as do the words, it "having been shown to the satisfaction of the

court," import a trial. *Guildford v. Love*, 49 Tex. 715.

After such adjudication, and after a commission to make partition in accordance therewith had made their report, the court ordered that the administrator make deed for the half set apart within one month. Held, that the failure of the administrator to make such deed did not avoid the adjudication as to the extent of the interest. *Guildford v. Love*, 49 Tex. 715.

Persons Concluded—Heirs Concluded.

—Executors whether an independent executor or an executor administering under the probate court, is competent to bind heirs in defending, foreclosure suit; e. g., by submission to jurisdiction of federal bankruptcy court in suit by assignee to foreclose. *Cuney v. Shaw*, 56 Tex. 435, 438, citing *Guildford v. Love*, 49 Tex. 715; *Gunter v. Fox*, 51 Tex. 383; *Zacharie v. Waldrom*, 56 Tex. 116.

Presumption That Administrator Given Notice.—To support order of county court adjudging interest in land as against estate, it will be presumed, in absence of recitals of service that administrator was given due notice. *Guildford v. Love*, 49 Tex. 715, 741.

Title to Land Litigated in Suit in Which Administrator Defendant.—A judgment against the administrator alone does not conclude an heir to land, title to which may have been litigated in a suit in which the administrator was defendant in the litigation. *East v. Dugan*, 79 Tex. 329, 15 S. W. 273.

The heirs and devisees of a testator whose will provided for administration independently of the probate court are bound by a judgment entered in 1871 against the independent executor in an action involving the estate's title to certain real property, notwithstanding that they were not made parties thereto. *Wood v. Mistrretta*, 20 Tex. Civ. App. 236, 49 S. W. 236, 50 S. W. 135, affirmed in 93 Tex. 678, no op.

(h) Appeal.

See ante, "Pleading," V, M, 10, c, (2), (e).

N. PERSONAL LIABILITY.

Administrator is personally liable for his authorized acts. *Johnson v. Brown*, 25 Tex. Supp. 120, 128; *Edmonson v. Garnett*, 33 Tex. 230, 259.

The administration of the assets under the order of the court protects the administrator, in absence of actual fraud, against heirs of the deceased. *Cameron v. Morris*, 83 Tex. 14, 18 S. W. 422.

On Contracts.—See ante, "Personal Liability on Unauthorized Contract," V, M, 2, c; "Employment of Attorney," V, M, 2, d, (3), (d).

O. PROPERTY ACQUIRED BY EXECUTOR OR ADMINISTRATOR.

1. Conveyance in Individual Capacity.

Conveyance to Executor as Agent of Creditors.—An administrator sold land of the estate on 12 months' credit, and the note distributed among creditors of the estate in payment of their claims. When the note became due, the purchaser of the land conveyed it to the administrator in his individual capacity as an agent of the creditors as a part payment on the note. Held that, the estate's interest in the land was completely divested by the sale, and the fact that the administrator in his individual capacity received a reconveyance of it and sold it for the creditors did not give the heirs of the decedent any interest in the land. *Berryman v. Biddle*, 48 Tex. Civ. App. 624, 107 S. W. 922; *Berryman v. McDonald*, 49 Tex. Civ. App. 81, 107 S. W. 944.

Lands in Which Decedent Had Interest.—An administrator, who purchased in his own name lands in which decedent had an interest, and assumed the payment of a mortgage thereon, could not shift his liability to the estate by an ex parte proceeding in the county court, in which he alleged he had purchased the lands for the estate,

and not for himself, after the time for filing the mortgagee's claim to establish a lien had expired, and after proceedings had been begun to recover the lands. Judgment, *American Freehold Land & Mortg. Co. of London v. MacDonell* (Civ. App.), 54 S. W. 259, reversed. *American Freehold Land Mortg. Co. of London v. McDonell*, 55 S. W. 737, 93 Tex. 398.

2. Deed to Executor or Administrator as Such.

Deed made to administrator, as such, does not vest title in him, but becomes assets in his hands. *Soye v. McCallister*, 18 Tex. 80, 97.

A deed to an administrator vests the title in him, only sub modo, and for the purposes of administration. He takes only temporarily, for the benefit of creditors, if any, and the heirs; and his right determines with the period of his administration. *Easterling v. Blythe*, 7 Tex. 210.

Where land is conveyed to an administrator, it will be presumed, after the lapse of the period fixed by law for administration, that the estate has been fully administered, so as to entitle the heirs to sue for recovery of the land. *Easterling v. Blythe*, 7 Tex. 210.

Where land is conveyed to an administrator, the heirs, after the estate has been administered, may sue in trespass to try title therefor. *Easterling v. Blythe*, 7 Tex. 210.

Heirs may sue jointly to recover land, with or without administrator, where rights of creditors will not be affected. *Easterling v. Blythe*, 7 Tex. 210, 213.

"And, as respects the right of the heirs to maintain the action, it is not material whether their title be considered a legal or an equitable title. The law affords the same protection to the one as the other. *Easterling v. Blythe*, 7 Tex. 210, 214.

A vendor contracted by title bond to sell land on which he reserved a vendor's lien. Subsequently, on the pay-

ment of the purchase money by another than the purchaser, the vendor executed an instrument purporting to release and quitclaim the land to the purchaser, free of the vendor's lien. Held, that neither the title bond nor the subsequent instrument divested the vendor of his legal title, and a subsequent conveyance of the land and of the vendor's lien to the executrix of the person who paid the purchase money for the vendee invested such executrix with a vendor's lien, as well as the superior title to the land, or to money realized from its sale, as security for her claim. *Zieschang v. Helmke* (Civ. App.), 84 S. W. 436.

3. Property Purchased with Funds of Estate.

Where an executor or administrator purchase property with the funds of the estate, the purchase inures to the benefit of the estate. Where an executor or administrator purchases land with the money of the estate and takes the deed in his own name, and afterwards sells the same, his conduct is a fraud upon the rights of the heirs of the estate which he represented and a purchaser from the administrator with a knowledge of the facts becomes particeps criminis in the fraud. *McCoy v. Crawford*, 9 Tex. 353, 356.

Where an administrator purchases slaves with the property of the estate, they belong to the estate, and he holds them in trust for all interested, even if he be not rightfully administrator. *Parker v. Portis*, 14 Tex. 166.

Property bought by executors with funds belonging to estate or profits of such estate becomes part of estate, to which wife has no greater interest than she had at time of her husband's death. *Weir v. Smith*, 62 Tex. 1, 10.

4. Purchase at Sale in Favor of Decedent's Estate.

Where executor bid for land as executor of estate, it was sold to him as such executor, and he paid for it by credit on debts belonging to estate,

to pay which land was sold, property belonged to estate. *Thomson v. Shackelford*, 6 Tex. Civ. App. 121, 129, 24 S. W. 980, affirmed in 93 Tex. 697, no op. See *Weir v. Smith*, 62 Tex. 1, 15.

Where an administrator purchases land at a judicial sale made to satisfy a claim in favor of the estate which he represents, and causes the purchase money to be credited on the claim, the purchase inures to the benefit of the estate, although the administrator may have accounted for the purchase money in the final settlement. *McCoy's Heirs v. Crawford*, 9 Tex. 353.

Rights and Remedies of Heirs.—

Land purchased by administrator at judicial sale to satisfy debt due estate may be recovered by heirs from person to whom he has sold it with notice, notwithstanding purchase money has been accounted for. *McCoy v. Crawford*, 9 Tex. 353, 357.

A will directed the executor to collect the debts due testator, and divide them equally between five persons, one of whom was the executor. To defraud one of such legatees, who was also a creditor of the executor, the latter conveyed land taken in satisfaction of such debts to one having knowledge of his intent. Held that, in a suit by such defrauded legatee alone, the conveyance would be held void only as to two-fifths of the land; the executor being authorized by the will to sell any portion of the estate to satisfy legacies. *Thomson v. Shackelford*, 6 Tex. Civ. App. 980, 24 S. W. 980.

Deed to Heir by Mistake.—Where land sold upon a judgment recovered by an executor is bid in by him at execution sale, and by mistake the sheriff's deed is made out to the heirs of the testator, the land becomes an asset of the estate; and the fact of the mistake may be shown in a subsequent suit between the devisees of the testator and parties deriving title from the executor. *Bennett v. Kiber*, 76 Tex. 385, 13 S. W. 220.

5. Purchase from Heirs, Devisees, etc.

A trustee or executor who purchases the estate from the cestui que trust, or heir, must pay therefor a full, fair and adequate consideration, and if there be any concealment as to the real value of the property, or a false or fraudulent representation as to the value thereof, the sale will be set aside. *Hickman v. Stewart*, 69 Tex. 255, 5 S. W. 833; *Erskine v. De La Baum*, 3 Tex. 406; *Connolly v. Hammond*, 51 Tex. 635.

Under the laws of the late republic of Texas in force on June 1, 1844, an administrator could purchase from an heir of his intestate the interest of such heir in the lands belonging to the succession. *Erskine v. De La Baum*, 3 Tex. 406.

The vendor could not, at his option, set aside a purchase and sale so made, without showing some fraud on the part of the administrator in procuring such purchase. *Erskine v. De La Baum*, 3 Tex. 406.

Burden is on heirs selling to administrator to show fraud in vendee. *Erskine v. De La Baum*, 3 Tex. 406, 421.

Where testator gives a life estate in land to his wife, with remainder to his heirs, and the wife conveys her interest to the executor, he can not acquire title adverse to the heirs; and therefore, on the death of the wife, the remainder vests in the heirs, and is held by the executor for their benefit, and is a part of the estate, subject to distribution under the will. *Blackwell v. Blackwell*, 86 Tex. 207, 24 S. W. 389, reversing 23 S. W. 31.

6. Purchase from Decedent's Vendee.

See ante, "Purchase from Decedent's Vendee," V, M, 5, g.

7. Purchase of Claims against Estate.

See ante, "Purchase of Claims against Estate," V, M, 5, h.

P. COEXECUTORS AND COADMINISTRATORS.

1. Authority of Part to Act.

The acts of one of several adminis-

trators in respect to the administration of the effects are deemed to be the acts of all, and are valid. *Dean v. Duffield*, 8 Tex. 235.

All executors appointed by will must join in its execution. *McLane v. Belvin*, 47 Tex. 493, 501; *Hart v. Rust*, 46 Tex. 556; *Giddings v. Butler*, 47 Tex. 535, 544.

Where a will confers power on three executors "to settle the affairs" or to "settle up the estate" of a testator, one executor alone can not execute such power, where all three have accepted the trust. *Wright v. Dunn*, 73 Tex. 293, 295, 11 S. W. 330.

Two executors without the joinder, and in opposition to the wish of the third, can not create a valid and binding obligation against the estate for the payment of money. *McLane v. Belvin*, 47 Tex. 493; *Giddings v. Butler*, 47 Tex. 535, 544.

Ratification.—When a trust is executed by one of several joint executors, with the consent and approbation of the others, or when the others subsequently ratify a sale made by one under the trust, the act of the single executor will be regarded in equity as binding upon the estate. *Giddings v. Butler*, 47 Tex. 535.

The exceptions recognized above are as well settled as the rule that a joint power must be executed by the joint act of the trustees or executors. *Giddings v. Butler*, 47 Tex. 535.

Undertaking by one of two independent executors under a will requiring executors to act jointly does not bind the estate and can not be specifically enforced. *House v. Kendall*, 55 Tex. 40, 43.

Evidence of Contract.—In a suit for commissions by a real estate agent alleged to have been employed to sell land belonging to a decedent's estate, the letters written by one of the executors to plaintiff and to the person to whom testator's real estate was alleged to have been sold are admissi-

ble against the estate without the co-executors having joined therein; Rev. St. arts. 1936, 1937, providing that the acts of one executor shall be as valid as if all had joined therein, except in the conveyance of real estate. *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268.

Execution of Power of Sale by Part of Several Joint Executors.—See the title EXECUTORS' AND ADMINISTRATORS' SALES.

2. Effect of Death, Resignation or Refusal to Act.

a. In General.

Where two or more persons are nominated in a will as executors, with a trust imposed thereby, without any expression denying the power to a less number to execute the will, one alone may execute the will, where the others decline to accept, renounce the trust, or die before the duties imposed by the will upon the executors are performed. *McCown v. Terrell*, 9 Tex. Civ. App. 66, 73, 29 S. W. 484 (see 87 Tex. 470); *Johnson v. Bowden*, 43 Tex. 670, 671; *Mayes v. Blanton*, 67 Tex. 245, 3 S. W. 40; *Roberts v. Connellee*, 71 Tex. 11, 8 S. W. 626; *McDonald v. Hamblen*, 78 Tex. 628, 632, 14 S. W. 1042; *Bennett v. Kiber*, 76 Tex. 385, 13 S. W. 220; *McCown v. Terrell* (Civ. App.), 40 S. W. 54, 56, reversed in 9 Tex. 231; *Daugherty v. Moon*, 59 Tex. 397, 399; *Anderson v. Stocksall*, 62 Tex. 54.

A will made, conferring powers upon executors, while the statutes of the state provide that the will may be administered by the survivor, or by one qualifying, on the death, resignation, or refusal to act of the others, will be considered as conferring such powers upon those who by law might discharge the duties of executors. *Johnson v. Bowden*, 43 Tex. 670.

b. Effect of Failure to Qualify.

A conveyance by part of the executors named in a will is justified, where the others refuse to qualify. *Johnson*

v. Bowden, 43 Tex. 670; *Johnson v. Bowden*, 37 Tex. 621.

Return of Inventory.—Section 74 of the probate act of March 20, 1848 (Paschal's Dig., art. 1335), providing "that if there be more than one executor named in the letters, any one or more of them, on the neglect of the rest, may return an inventory," &c., conferred the full powers granted by the will to executors upon the one or more qualifying. *Johnson v. Bowden*, 43 Tex. 670.

Presumption of Renunciation by Joint Executor—Independent Executor.—Where a testator bequeaths his estate to several executors, and the survivor of them, as independent executors, and only one of them qualifies, the others being still alive, the independent feature of the will must be disregarded, and the executor who qualifies must administer the estate, as in other cases, under the orders of the probate court. *Blanton v. Mayes*, 58 Tex. 422.

Where a testator bequeaths his estate to several executors and the survivor of them on trusts specified to be executed without action of the court exercising probate jurisdiction other than the probate and registration of the will, the death of coexecutors named, is the sole event which can authorize the one who qualifies under the will to administer the estate and execute the trusts free from the control of the probate court. *Blanton v. Mayes*, 58 Tex. 422.

c. Surviving Coexecutor or Administrator.

(1) Authority to Act.

Where there are several executors, and one of them dies, the entire authority remains with the survivors. *Anderson v. Stockdale*, 62 Tex. 54; *Saul v. Frame*, 3 Tex. Civ. App. 596, 22 S. W. 984.

Testator appointed his wife and W. executors of his will, directing that if W. declined to act the wife need give

no bond. Before the trust was executed, the wife died. Held, that the power to execute the will survived in *McCown v. Terrell*, 9 Tex. Civ. App. 66, 29 S. W. 484.

Under a will appointing A and B "joint executors" independent of the probate court, the use of the word "joint" does not inhibit one executor from acting thereunder where the other dies before the testator. *Anderson v. Stockdale*, 62 Tex. 54, 61.

(2) When Powers Conferred by Will Survive.

When a power is given to two or more by their proper names, who are not made executors, it will not survive without express words. When it is given to three or more generally as "to my trustees," "my sons," etc., and not by their proper names, the authority will survive whilst the plural number remains. When the authority is given to executors and the will does not expressly point to the joint exercise of it, even a single surviving executor may execute it. But when it is given to them nominatim, although in the character of executors, it is at least doubtful whether it will survive. *Johnson v. Bowden*, 43 Tex. 670, 672.

Power of Sale in Will.—See the title EXECUTORS' AND ADMINISTRATORS' SALES.

3. Collection of Assets.

Where there are coadministrators, the sureties become liable for the acts of one or both of the administrators, while each of the administrators under the bond stands as surety for the other; "hence, even during the lifetime of a coadministrator, the other may maintain an action against him if he be misapplying the assets of the estate, as may he, and so is he in duty bound to do, against his estate and the sureties on his bond, should he die or be removed after having misapplied assets of the estate, or with them in his hands. *Davis v. Thorn*, 6 Tex. 482; *Dean v. Duffield*, 8 Tex. 236, Pas. Dig.,

5740." *Keowne v. Love*, 65 Tex. 152, 157.

Where one of two coadministrators dies, having assets in his hands unadministered, the surviving administrator is the only person authorized to receive them. *Davis v. Thorn*, 6 Tex. 482.

A surviving administrator may pursue, by suit, the assets of the estate of his intestate in the possession of the administrator of the deceased coadministrator. *Davis v. Thorn*, 6 Tex. 482.

A surviving administrator may maintain a suit in his representative capacity to recover on a promissory note executed to him jointly with his coadministrator. *Wood v. Evans*, 43 Tex. 175.

Under art. 5740, Pas. Dig., it is the duty of a surviving administrator to recover from the estate of the deceased administrator and his sureties any part of the estate for which he was accountable, and failure to do so until limitations have run makes such surviving administrator liable on his bond. *Keowne v. Love*, 65 Tex. 152, 157; *Davis v. Thorn*, 6 Tex. 482, 485.

Petition.—Petition in suit on note by administrator, which shows that note was executed to plaintiff and his coadministrator jointly, and that he sues in official capacity is sufficient. *Wood v. Evans*, 43 Tex. 175, 182.

4. Liability.

See ante, "Collection of Assets," V, P, 3.

Where there are joint administrators, each is surety for the other; and, if one is squandering the assets of the estate, the liability of the other to be injured is a sufficient ground for relief. *Davis v. Thorn*, 6 Tex. 482.

Q. SUBSEQUENT MARRIAGE OF EXECUTRIX.

If an executrix marry after executing bond, she and her husband should act jointly in all matters pertaining

to the representative capacity. *Airhart v. Murphy*, 32 Tex. 131, 133.

R. TRUSTS COLLATERAL TO ADMINISTRATION CONFIDED TO EXECUTOR.

See the titles PARTITION; TRUSTS AND TRUSTEES.

"A trust confided to an executor for a purpose collateral to that of the mere administration of the estate—as, for example, to manage the property and invest the proceeds for accumulation, or to maintain a widow and children, or to turn land into money for the convenience of partition, or to exercise any discretionary power confided to the executor for his personal fitness and fidelity—is personal to such appointee, and can not be exercised by any other person. 2 Woerner, Adm'r, § 340; *Frisby v. Withers*, 61 Tex. 134, 138. When such condition is reached that the person designated can not act, equity will grant relief by a distribution of the estate. 2 Beach, Trusts, § 431 et seq.; also *Id.* § 705. But so long as the executor is acting, and does not resign or is not removed, the provision of the will postponing a partition is absolute, and entitled to be carried out, and no partition could be had unless all the interested parties, being sui juris, consent thereto. *Underh. Trust*, p. 370; 2 Beach, Trust, § 705." *Wells v. Houston* (Civ. App.), 56 S. W. 233, 236. See the title TRUSTS AND TRUSTEES.

S. SUITS FOR RECOVERY OF ASSETS AND PRESERVATION OF ESTATE.

1. Jurisdiction and Venue.

a. Probate Court.

Try Title to Property.—"Where there is a controversy as to whether certain property belongs to the estate, or some individual, the probate court has no jurisdiction to adjudicate such an issue. *Edwards v. Mounts*, 61 Tex. 398." *White v. White*, 11 Tex. Civ. App. 113, 114, 32 S. W. 48.

The probate court has no jurisdiction to determine, as between an administrator and the heirs, the ownership of the proceeds of a policy of insurance, which names beneficiaries claimed by the administrator to be assets of the estate, and by the heirs as their individual property, derived by inheritance from another ancestor, the assignee of the party insured. *Edwards v. Mounts*, 61 Tex. 398, following *Timmins v. Bonner*, 58 Tex. 554, 555; *Dulaney v. Walsh* (Civ. App.), 37 S. W. 615, 616, affirmed in 90 Tex. 329.

Where petition of heirs merely alleges mismanagement of estate by executor and purpose of suit is only to protect their interests, action must be brought in probate court. *Jerrard v. McKenzie*, 61 Tex. 40, 43.

Contest between Administrator and Donee of Estate.—The probate court has no jurisdiction over a contest for a decedent's estate between the administrator and one claiming the estate as a gift from, and not as heir, devisee, or legatee of, decedent. *Wadsworth v. Chick*, 55 Tex. 241.

Preservation of Right under Executor's Purchase of Land.—See the title COURTS, vol. 5, p. 319.

b. County Court.

Suit to Recover Papers Belonging to Estate.—The court has jurisdiction, in favor of an administrator, under Hart. Dig. art. 1228, to compel the production of papers relating to the estate of a deceased person, although defendant resides in a different county. *Pierpont v. Threlkeld*, 13 Tex. 245.

Under Act March, 1848, § 119 (Pasch. Dig., art. 1380), providing that, when complaint shall be made in writing to any chief justice of the county court that any person has any papers belonging to the estate of any testator or intestate, said chief justice shall cause such person to be cited to appear before him and show cause why he should not deliver such papers to the executor or administrator, the

county court has jurisdiction of the complaint of an administrator against parties who withheld from him any papers belonging to the estate under his charge. *Donley v. Cundiff*, 35 Tex. 741.

Plea of Set-Off.—See post, "District Court," V, S, 1, c.

c. District Court.

Suits by Creditors.—The fact that a creditor suing decedent's widow to establish title in the estate to land claimed by her joined the administrator as a party defendant, and asked that he be required to place the property in his inventory of the estate, did not deprive the district court of jurisdiction, since such prayer was for the administrator's benefit, if it should be determined that the land belonged to the estate. *Phillips v. Phillips*, 57 S. W. 59, 23 Tex. Civ. App. 532.

Suits for Fraud and Maladministration of Administrator.—District court has jurisdiction in suit by heir against fraud and maladministration of administrator. *Smith v. Smith*, 11 Tex. 102, 105. See the title COURTS, vol. 5, p. 271.

An action brought by persons interested in an estate, charging fraud against others in relation thereto, and that there is a fraudulent combination and collusion between the administrator and such other parties in derogation of, or injury to, the plaintiff's rights, is within the jurisdiction of the district court. *Crain v. Crain*, 17 Tex. 80.

Action by Guardian against Executor.—Although, under Pasch. Dig. art. 1371, allowing a creditor, without calling on the heirs, to proceed to judgment against the executor in the district court, a guardian may sue the executor in such court to recover the ward's money, used for the executor's benefit, yet a suit to protect the ward's property against the executor's improper conduct must be brought in the

probate court. *Jerrard v. McKenzie*, 61 Tex. 40.

Plea of Reconvention, Set-Off or Counterclaim.—District court has not jurisdiction of plea of debt in reconvention to action on note by executors. *Atchison v. Smith*, 25 Tex. 228, 231.

In an action by an administrator in the district court, as a general rule, the defendant can not plead in off-set any demand against the estate accruing since the death of the deceased. To adjust such accounts would encroach on the province of the county court, and lead to embarrassing investigations as to the assets and proper distribution of an estate. *Atchison v. Smith*, 25 Tex. 228.

The district court should not entertain jurisdiction of a plea in bar of a suit on notes given for lands of the estate sold by the executors, alleging that the defendants had acquired a debt against the estate larger than that sued on, and a lien on the lands for which the notes were given; that said lien had priority over the other debts of the estate; that it was indebted to but few persons and could be easily settled by bringing the parties in interest into the district court. *Atchison v. Smith*, 25 Tex. 228.

The county court is fully competent to adjudicate the rights of the parties. *Atchison v. Smith*, 25 Tex. 228.

d. Venue.

Change of Venue.—Remedy given to claimants of estate to bring suit for its recovery in county where letters of administration were issued is subject to general law giving right of either party to change venue. *Treasurer v. Wygall*, 46 Tex. 447, 455.

2. Right of Action.

a. In General.

In suit by administrator, no other right than intestate had can be set up. *Sloan v. Martin*, 33 Tex. 417, 419.

b. Capacity to Sue.

(1) In General.

Recovery of Real Estate.—The ad-

ministrator can sustain an action in his own name for land belonging to his intestate, because his undertaking is to administer all the estate. *Graham v. Vining*, 2 Tex. 433, 439; *Thompson v. Duncan*, 1 Tex. 485.

An administrator may institute a suit to try title and prosecute the same to final judgment. *Egery v. Power*, 38 Tex. 373, 380, citing *Lacy v. Williams*, 8 Tex. 182; *Givens v. Davenport*, 8 Tex. 451; *Thomas v. Jones*, 10 Tex. 52; *Patton v. Gregory*, 21 Tex. 513; *Barrett v. Barrett*, 31 Tex. 344.

A son to whom a deed had been made of land purchased by his father may, as administrator of his father's estate, maintain against a third party an action of trespass to try title. *Burdett v. Haley*, 51 Tex. 540.

Intestate and Heirs Alien.—Plea in abatement that intestate and heirs were aliens to state of Texas is unavailing in answer to suit by administrator to recover land granted intestate by government. *Hays v. Barrera*, 26 Tex. 78, 81; *White v. Sabariego*, 23 Tex. 243.

Temporary Administrator.—See post, "Powers and Duties," XI, B.

(2) Personal or Representative Capacity.

Where an intestate had converted money of his wife, which he so confused with his own as to prevent an identification, the wife, suing, as administratrix, for conversion of property of the estate, can recover her money, since it must be treated as belonging to the estate. *William J. Lemp Brewing Co. v. La Rose*, 50 S. W. 460, 20 Tex. Civ. App. 575.

Suit for Penalty for Using and to Cancel Note.—Where a cross bill in a suit by an administratrix to recover double the amount of usurious interest paid, and to cancel a note in favor of cross petitioner, showed that decedent had conveyed to the administratrix the property on which the cross petitioner sought to foreclose a lien securing the

note, the administratrix was properly made a party both in her individual and representative capacity. *Cassidy v. Scottish-American Mortg. Co.*, 64 S. W. 1023, 27 Tex. Civ. App. 211; *Schmeltz v. Garey*, 49 Tex. 49.

Land Sued for Homestead of Executrix.—Plaintiff, as executrix of her deceased husband, brought an action for the possession of 297 acres of land held by defendant. Defendant's plea in abatement was based on the proposition that plaintiff could not maintain the action as executrix, as the land was her homestead. Held that, until the 200 acres to which plaintiff was entitled as a homestead was set apart and segregated by the probate court, she had control of the entire tract as representative of the estate, and the plea was bad. *Cammack v. Rogers*, 74 S. W. 945, 32 Tex. Civ. App. 125.

Right to Sue in His Own Name.—Since real as well as personal estate of a decedent passes to his executor, he may sue in his own name and character for the recovery of lands belonging to the estate. *Thompson v. Duncan*, 1 Tex. 485.

This is because his undertaking under our statute is to administer all the estate. *Graham v. Vining*, 2 Tex. 433, 439; *Thompson v. Duncan*, 1 Tex. 485.

An administrator or executor may sue the government to establish head-right claims of his decedent. *Thompson v. Duncan*, 1 Tex. 485, 489.

Note Payable to Administrator.—An administrator to whom a note is made payable may sue thereon in his own name or in his representative capacity, at his election. *Groce v. Herndon*, 2 Tex. 410; *Claiborne v. Yoeman*, 15 Tex. 44; *McKinney v. Peters*, *Dallam* 545.

Proof.—Plaintiff need not prove representative capacity or right to recover in such capacity where capacity is not put in issue by plea. *Trammell v. Swan*, 25 Tex. 473, 499; *Cheatham v. Riddle*, 12 Tex. 112, 118.

Where the holder of a vendor's lien conveys the property to plaintiff after the default of the vendee and the plaintiff brings an action of trespass to try title, as executrix of her deceased husband, she may show that such land, though conveyed to her individually, was purchased with the money of the husband, and was held for the benefit of his estate. *Ellis v. Hannay* (Civ. App.), 64 S. W. 684.

c. Defenses.

Return of Goods Defense to Suit by Administrator for Wrongful Attachment.—See the title ATTACHMENT, vol. 2, p. 535.

3. Form of Action or Remedy.

a. Cancellation or Rescission.

Where the grantees in a deed verbally assumed a debt of the grantor secured by deed of trust on the land, their failure to pay the debt at maturity gave the grantor no right to rescind the transaction and cancel the deed, and an action by his administrator against the grantees to cancel the deed would not lie because of the failure to pay the debt, though the creditor had presented a claim against the estate of the grantor for the debt, and it had been allowed. *Thurmond v. Thurmond* (Civ. App.), 87 S. W. 878.

b. Summary Remedy for Failure of Attorney to Pay Over Money.

The benefits of art. 62, Hart. Dig., providing a summary remedy against an attorney, for his failure to pay over money collected, extends as well to the case of an administrator for whom, or for whose intestate, the attorney has collected money, which the administrator is entitled to receive, as to any other party. *Trammell v. Shropshire*, 22 Tex. 327, 328.

c. Injunction.

Injunction against Sale of Heir's Intestate under Execution.—See ante, "Rights of Creditors of Heirs," V, K, 1, b, (2), (b), cc.

d. Trespass to Try Title.

See ante, "In General," V, M, 2, b, (1), (a).

4. Limitation of Action.**a. Person for and against Whom Limitations Run.**

The statute of limitations will run against administrators. *Bowen v. Kirkland*, 17 Tex. Civ. App. 346, 352, 44 S. W. 189, affirmed in 93 Tex. 725, no op.; *Robb v. Henry* (Civ. App.), 40 S. W. 1047, affirmed in 93 Tex. 737, no op.

Heirs of an intestate have as much right to hold lands of the estate against the administrators of the estate as against any other person asserting title in opposition to their vendor, and the administrators are as much bound to sue them within the statutory time as any other possessor holding under a title adverse to the estate. *Robb v. Henry* (Civ. App.), 40 S. W. 1047, 1049, affirmed in 93 Tex. 737, no op.; *Calhoun v. Burton*, 64 Tex. 510, 511; *Duke v. Reed*, 64 Tex. 705, 714.

Purchase from Heirs.—Limitations in favor of a purchaser of the land of an intestate from the heir run against the administrator and creditors during the pendency of administration. *Robb v. Henry* (Civ. App.), 40 S. W. 1047, affirmed in 93 Tex. 737, no op.; *Duke v. Reed*, 64 Tex. 705, 714; *Calhoun v. Burton*, 64 Tex. 510, 511; *Bowen v. Kirkland*, 17 Tex. Civ. App. 346, 351, 44 S. W. 189, affirmed in 93 Tex. 725, no op.

Action by Heirs against Executor.—

Where an independent executor claims the property in his hands for the satisfaction of a debt due him from the estate, limitations can not be invoked against such claim in an action by decedent's heirs to recover the property so held. *Moore v. Bryant*, 10 Tex. Civ. App. 131, 31 S. W. 223.

b. Period.

Money due an estate having a proper representative becomes barred by the statute of limitations of two years after

the accrual of the right to sue if not evidenced by contract in writing. *Rindge v. Oliphint*, 62 Tex. 682; *Thomas v. Greer*, 6 Tex. 372, 377.

In a suit by the executrix of one partner against the surviving partner on an open note, defendant claimed in set-off that the deceased partner had lent certain partnership property to third parties, and agreed to be responsible to defendant for his half interest in the property loaned. Held, since the answer indicated that the agreement was that the deceased partner would account in the course of settlement of the partnership affairs for defendant's half interest in the loaned property, the lapse of four years would not necessarily bar a remedy based upon that agreement. *McKay v. Overton*, 65 Tex. 82.

c. Suspension.

Limitation does not run against a cause of action arising in favor of an estate after the decedent's death until the appointment of a legal representative or for a year after the death, at least, in the absence of exceptional facts permitting the heir to sue to redress the wrong without an administration. When the legal representative qualifies, his title relates back to the time of the death of the owner of the estate and connects itself with the title of such owner. *Lemp Brewing Co. v. La Rose*, 20 Tex. Civ. App. 575, 50 S. W. 460, citing *Davis v. Dixon*, 61 Tex. 446, 449; *Life Ass'n of America v. Goode*, 71 Tex. 90, 97, 8 S. W. 639.

Disability of Heirs.—The statute of limitations is not prevented from running against a claim in favor of a decedent's estate by the disability of the heir, if a right of action exists in favor of the personal representative. *Rindge v. Oliphint*, 62 Tex. 682.

Two heirs of an estate brought suit against another heir, who had been in possession of lands of the estate for five years, claiming under an adverse title. The administrators, as inter-

venors, attempted to avoid the bar of five years' limitation by alleging that within the five years they intervened in another suit against defendant, in which it was sought to subject the property to the debt of a particular creditor; in that suit they set up the same cause of action against defendant as in the present, and the former suit was still pending. Held, that their intervention in the former suit did not protect them against the statute of limitation pleaded in the latter. *Duke v. Reed*, 64 Tex. 705. See *Robb v. Henry* (Civ. App.), 40 S. W. 1047, affirmed in 93 Tex. 737, no op.

Pendency of Action to Annul Administration.—The running of limitations against an administrator and a claimant under him is not, in an action by such claimant to recover real property formerly belonging to the estate, suspended as against the defendant, a purchaser from the heir, by reason of the pendency of an action to annul the administration, nor during an appeal from a judgment in such action declaring such administration void, which judgment was reversed. *Bowen v. Kirkland*, 17 Tex. Civ. App. 346, 44 S. W. 189, affirmed in 93 Tex. 725, no op.

The doctrine of *lis pendens* does not apply to an action to revoke an administration so as to affect a purchase of real property from the heir pending such action and prevent him from availing himself of the time during which such action was pending, in support of his plea or limitations against a claimant under the administrator. *Bowen v. Kirkland*, 17 Tex. Civ. App. 346, 44 S. W. 189, affirmed in 93 Tex. 725, no op.

Action by Heirs to Set Aside Sale under Deed of Trust.—Action to set aside a deed of trust and conveyance by the trustee thereunder on the ground of fraud and collusion between the trustee and the purchaser accrued at the time of making the deed and was subject to the statute of limitation of

four years (Rev. Stat., art. 3358), but the statute was suspended for one year on the death of the party entitled to sue, where there was no administration upon his estate (Rev. Stat., art. 3369), and suit brought by his heirs more than four and less than five years after the conveyance by the trustee was not barred. *Groesbeck v. Crow*, 91 Tex. 74, 40 S. W. 1028, reversing 39 S. W. 1003.

5. Parties.

a. Proper Parties.

(1) Parties Plaintiff.

(a) General Rule.

The general rule is that while administration is pending on an estate, a suit for the recovery of the property of the estate should be brought by the administrator. To this rule the following exceptions exist, viz: 1. When the administrator can not or will not act for the protection of those beneficially interested. 2. Where the interest of the executor or administrator is antagonistic to that of the estate. *Rogers v. Kennard*, 54 Tex. 30; *Patton v. Gregory*, 21 Tex. 513, 517; *Crain v. Crain*, 17 Tex. 80; *Sanders v. Devereux*, 25 Tex. Supp. 1; *Putnam v. Young*, 57 Tex. 461; *Lacy v. Williams*, 8 Tex. 182. See post, "Heirs, Distributees, Legatees and Devisees," V, S. 5, a, (1), (b).

The administrator, where there are unpaid creditors, is the proper party to sue for and recover land from those adversely holding it. *McCelvey v. McCelvey*, 15 Tex. Civ. App. 105, 38 S. W. 473.

(b) Heirs, Distributees, Legatees and Devisees.

aa. General Rule.

As a general rule, heirs, devisees, etc., are not allowed to sue for the recovery of the debts or property of an estate, pending an administration; the executor or administrator must sue. *Patton v. Gregory*, 21 Tex. 513; *Gidding v. Steele*, 28 Tex. 732, 748; *Webster*

v. Willis, 56 Tex. 468, 473; *Putnam v. Young*, 57 Tex. 461, 464; *Lacy v. Williams*, 8 Tex. 182; *Cochran v. Thompson*, 18 Tex. 652; *Moore v. Morse*, 2 Tex. 400; *Evans v. Oakly*, 2 Tex. 182; *Laas v. Seidel*, 28 Tex. Civ. App. 140, 142, 66 S. W. 871, 68 S. W. 724; *Northcraft v. Oliver*, 74 Tex. 162, 166, 11 S. W. 1121; *McIntyre v. Chappell*, 4 Tex. 187; *Easterling v. Blythe*, 7 Tex. 210; *Bufford v. Holliman*, 10 Tex. 560; *Sanders v. Devereux*, 25 Tex. Sup. 1, 12; *Rogers v. Kennard*, 54 Tex. 30, 36; *Bogges v. Brownson*, 59 Tex. 417, 421; *Lee v. Turner*, 71 Tex. 264, 265, 9 S. W. 149; *Hynes v. Winston* (Civ. App.), 54 S. W. 1069; *Sun Life Ins. Co. v. Phillips* (Civ. App.), 70 S. W. 603; *Walker v. Abercrombie*, 61 Tex. 69; *Richardson v. Vaughan*, 89 Tex. 93, 23 S. W. 640, affirming 22 S. W. 1112.

Ordinarily heirs can not sue on a cause of action which accrued to the ancestor but suit must be brought by an administrator or executor *Western Union Tel. Co. v. Kerr*, 4 Tex. Civ. App. 280, 23 S. W. 564; *Walker v. Abercrombie*, 61 Tex. 69.

"It is said in *Patton v. Gregory*, 21 Tex. 513, that there are exceptions to this general rule as well established as the rule itself; that the exceptions against the heirs, as improper parties, have not been sustained in any except the two cases reported in volume second, Texas reports, and that from the tendency of the decisions such exceptions do not seem to have been favored. *James v. Fulcrod*, 5 Tex. 512, 517; *Evans v. Oakley*, 2 Tex. 182; *Moore v. Morse*, 2 Tex. 400, 402; *Blakey v. Duncan*, 4 Tex. 184; *Easterling v. Blythe*, 7 Tex. 210, 211; *Lacy v. Williams*, 8 Tex. 182; *Bufford v. Holliman*, 10 Tex. 560; *Clay v. Clay*, 13 Tex. 195, 201; *Cochrane v. Thompson*, 18 Tex. 652; *Giddings v. Steele*, 28 Tex. 732, 748." *Rogers v. Kennard*, 54 Tex. 30, 36.

"The old rule that the heirs, etc.,

can not sue unless there be collusion or insolvency on the part of the executor or some special case * * * should be liberally construed under our system, which subjects not only personal but also real property of an estate to administration and where lands are so constantly appreciating that in a few years they may have increased five hundred or one thousand per cent beyond their appraised value at the grant of administration. It is not necessary to support actions of this character that there should have been collusion of insolvency on the part of the executor or administrator." *Patton v. Gregory*, 21 Tex. 513, 517.

Trespass to Try Title.—This was the rule in actions of trespass to try title to land. *Rogers v. Kennard*, 54 Tex. 30, 36; *Bogges v. Brownson*, 59 Tex. 417, 421; *Guilford v. Love*, 49 Tex. 715, 733; *Burdett v. Haley*, 51 Tex. 540, 542; *Gunter v. Fox*, 51 Tex. 383, overruling *Barrett v. Barrett*, 31 Tex. 344.

Suit to Recover Debt.—The general rule is that the heirs of a deceased person are not the proper parties to maintain suit for a debt due the estate of the decedent. *Stelle v. Shannon*, 62 Tex. 198.

The general rule is that the legal representative of a deceased person's estate is the proper person to maintain a suit to recover a debt due to the estate; but to this rule there are exceptions. *Sun Life Ins. Co. v. Phillips* (Civ. App.), 70 S. W. 603; *Hynes v. Winston* (Civ. App.), 54 S. W. 1069; *Bufford v. Holliman*, 10 Tex. 560; *Walker v. Abercrombie*, 61 Tex. 69; *Richardson v. Vaughan*, 86 Tex. 93, 23 S. W. 640, affirming 22 S. W. 1112.

Since the title to personal property of an intestate passes to his personal representative, the heirs can not sue to recover a debt due to the estate. *Richardson v. Vaughan* (Civ. App.), 22 S. W. 1112.

Under the law as it now exists it

would seem that the heir, though entitled to the estate, and though it has vested in him by operation of law, can not, in general, sue for the recovery of debts. *Cochran's Adm'r v. Thompson*, 18 Tex. 652.

Rule that the representative of a decedent's estate is the proper party to maintain suit for debts due such estate does not exist for protection of debtors indisposed to pay just debts. *Walker v. Abercrombie*, 61 Tex. 69, 71.

Price of Personal Property.—An action will not lie by the widow of a testator or intestate, in her own right and as guardian of minor heirs, to recover the price of personal property of the estate. The executor or administrator must sue. The court will not presume a distribution. *Sanders v. Devereux*, 25 Tex. Supp. 1.

Recovery of Accounts.—The widow and only heirs of a deceased person can not maintain an action on accounts, one of which is for goods sold and delivered by deceased to defendant, and the other of which was assigned to deceased's estate, in the absence of any cause shown why they should be permitted to maintain it, instead of deceased's legal representative. *Richardson v. Vaughan* (Civ. App.), 22 S. W. 1112.

Suit for Injury to Land.—Heirs can not sue for injury to their ancestor's land, pending administration, save where, from the misconduct of the personal representative or some other reason, such suit is necessary to protect their interests. *Lee v. Turner*, 71 Tex. 264, 9 S. W. 149; *Rogers v. Kennard*, 54 Tex. 30, 36; *Giddings v. Steele*, 28 Tex. 732, 748; *Sanders v. Devereux*, 25 Tex. Supp. 1, 12; *Webster v. Willis*, 56 Tex. 468.

Sole Heir.—When the mother is the only heir of a deceased son she may bring suit to recover a debt due the son. *Spencer v. Millican*, 31 Tex. 65.

Legatees.—A legatee can usually assert his interest in the property bequeathed to him only through the

legal representative of his testator, according to the laws regulating the settlement of the estate of deceased persons. *Moore v. Morse*, 2 Tex. 400, 402.

bb. Exceptions to Rule.

(aa) Where Representative Can Not or Will Not Sue.

An administratrix is a trustee acting for the benefit of creditors and distributees and in cases where she will not or can not act for the protection and preservation of the estate the cestui que trusts have a right to act in the behalf and for the protection of their several interests, and such rights are the proper subjects of judicial cognizance. *Crain v. Crain*, 17 Tex. 80. See, to the same effect, *Rogers v. Kennard*, 54 Tex. 30, citing *Chevallier v. Wilson*, 1 Tex. 161, and *Newson v. Chrisman*, 9 Tex. 113, 116; *Lee v. Turner*, 71 Tex. 264, 266, 9 S. W. 149.

Where but limited period has elapsed since death of deceased, legatees can not, in general, sue strangers for personal property. *Bufford v. Holliman*, 10 Tex. 560, 575.

The neglect and refusal of an administrator for six years to bring an action, on a debt due the estate, authorize the heirs to sue. *Patton v. Gregory*, 21 Tex. 513; *Rogers v. Kennard*, 54 Tex. 30, 36.

In *Easterling v. Blythe*, 7 Tex. 210, it was held that the heir might sue as well as the administrator more than ten years having elapsed without any one having acted as administrator. *Howard v. Bennett*, 13 Tex. 309, 314.

Where suit was brought by the heirs who alleged that at the October term last, of the county court of said H. county, the said administration was duly closed, and the administrator discharged; that among the property left them by their father were two negroes, to wit, etc., of the value, etc.; that on the — day of —, 1846, while the said A. (one of the defendants) was executor, the said B. and C. (the other

defendants), combining with the said executor for the purpose of defrauding the petitioners, with the assent and connivance of said executor, took said negroes away, and unlawfully converted them to their own use, etc., that, by reason of the combination and connivance aforesaid, the said executor utterly failed and refused to sue for said negroes, etc., it was held that the facts alleged constituted an exception to the rule that suit should be brought by the legal representative, and not the heir. *Lacy v. Williams*, 8 Tex. 182.

It is presumed that estate is closed after eighteen years and heirs may sue to recover property. *Clay v. Clay*, 13 Tex. 195, 202.

Where A., domiciled in Texas, died, and his administrator recovered judgment against a debtor in the state of Kentucky, and the administrator afterwards died, it was held that A.'s heirs could maintain a suit on such judgment against the debtor eighteen years after A.'s death. *Clay v. Clay*, 13 Tex. 195.

Where a decedent was domiciled and died in Texas and letters of administration were granted on his estate in Kentucky, and fourteen years thereafter the administrator recovered two judgments against the defendant in Kentucky courts, and it appeared that there was no creditors, but that the judgments were recovered for the heirs, the heirs were entitled to maintain an action on the judgments brought four years after their recovery, since such facts were sufficient to raise a presumption that the property in the judgments had vested exclusively in the heirs. *Clay v. Clay*, 13 Tex. 195.

Willful Neglect or Fraud on Part of Administrator or Executor.—Under Probate Act 1848, § 112, Pasch. Dig., art. 1373, giving to the executor and administrator the right to the possession of all the estate, etc., in cases

of willful neglect, refusal of duty or fraudulent combination on the part of the executor or administrator, the heirs had the right to sue to protect their interests. *Gunter v. Fox*, 51 Tex. 383; *Moore v. Morse*, 2 Tex. 400, 402; *Patton v. Gregory*, 21 Tex. 513.

(bb) Interest of Administrator Antagonistic to Estate.

Where the interest of an administrator is antagonistic to a claim for the recovery of land for the estate, suit may be brought by another than the administrator. *Rogers v. Kennard*, 54 Tex. 30.

When land adversely possessed by those claiming under the administrator, through deeds made in his individual and representative capacity, may be sued for by the heirs or those claiming under them, the interest of the administrator would be antagonistic to those claiming, and he could not move as a plaintiff in a suit in their behalf. *Chevallier v. Wilson*, 1 Tex. 161, and *Newson v. Chrisman*, 9 Tex. 113, 116, discussed in *Rogers v. Kennard*, 54 Tex. 30.

(cc) Suits Necessary to Preserve Estates.

Even heirs may bring such actions as are necessary to preserve the estate inherited from the ancestor or where it is shown to be necessary for their protection. *Western Union Tel. Co. v. Kerr*, 4 Tex. Civ. App. 280, 283, 23 S. W. 564; *Baker v. Hamblen* (Civ. App.), 75 S. W. 362; *Walker v. Abercrombie*, 61 Tex. 69; *Herndon v. Davenport*, 75 Tex. 462, 12 S. W. 1111; *Fowler v. Agnew*, 43 Tex. Civ. App. 540, 95 S. W. 36, 37, affirmed in 101 Tex. 636, no op.; *Lee v. Turner*, 71 Tex. 264, 265, 9 S. W. 149; *Rogers v. Kennard*, 54 Tex. 30, 36; *Giddings v. Steele*, 28 Tex. 732; *Sanders v. Devereux*, 25 Tex. Supp. 1.

A husband, during the marriage, purchased land of which he died seised, leaving a widow and children. His estate was insolvent. The land was not

disposed of in the probate proceedings. The administrator, on conveying property belonging to the estate, supposed that he was also conveying the land in controversy. The purchaser took possession of the land, believing that the same belonged to him, and made valuable improvements thereon. Held, that the widow and children were entitled, in trespass to try title, to recover the land, subject to a judgment in favor of the purchaser for the value of the improvements. *Fowler v. Agnew*, 43 Tex. Civ. App. 540, 95 S. W. 36, affirmed in 101 Tex. 636, no op.

"In *Moore v. Morse*, 2 Tex. 400, 403, it was said: * * * 'If the property was likely to be wasted, destroyed or carried beyond the jurisdiction of the court before a legal representative had been constituted, or before he could enforce his legal rights in the ordinary way, such ground would authorize the interposition of the judge by some one of the remedial processes known to our judicial system to prevent such wrong.'" *Walker v. Abercrombie*, 61 Tex. 69, 73.

Debts About to Be Barred by Statute of Limitations.—In *Walker v. Abercrombie*, 61 Tex. 69, "three years had elapsed since the death of the ancestor and no administration upon his estate had been applied for; the estate was alleged to be insolvent, and it appeared that the debt which was sought to be recovered was about to be barred by limitation. It would seem that where a suit is necessary to preserve the property, the right of the heirs to bring it ought to be maintained, especially where a considerable time has elapsed without administration. Creditors who have not seen proper to attempt the collection of their claims through the probate court are not likely to suffer any injury in such a case by permitting the heirs to sue." *Richardson v. Vaughan*, 86 Tex. 93, 94, 23 S. W. 640, affirming 22 S. W. 1112.

Estate in Danger of Loss by Adverse Possession.—Where the petition did not disclose that there were no debts of the estate existing, or that there was no necessity for further administration, but showed that no administration was in fact pending, and that none had existed for about five years, and the pleadings and the circumstances indicated by them showed that there was a reasonable probability that the estate was in danger of losing part of the property by adverse possession, there was warrant for the proceeding by an heir to recover the property. *Baker v. Hamblen* (Civ. App.), 75 S. W. 362.

Suits to Restrain Waste or Misappropriation Community Property Surviving.—See the title HUSBAND AND WIFE.

(dd) Where There Is No Administration and No Necessity Therefor.

Recovery of Debt.—Where there is no administration and no indebtedness, the heir may recover a debt due the estate. *Webster v. Willis*, 56 Tex. 468; *Richardson v. Vaughan*, 86 Tex. 93, 23 S. W. 640, affirming (Civ. App.), 22 S. W. 1112; *Moore v. Morse*, 2 Tex. 400; *Evans v. Oakley*, 2 Tex. 182; *Lacy v. Williams*, 8 Tex. 182; *Giddings v. Steele*, 28 Tex. 732; *Finch v. Edmonson*, 9 Tex. 504, 511; *Walker v. Abercrombie*, 61 Tex. 69; *Bufford v. Holliman*, 10 Tex. 560; *Hynes v. Winston* (Civ. App.), 54 S. W. 1069; *Sun Life Ins. Co. v. Phillips* (Civ. App.), 70 S. W. 603.

Where an administration of an estate was not necessary for any other purpose than the distribution of the estate between the widow and an only heir, and such parties failed to agree in the distribution, the heir may maintain an action for the protection and maintenance of his rights respecting personal property. *McIntyre v. Chappell*, 4 Tex. 187.

Action on Insurance Policy.—The widow and children of an insured

could maintain action on the life insurance policy, the petition averring that there were no debts and no administration. *Sun Life Ins. Co. v. Phillips* (Civ. App.), 70 S. W. 603.

Suit to Recover Property.—The general rule that a suit to recover property belonging to the estate of a deceased person must be brought by the administrator is subject to the exception that where there is no administrator, and no necessity therefor, suit may be brought by the heirs. *Rylie v. Stammire* (Civ. App.), 77 S. W. 626; *Richardson v. Vaughan*, 86 Tex. 93, 94, 23 S. W. 640, affirming 22 S. W. 1112; *Giddings v. Steele*, 28 Tex. 732.

In the absence of any administration and of any necessity therefor, an heir of decedent may recover his share of the estate converted by another. *Goldstein v. Susholtz*, 46 Tex. Civ. App. 582, 105 S. W. 219.

Where there is no administration, the heirs may sue for and recover the property of the estate. *Blair v. Cisneros*, 10 Tex. 34.

If there be no claims against an estate, heirs are entitled to the property and they may sue for it in their own names. *Remick v. Luter*, 32 Tex. 797, 799.

"When there are creditors or an administrator of the estate, the heirs should not be permitted to sue for and recover property of the estate in their own right, and hold it against the administrator and the creditors, and thus effect a partition of the estate in whole or part, without satisfying the debts against the estate." *Giddings v. Steele*, 28 Tex. 732, 748; *Northcraft v. Oliver*, 74 Tex. 162, 166, 11 S. W. 1121.

Where administration is still pending, heirs can not sue for recovery of property of the estate, if unpaid debts existed. *Northcraft v. Oliver*, 74 Tex. 162, 170, 11 S. W. 1121; *Giddings v. Steele*, 28 Tex. 732, 748.

It appeared, in an action of trespass

to try title that the land was purchased at sheriff's sale by defendants' vendor to satisfy a personal judgment against one on whom no personal service was had, he being at the commencement of the suit, and till his death, a nonresident; that plaintiffs were his heirs, but before their suit administration on the estate had begun and was still pending, and debts were still owing by the estate. The administrator was not a party to the suit. Held, that the heirs could not recover while the administration was pending, or where there was no administration, without showing that there were no debts owing by the estate. *Northcraft v. Oliver*, 74 Tex. 162, 11 S. W. 1121.

"In the case of *Peveler v. Peveler*, 54 Tex. 53, Justice Gould says: 'To show their right to sue the plaintiffs alleged that there was "no administration on said estate, the administration of the defendant L. J. Peveler having been closed by his removal." If, however, the evidence showed a pending administration and unsettled claims, then prima facie at least it showed that the heirs had no right to sue. The defendants were not driven to plead nonjoinder of the administrator in abatement. The case was not one of defect of parties who ought to have been coplaintiffs, but it was one in which the evidence negatived the right of action claimed by plaintiffs.'" *Northcraft v. Oliver*, 74 Tex. 162, 169, 11 S. W. 1121.

Where there are debts against an estate but no property subject to their payment, decedent's widow may herself maintain action upon judgment rendered in favor of her husband. *Walker v. Abercrombie*, 61 Tex. 69, 72.

Administration Obtained by Fraud.—Heir may sue to recover property on ground that administration was obtained by fraud, and that there were no debts. *Giddings v. Steele*, 38 Tex. 732, 748.

Whether Debts Existed a Question for Jury.—In trespass to try title by the heirs of an estate to recover land sold by execution whether debts existed against the estate so as to justify its sale by execution, held for the jury. *Terrell v. McCown*, 91 Tex. 231, 43 S. W. 2.

Mother's Share, Administration Pending on Father's Estate.—While administration is pending on father's estate, heirs may sue to recover their mother's share. *Putnam v. Young*, 57 Tex. 461, 464. See the title HUSBAND AND WIFE.

Administration in Another State.—Where a petition alleged that the heirs suing were all the heirs of decedent; that there was no administration on the estate, and that none was necessary; that there was no property except the notes sued on, and no debts except such as were incident to the action,—the heirs can maintain such action, though the petition showed that there was an administration pending in another state. *Hynes v. Winston* (Civ. App.), 54 S. W. 1069.

(ee) Where Administration Closed or Administrator Discharged.

It is a general rule that the heirs can not sue in their own right as heirs for land of their ancestor's estates but there are exceptions to this rule, as when the administration has been closed. *Giddings v. Steele*, 28 Tex. 732; *Lacy v. Williams*, 8 Tex. 182; *Webster v. Willis*, 56 Tex. 468; *Lee v. Turner*, 71 Tex. 264, 266, 9 S. W. 149.

"But if the heirs may not sue previously, they certainly may do so, for whatever remains of the estate, after it has been fully administered and its liabilities to creditors extinguished." *Easterling v. Blythe*, 7 Tex. 210, 213.

Heirs have right of action for property of estate only after administration is closed. *Fisk v. Norvel*, 9 Tex. 13, 17.

Where Administrator Discharged.—The heirs of a deceased person, for

the purpose of reviving a judgment, can prosecute a suit commenced by administrators, the said administrators having been discharged from office, even when they admit that such revivor will not be for their own, but for the benefit of a third party, who is the real owner of the original cause of action. *Grayson's Representatives v. Winnie*, 13 Tex. 288.

(ff) Suits to Cancel Conveyance or Vacate Will.

An heir who, in suing to recover a debt due his ancestor, or to recover personal property, must negative the existence and necessity of administration, need not do so in a suit to cancel a conveyance of real estate made by the ancestor, or to vacate his unauthorized will. *Veal v. Fortson*, 57 Tex. 482; *Moore v. Moore*, 23 Tex. 637.

(gg) Partition Including Property Sued for.

Partial partition including property sued for is sufficient reason for the heirs prosecuting a suit for its recovery. *Lee v. Turner*, 71 Tex. 264, 266, 9 S. W. 149.

Where the estate of a decedent had been fully partitioned and the executor discharged, the executor was not a proper party in an action on an account brought by one to whom it had been allotted on a partition of the estate. *Hill v. Herndon* (Civ. App.), 89 S. W. 831.

(hh) Allegation and Proof of Conditions Precedent.

"An heir or devisee can not maintain an action for recovery of property belonging to the estate unless it is alleged and proved that there were no debts and no necessity for administration, or that administration had closed, or that the suit was necessary to the preservation of the estate and that the executor or administrator had failed or refused to discharge his duty.

Richardson v. Vaughan, 86 Tex. 93, 23 S. W. 640, affirming 22 S. W. 1112; *Northcraft v. Oliver*, 74 Tex. 162, 11 S. W. 1121; *Lee v. Turner*, 71 Tex. 264, 9 S. W. 149; *Webster v. Willis*, 56 Tex. 468, 471." *Laas v. Seidel*, 28 Tex. Civ. App. 140, 142, 66 S. W. 871, 68 S. W. 724; *Giddings v. Steele*, 28 Tex. 732, 749; *Finch v. Edmonson*, 9 Tex. 504; *Fisk v. Norvel*, 9 Tex. 13, 15; *Hurt v. Horton*, 12 Tex. 285; *Smith v. Strahan*, 16 Tex. 314.

To authorize the bringing of a suit by heirs to recover property belonging to the estate of a deceased person, they must allege and prove that there is no administration pending, and no necessity for one. *Rylie v. Stammire* (Civ. App.), 77 S. W. 626; *Richardson v. Vaughan*, 86 Tex. 93, 94, 23 S. W. 640, affirming 22 S. W. 1112.

Heirs, to be entitled to sue in own right for claim of ancestor, must prove lapse of four years since death, without administration, close of administration, and nonexistence of debts against estate. *Webster v. Willis*, 56 Tex. 468, 472. See *Patterson v. Allen*, 50 Tex. 23; *McCampbell v. Henderson*, 50 Tex. 601.

Sufficiency of Allegations.—A complaint in intervention, in an action for the recovery of land, by the heirs of one from the vendee of whose administrator plaintiff acquired title, alleging that the decedent's estate was closed and the administrator discharged, and that they were entitled to the benefit of a judgment of foreclosure of a vendor's lien on the land, obtained by the administrator against his vendee, and that the administrator's deed had never been delivered, sufficiently shows that the legal title had not passed from the decedent's estate, and that they were entitled to assert the debt for the unpaid purchase money against plaintiff, and to satisfaction of the same by a sale of the land. *Spaulding v. Anders* (Civ. App.), 35 S. W. 407.

A will provided that the residue of the estate after administration should go to a church. Plaintiff, an heir, sued to recover certain land, alleging that it had been unlawfully conveyed to defendant by the executor; that the rights of the church had been adjudicated by a judgment decreeing that it was entitled to \$1,200 under the will, with a lien therefor on land belonging to the estate, which lien had been foreclosed and the land bought in by the church; that the land was worth \$10,000; that, if anything remains due to the church, plaintiff is ready to pay it. Held not to show that the heirs had no interest in the estate. *Baker v. Hamblen* (Civ. App.), 75 S. W. 362.

If the land sued for was as valuable as alleged, the heirs would appear to have an interest in the estate, though a debt of \$900 recognized in the will had not been paid. *Baker v. Hamblen* (Civ. App.), 75 S. W. 362.

An allegation that the estate of a decedent was solvent would not support an inference that there was no necessity for administration, as against a general demurrer. *Laas v. Seidel*, 95 Tex. 442, 67 S. W. 1015.

In action on note bequeathed to plaintiff an allegation in the petition that testator's estate is solvent is not equivalent to an allegation that there is no administration pending, and that none is necessary. *Laas v. Seidel*, 95 Tex. 442, 67 S. W. 1015.

Where the petition showed that the property sued for was the community property of plaintiff and her deceased husband, but failed to show whether or not administration had issued on his estate, there being no allegation that it had not issued, and that there were no debts and no necessity for administration, it was insufficient. *Rylie v. Stammire* (Civ. App.), 77 S. W. 626.

Judgment Final by Default.—Where in absence of debts and of an administration heirs institute suit to recover

upon a promissory note and to foreclose a mortgage to secure it executed to their ancestor, a petition setting out the facts, the execution of the note, and the mortgage to secure it by the defendant to the ancestor of the plaintiffs, with date, amount, and interest, with description of the land mortgaged, with prayer for relief, will support a judgment final by default for the plaintiffs. *Loungeway v. Hale*, 73 Tex. 495, 11 S. W. 537.

Raising Objection.—Defect in a petition by a legatee claiming a bequest from the testator of a sum owing to him by defendant, in that it failed to allege that there was no administration on the testator's estate pending or necessary, was properly raised by general demurrer. *Laas v. Seidel*, 95 Tex. 442, 67 S. W. 1015, following *Richardson v. Vaughan*, 86 Tex. 93, 23 S. W. 640, affirming 22 S. W. 1112, and stating that: "the report of the case in 86 Tex. and 23 S. W. does not show the manner in which the question arose, but the report of the decision of the court of civil appeals shows that the question was raised as stated."

The objection that the petition of one who sues as heir does not show that there was no administration, and no necessity for administration, can not be taken by a motion in arrest of judgment. *Veal v. Fortson*, 57 Tex. 482.

Plea in Abatement.—The objection that the plaintiff has no right to sue was made by plea in abatement in *Lee v. Turner*, 71 Tex. 264, 265, 9 S. W. 149; *Webster v. Willis*, 56 Tex. 468, 473.

"The heir's right to recover need not be contested by plea in abatement. The objection goes to the title of the plaintiff, and not to the capacity in which she sues." *Sanders v. Devereux*, 25 Tex. Supp. 1, 13.

On Appeal.—The petition does not in terms allege that petitioners are the

legal owners and holders of the note, but it does show that they acquired the ownership and the right of possession of the note by descent from the payee. This is sufficient to support the judgment in their favor, objection for the defect in the allegation being made for the first time on appeal. *Loungeway v. Hale*, 73 Tex. 495, 498, 11 S. W. 537.

(ii) Objections to Capacity to Sue.

See ante, "Allegation and Proof of Conditions Precedent," V, S, 5, a, (1), (b), bb, (hh).

(jj) Right of Personal Representative to Intervene.

See *Moore v. Morse*, 2 Tex. 400.

(c) Creditors.

See ante, "Jurisdiction and Venue," V, S, 1.

One holding claim against estate can not collect debts due it and apply proceeds to his claim. *Cook v. Jordan*, 21 Tex. 221. See post, "Collection and Enforcement," VII, I.

A creditor is entitled to inquire whether the interest of the estate in land disposed of by the survivor, and whether the right of the creditor to subject such land to his claim, were destroyed by that conveyance. In order to do so he is authorized to put himself properly upon the record as an approved or an established creditor of the estate. *Bledsoe v. Beiler*, 66 Tex. 437, 1 S. W. 164.

"Cases may arise in which one claiming to be a creditor of an estate who has not established his claim in either of the modes prescribed by law may become entitled to equitable relief looking to the preservation of the estate or the prevention of its misappropriation." *Red River County Bank v. Higgins*, 72 Tex. 66, 69, 9 S. W. 745.

Property Descended to Heirs.—The administrator is the proper party to sue for such property as descended to the heirs and no creditor pending the administration could sue for its re-

covery. *P. J. Willis & Bro. v. Smith*, 65 Tex. 656.

When property has been conveyed in fraud of his creditors such creditors alone can sue for its recovery. *Willis & Bro. v. Smith*, 65 Tex. 656, 658. See post, "Property Fraudulently or Voluntarily Conveyed by Decedent," VII, C, 22, a, (4). See the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**.

(2) Parties Defendant.

Administrator should be made party to suit to set aside fraudulent conveyance. *Hall v. McCormick*, 7 Tex. 269. See the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**.

b. Necessary Parties.

(1) Heirs, Devisees and Legatees.

Prior to Probate Law of 1870.—The general rule, under all of our probate laws, until the enactment of the probate law of 1870, has been that the administrator is entitled to sue for and defend suits for land claimed by the estate without heirs being joined. *Bogges v. Brownson*, 59 Tex. 417, 421; *Sherman v. Taylor*, 16 Tex. 413; *Guilford v. Love*, 49 Tex. 715, 733; *Gunter v. Fox*, 51 Tex. 383, overruling *Barrett v. Barrett*, 31 Tex. 344; *Burdett v. Haley*, 51 Tex. 540; *Rudd v. Johnson*, 60 Tex. 91, 92; *Zacharie v. Waldron*, 56 Tex. 116; *Rogers v. Kennard*, 54 Tex. 30, 36; *Thompson v. Duncan*, 1 Tex. 485; *Howard v. Republic*, 2 Tex. 311, 312; *Graham v. Vining*, 2 Tex. 433.

Under *Pasch. Dig.*, art. 1373, giving an administrator a right to possess all the estate subject to the payment of debts, the residuum to go to the heirs, such administrator could, without the heirs joining him, bring and defend suits for land to protect the interests of the estate. *Gunter v. Fox*, 51 Tex. 383.

Under Act of 1870.—By the express provisions of the probate act of 1870, the heirs are necessary parties when

title to land is affected. *Gunter v. Fox*, 51 Tex. 383.

Under Law of 1876.—Under the probate laws of 1876, an administrator suing alone as such may maintain an action of trespass to try title without making the heirs parties. *Bogges v. Brownson*, 59 Tex. 417.

Under the statute of 1876 pertaining to estates of deceased persons the heirs of the deceased are not required to be joined with the executor in suits involving the title to lands. *Zacharie v. Waldron*, 56 Tex. 116.

The general probate law of 1876 (Acts 15th Leg.), wholly repealed the probate acts of 1870 and 1873, and the amendments thereof, for it plainly was intended to embrace the entire subject matter of those acts, and to be a substitute for them. *Bogges v. Brownson*, 59 Tex. 417, 419.

Where Defendant Asks Affirmative Relief.—Though under *Rev. Stat.*, art. 1201, an administrator or executor may sue to recover land without joining the heirs, yet when the defendant in such a suit asks affirmative relief in his answer he becomes a plaintiff to the extent of such relief, and, if he fails to comply with the requirements of *Rev. Stat.*, art. 1202; (Act Aug. 15, 1870, p. 141), by making the heirs of the estate parties, a judgment in his favor will not operate to divest the title of the estate. *East v. Dugan*, 79 Tex. 329, 15 S. W. 273.

Where an action by an administrator to enforce a vendor's lien is changed by the defendants into an action to quiet title, it is error to adjudicate title to the defendants against the administrator without making the heirs parties, as the lands of an intestate vest upon his death in his heirs, and they can not be divested of title unless made parties. *Loller v. Frost*, 38 Tex. 208, following *Barrett v. Barrett*, 31 Tex. 344, which was afterwards overruled in *Gunter v. Fox*, 51 Tex. 383.

Where Invalidity of Sale Defense to Action for Purchase Price.—If, to an

action for the price of land sold, the defense of the invalidity of the sale is raised, the heirs of decedent must be made parties. *Clairborne v. Yoeman*, 15 Tex. 44.

(9) Suit to Set Aside Fraudulent Conveyance.

See post, "Property Fraudulently or Voluntarily Conveyed by Decedent," VII, C, 22, a, (4). See the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**.

c. Intervention.

(1) Third Persons in Suits by Executor or Administrator.

In suit by administrator for conversion of estate property it was error to allow a creditor of the estate to intervene and set up fraud in conveyances under which defendant claimed title to the property alleged as converted, since the creditor had no cause of action against defendant for its conversion. *Lemp Brewing Co. v. La Rose*, 20 Tex. Civ. App. 575, 50 S. W. 460; *Willis v. Smith & Bro.*, 65 Tex. 656, 658; *Blum v. Goldman & Son*, 66 Tex. 621, 1 S. W. 899; *Le Gierse & Co. v. Kellum*, 66 Tex. 242, 18 S. W. 509.

In suit by administrator upon note due estate, attorneys of administrator can not intervene upon contract with plaintiff for stipulated sum out of recovery. *Robb v. Smith*, 40 Tex. 89, 96.

(2) Executor or Administrator in Actions by Others.

An administrator on the estate of one who had conveyed his homestead by deed, in which the wife had not joined, has no right to intervene in a suit between third parties claiming the land, and to assert the invalidity of the deed. *Irion v. Mills*, 41 Tex. 310.

Where L, as administrator of K, brought suit on a note payable to Ks. as executors of the same deceased K, and these executors afterwards intervened, and claimed the note as executors, whereupon the administrator

relinquished in favor of the executors, there was nothing of which the defendants could complain, and it was error to dismiss the suit as to the intervenors. *Batchelor v. Douglas*, 31 Tex. 182.

6. Pleading.

a. Petition.

Averment of Capacity.—Where plaintiff sued on a note, alleging that E., "a resident citizen, administrator of the estate of B.," sued on the note, the property of his intestate, which fact was not put in issue, it was immaterial whether the suit was brought in plaintiff's own right or as administrator. *Trammell v. Swan*, 25 Tex. 473.

A petition by an heir to recover land held not to show that the heirs had no interest in the state *Baker v. Hamblen* (Civ. App.), 75 S. W. 362, citing *Richardson v. Vaughan*, 86 Tex. 93, 23 S. W. 640, affirming 22 S. W. 1112.

Amendments Showing Right in Individual Capacity.—Where plaintiff sues as administrator on a note alleged to be due his intestate, he may amend his complaint by alleging that the note sued on belonged to himself, and pray the judgment in his own right after a plea of *ne unques* administrator, subject to costs and any defense that might have accrued since the commencement of the suit. *Whitehead v. Herron*, 15 Tex. 127. See, also, *Henderson v. Kissam*, 8 Tex. 46; *Horton v. Wheeler*, 17 Tex. 52.

Allegation That There Are Creditors.—Where administrator sues on claim in favor of creditors, but not in favor of heirs, he must allege that there are creditors. *Bradshaw v. Mayfield*, 18 Tex. 21, 25.

Time and Place of Payment—Suit to Cancel Note.—A petition by an administrator in an action to cancel a note given for the purchase price of land and a deed of trust securing the same, on the ground that the note had been paid, is not bad for failure to

state the time and place of payment, where it alleges facts from which a presumption of payment might arise, and that plaintiff has no personal knowledge of the facts of the matter. *Johnson v. Lockhart*, 20 Tex. Civ. App. 596, 50 S. W. 955, affirmed in 93 Tex. 644, no op.

b. Plea or Answer.

Denial of Representative Capacity.—

An executor's right to sue to recover property belonging to the estate can only be questioned under a plea in abatement. *Fischer v. Giddings*, 95 S. W. 33, 43 Tex. Civ. App. 393.

In a suit by the legal owner of a promissory note for use of the administrator of an estate, the incapacity of the administrator to sue or to act in capacity of administrator can not be pleaded in abatement. *Hitson v. Dillahunt*, 38 Tex. 585.

Plea of Set-Off.—See post, "Requisites of Plea or Answer," V, S, 11, b.

7. Issues and Proof.

In an action by an administrator for conversion of decedent's property, defendant could not under the general issue attack plaintiff's title arising from possession, by evidence of title in another or in plaintiff individually. *William J. Lemp Brewing Co. v. La Rose*, 20 Tex. Civ. App. 575, 50 S. W. 460.

8. Evidence.

Presumption and Burden of Proof.—

In suit by administrator against intestate's widow for property she claims as her own, burden of proof is on her, to establish her title by clear, satisfactory proof. *Coats v. Elliott*, 23 Tex. 606, 612.

In a suit by an administrator to assert a right which is good in favor of creditors, but not in favor of heirs, it would seem that he must allege and prove that there are creditors. It will not be presumed. *Bradshaw v. Mayfield*, 18 Tex. 27.

In an action on a life insurance policy payable to creditor as his inter-

est may appear, the burden is on administratrix to show to what extent the debt has been paid. *Andrews v. Union Cent. Life Ins. Co.* (Civ. App.), 44 S. W. 610, reversed in 92 Tex. 584.

Circumstances Strengthening Presumption of Payment.—In suit by administrator to cancel note and deed of trust given to secure it, and remove cloud on title to land, any circumstance tending to strengthen presumption of payment of the note arising from great lapse of time since its maturity was competent evidence. *Johnson v. Lockhart*, 20 Tex. Civ. App. 596, 600, 50 S. W. 955, affirmed in 93 Tex. 644, no op.

Receipt for power of attorney to sell land is admissible in evidence by purchasers when sued by administrator of constituent to recover land. *Rogers v. Bracken*, 15 Tex. 564, 566. See the title POWERS.

Denial of Admissions by Defendant.

—In suit by administrator to recover assets of estate, where evidence of defendant's admissions that he had money belonging to estate is received, defendant should be allowed to deny them. *Garner v. Cleveland*, 35 Tex. 74, 77. See the title WITNESSES.

The admission of evidence of the common grantor's title beyond the common source is not prejudicial error in an action by an executor to cancel his testator's deed for want of delivery and of its acceptance by the grantee, where the pivotal issue in the case was as to such delivery and acceptance. *Blackman v. Schierman*, 21 Tex. Civ. App. 517, 51 S. W. 886.

Representative Capacity.—See ante, "Personal or Representative Capacity," V, S, 2, b, (2).

Ownership at Decedent's Death.—See post, "Evidence of Ownership," VII, C, 22, b.

Admissibility of Declarations of Testator That He Held No Lien in Suit by Executor to Enforce Vendor's Liens.—See the title DECLARA-

TIONS AND ADMISSIONS, vol. 6, p. 1.

Declaration of Deceased Grantor in Suit by Executor to Remove Cloud.—See the title DECLARATIONS AND ADMISSIONS, vol. 6, p. 1.

9. Questions for Jury.

In an action by executors on a note, where defendant claimed that he transferred to plaintiffs' decedent another note, made by third persons, which was accepted in full payment of the first note, evidence held insufficient to justify a submission of the question to the jury. *Huff v. Powell*, 48 Tex. Civ. App. 582, 107 S. W. 364.

Where the issues to be determined involved the question as to whether the property sued for belonged to the plaintiff's intestate at her death, or had been given previously to the defendant's intestate, and whether the possession of the defendant's intestate, after the death of the alleged donor, was held in his own right, or in right of his wife, as one of the heirs of the alleged donor, held, that these were questions of fact, to be decided by the jury. There being conflicting testimony, the refusal to give such instructions as correctly submitting the law by which they should be determined, was error. *Gilkey v. Peeler*, 22 Tex. 663.

10. Adjustment of Liens.

Suit to Redeem Lands.—Where an administrator sued to establish a trust in a tract of land and to redeem it for benefit of his intestate's estate, it was proper on ascertaining that there was money due on the land to ascertain the amount and certify the claim to the county court. *Jackson v. Mumford*, 74 Tex. 104, 110, 11 S. W. 1061.

11. Set-Off and Counterclaim.

a. Debts and Claims Which May Be Pleaded as Set-Offs.

As general rule parties sued for money due an estate can not plead in offset claims due them by estate, but there are exceptions. *Alford v.*

Smith, 40 Tex. 77, 85; *Atchison v. Smith*, 25 Tex. 228, 231; *Hall v. Hall*, 11 Tex. 526.

One indebted to a deceased person at the time of his death may set off a debt due to him by intestate in an action brought against him by administrator of estate of deceased, and is therefore not entitled to an injunction to restrain enforcement of demand. *Howard v. Randolph*, 73 Tex. 454, 458, 11 S. W. 495.

In case of a suit by an administrator, where there are mutual claims between the defendant and the deceased, the defendant is entitled to plead his claim as a set-off, and the previous presentation of such claim to the administrator is not essential. *Smalley v. Trammell*, 11 Tex. 10; *Walker v. Fearhake*, 22 Tex. Civ. App. 61, 62, 52 S. W. 629; *Morton v. Gordon*, *Dallam* 396; *Mitchell v. Rucker*, 22 Tex. 66, 70.

In a suit by an administrator, the defendant can set off items of a similar nature, though he has not duly authenticated them, so that he could maintain an action on them. *Mitchell v. Rucker*, 22 Tex. 66.

In such case the set-off operated as an extinguishment of plaintiff's debt to the extent that might be established, even to the full amount of plaintiff's demand. *Smalley v. Trammell*, 11 Tex. 10; *Mitchell v. Rucker*, 22 Tex. 66, 70. See *Dickenson v. McDermott*, 13 Tex. 248, 252.

A bank, when sued by the administrator of a deceased depositor for the amount of his deposit, may set off the amount of a note of the intestate held by it which was due at the time of his death. *Traders' Nat. Bank v. Cresson*, 75 Tex. 298, 12 S. W. 819; *Smalley v. Trammell*, 11 Tex. 10, 11; *Mitchell v. Rucker*, 22 Tex. 66.

In an action by an administrator upon a debt due the estate, the defendant can not set off a debt due to him by the estate, as such set-off would interfere with the jurisdiction

of the probate court in allowing claims against the estate. *Collins v. Barbee*, 3 Willson, Civ. Cas. Ct. App. § 126.

In an action by an administrator to recover a sum due from defendant to plaintiff's intestate, defendant may plead by way of set-off a claim existing in his favor and against the intestate which was due at the time of the latter's death. *Morton v. Gordon*, Dallah, Dig. 396.

Sole creditor of estate whose claim has been allowed and approved may set off such claim in suit by administrator for debt due estate. *Hall v. Hall*, 11 Tex. 526, 553; *Guthrie v. Guthrie*, 17 Tex. 541, 543; *Atchison v. Smith*, 25 Tex. 228.

Where the estate is not indebted, or to but an inconsiderable amount, and the defendant is sole distributee, the court would not permit judgment to be obtained and enforced against him by an administrator, who, in fact, is acting but as the trustee of the defendant. *Guthrie v. Guthrie*, 17 Tex. 541, 543. See, also, *Atchison v. Smith*, 25 Tex. 228, 231.

Claim held by administrator is a good set-off against the estate. *Knight v. Huff*, Dallah 425, 426.

There is no law conferring the right on an administrator to purchase claims against an estate to be used as set-offs against debts due the estate. *Johnson v. Brown*, 25 Tex. Supp. 120.

A claim for legal services rendered to an administrator of an estate may be pleaded as set-off in an action by such administrator individually to recover on a note. *Andrus v. Pettus*, 36 Tex. 108.

Since, under Pasch. Dig., arts. 5675, 5676, attorney's fees are part of the expenses of administration on an estate, entitled to priority of payment over all charges except funeral expenses, and the party rendering the same may at his option look directly to the administrator for payment, in which case it becomes an item in the

administrator's account allowable to him on settlement, an attorney against whom a summary proceeding is brought by an administrator to compel payment of moneys collected for an estate is entitled to set up as a defense that such moneys have been appropriated in payment of an indebtedness for services rendered the estate, though such indebtedness did not accrue within two years next before the institution of the proceeding. *Gammage v. Rather*, 46 Tex. 105.

Fees for services as attorney for the administrator in resisting a motion for his removal, if chargeable at all against the estate, should be established under the probate law; and they are subject to the same objections, when presented by such attorneys, as other offsets pleaded by defendant in a suit by the administrator. *Robb v. Smith*, 40 Tex. 89.

Authentication and allowance of claims by administrator do not prevent their application as equitable set-off in dispensing justice between the parties. *Eborn v. Cannon*, 32 Tex. 231, 249.

Claims against Administrator in Personal Capacity.—In an action by an administrator personal claims between the administrator and defendants should not be taken into consideration. *Houston v. Evans* (Sup.), 17 S. W. 925; *Johnson v. Brown*, 25 Tex. Supp. 120, 129.

Lien against Estate Enforceable in County Court Only.—A lien against an estate, which can only be enforced in the county court, is not available as a defense to a suit in the district court by the administrator upon a claim due to the estate. *Giddings v. Crosby*, 24 Tex. 295.

Demands Accruing Since Death of Deceased.—"The general rule in relation to debtors of an estate is that to an action brought by an administrator, the defendant can not plead in offset any demand against the estate accruing

since the death of the deceased. To adjust such discounts would encroach on the province of the county court, and lead to embarrassing investigations as to the assets and proper distribution of an estate." There are exceptions to the rule. The general rule is applicable as well to heirs who are indebted to the estate as to ordinary debtors. *Guthrie v. Guthrie*, 17 Tex. 541, 542. See *Hall v. Hall*, 11 Tex. 526, 553; *Atchison v. Smith*, 25 Tex. 228, 231.

Interest in Estate, Distributive Shares, Legacy.—In an action by the administrator of an estate against an heir to recover a debt due the estate, the heir can not set off the distributive share to which he may be entitled on final settlement against his liability to the estate. *Guthrie v. Guthrie's Adm'rs*, 17 Tex. 541

Where executors, whose administration of the estate is controlled by the county court, sue in the district court to recover money paid by testatrix for her son, who was also a residuary legatee under her will, defendant can not set off the debt against his interest in the estate, since the district court has no original probate jurisdiction. *Woessner v. Wells* (Civ. App.), 28 S. W. 247.

In an action by executors to recover money paid by testatrix to cancel notes for defendant, who was her son, and who became a residuary legatee under her will, defendant can not set off his interest in the estate without alleging a special legacy under the will, or showing that the estate is solvent, and that plaintiffs have funds sufficient to pay his legacy after paying the debts of the estate. *Woessner v. Wells* (Civ. App.), 28 S. W. 247.

Claims Purchased by Defendant.—"In an action brought by an administrator, the defendant can not be permitted to plead in offset a debt that had been allowed by the administra-

tor and approved by the probate judge, and assigned to the defendant before the commencement of the suit. This as a general rule is correct, as it might embarrass the settlement of estates, and lead to difficult investigations, as to what proportion of the claims against an estate could be paid out of the assets to be administered." This rule sometimes admits of exceptions. There is no question that sometimes cases under peculiar circumstances would arise, that would render the interposition of the equitable jurisdiction of the district court absolutely necessary to prevent great hardship and oppression. *Hall v. Hall*, 11 Tex. 526, 553.

Purchase of Claims Authorized by Administrator.—An administrator can not authorize a person to purchase claims against the estate to be used as a set-off against debts due the estate, under the provisions of Pasch. Dig. arts. 3443-3448, relating to "discount and set-off." *Johnson v. Brown*, 25 Tex. Supp. 120, distinguishing *Swenson v. Walker*, 3 Tex. 93. See post, "Estoppel to Dispute," VII, F, 5, a, (1), (b).

Set-Off Arising from Single Partnership Transaction.—In a suit by the executrix of one partner against the surviving partner on an open note, defendant claimed in set-off that the deceased partner had lent certain partnership property to third parties, and agreed to be responsible to defendant for his half interest in the property loaned. Held, that it was admissible for defendant to testify that the loaned property had not been returned. (2) Plaintiff was entitled to recover the value of the note, whether it was the result of a partial or final settlement of the partnership affairs, or arose from matters independent of the partnership. (3) Defendant could not claim against plaintiff's demand a set-off arising from a single partnership transaction. He should have prayed

for a settlement of the partnership affairs, and that any sum found due him should be allowed. *McKay v. Overton*, 65 Tex. 82.

Payment of Debt as Condition for Surrender of Property Belonging to Estate.—One sued by an estate for property alleged to belong to it can not protect himself by compelling payment of his debt as a condition for a surrender of such property, as he could if suit were by decedent himself, since that would in effect give him priority over other creditors of the same or of a higher class. *Northcraft v. Oliver*, 74 Tex. 162, 11 S. W. 1121.

"The right of the creditor of the estate is good to defend against the heirs taking and appropriating the property, but his right is no better to appropriate it exclusively to his own use than is that of the heirs to do the same thing. The creditor protects himself, and at the same time all other creditors and claimants of the estate, by surrendering the estate's property only to an administrator of the estate in whose hands our laws are so framed as to provide for its proper distribution." *Northcraft v. Oliver*, 74 Tex. 162, 169, 11 S. W. 1121.

Action by Partitioner Who Received Account Sued on.—In an action on an account for the pasturage of cattle, plaintiff pleaded that the account had been, together with all accounts and notes of the estate of her deceased husband, allotted to her, and defendant answered in reconvention for damages resulting from the husband's failure to carry out his contract for pasturage. It was proved that plaintiff had not only received the accounts and notes but a sum in cash. There was no exception to defendant's pleading as failing to show plaintiff's liability. Held, that plaintiff was liable for the damages sustained by defendant. *Hill v. Herndon* (Civ. App.), 89 S. W. 813.

Debts Paid by Executor De Son Tort.—See post, "Executor De Son Tort," XIV.

b. Requisites of Plea or Answer.

When a claim against an estate is sought to be set off in a suit by the administrator on a note, the plea should show as definitely as practicable the condition of the estate, the amount of its assets, and that there are no claims or liabilities of any character against said estate remaining unsettled except the claim pleaded in set-off. A mere general allegation that the defendant is the sole creditor of the estate is not sufficient. *Collins v. Barbee*, 3 App. Civ. Cases, § 126, citing *Hall v. Hall*, 11 Tex. 526; *Atchison v. Smith*, 25 Tex. 228, 231; *Alford v. Smith*, 40 Tex. 77; *Robb v. Smith*, 40 Tex. 89.

In a suit by an administrator on a note due the estate, the defendant can not off-set and prove a claim against the estate, without showing the necessity for the interposition of a court of equity to secure the ends of justice or to prevent injury or oppression to the defendant. *Robb v. Smith*, 40 Tex. 89.

In an action brought by an administrator upon a claim due his intestate, a plea, by way of set-off, that the defendant was, at the commencement of the suit, owner of the decedent's note, made to a third party, is bad, in that it does not show that he acquired the note before the decedent's death. *Mitchell v. Rucker*, 22 Tex. 66.

To entitle a person sued for the price of property bought of an administrator to offset an approved claim due him from the estate, his answer must show that he is the only creditor entitled to the fund to which he seeks to apply the offset, or, if other creditors are interested in the fund, must state the extent and character of such other claims, so that the court may determine whether such relief can be

allowed. *Alford v. Smith*, 40 Tex. 77.

c. Recovery of Excess of Set-Off over Debt.

Though a defendant may plead, in set-off, an account consisting of items similar in their nature to those of an account on which he is sued by an administrator, without having had the same duly authenticated and presented to the administrator, yet, he can not recover a judgment against the administrator, should his claim prove the largest, and the same can only operate as an extinguishment of the administrator's account. *Mitchell v. Rucker*, 22 Tex. 66.

Where a claim pleaded in set-off in suit by an administrator, has not been probated against the estate, defendant, if his set-off exceeds the debt sued on, can not recover the difference. *Walker v. Fearhake*, 22 Tex. Civ. App. 61, 62, 52 S. W. 629; *Mitchell v. Rucker*, 22 Tex. 66.

d. Evidence.

Where, in an action by a widow on an account allotted to her on the partition of her deceased husband's estate, she pleaded that all the accounts and notes of the estate had been allotted to her, and defendant pleaded in reconvention a specified sum resulting from breach of contract on the part of the husband relating to the transaction out of which the account arose, evidence showing that on partition of the estate the widow had not only received the notes and accounts, but also a sum in cash, was admissible on the issue of her liability for the damages claimed by defendant. *Hill v. Hernndon* (Civ. App.), 89 S. W. 813.

12. Judgment.

a. Form and Requisites.

A creditor has no right to collect the debts of his deceased debtor, and apply the proceeds to the payment of his claim upon the debtor's estate; and in suit against him to recover money

so collected judgment should be against him for the amount collected, and against the estate of the deceased for the amount of the defendant's claim upon it. *Cook v. Jordan*, 21 Tex. 221.

District court has no jurisdiction to determine in an original proceeding whether allowance to widow of decedent should be made; hence judgment in favor of widow suing on judgment rendered in favor of her deceased husband, properly declares that widow, on collecting such judgment in favor of decedent, shall hold proceeds as an administrator would, subject to decedent's debts. *Walker v. Abercrombie*, 61 Tex. 69, 72.

Recovery Inadequate.—Where, in a suit by an administrator to recover money, in which defendants pleaded offsets for boarding, etc., and for advancements to heirs, it was undisputed that defendants received \$650 belonging to decedent, and only \$50 was shown to have been paid on decedent's behalf, a judgment for plaintiff for \$14 was inadequate. *Manchester v. Bursey*, 48 Tex. Civ. App. 633, 107 S. W. 557.

b. Operation and Effect.

Persons Concluded.—A decree rendered in a suit brought by the executor or administrator for the recovery of land is binding upon the heirs who were not parties to it. *Bogges v. Brownson*, 59 Tex. 417, 420; *Gunter v. Fox*, 51 Tex. 383, 389. See, also, *Thompson v. Duncan*, 1 Tex. 485, 488; *Howard v. Republic*, 2 Tex. 311, 312; *Graham v. Vining*, 2 Tex. 433; *Guilford v. Love*, 49 Tex. 715, 733; *Shannon v. Taylor*, 16 Tex. 413.

Judgments in suits for title or possession of lands instituted by executors or administrators alone, are as conclusive as if rendered in favor of the testator or intestate. *Gunter v. Fox*, 51 Tex. 383, 389.

Though the administrator of a deceased husband's estate has authority

to maintain a suit to recover land for purposes of administration belonging to the community, without joining therein the heirs either of the deceased husband or wife, still a judgment against him in such a suit would constitute no bar to a suit by the heirs of the mother for her community interest. *Rudd v. Johnson*, 60 Tex. 91.

Setting Aside.—Where private acts of chief justice are complained of and he is not made party, petition to district court to set aside orders relating to estate can not present any cause of action as to him. *Glavecke v. Tijirina*, 24 Tex. 663, 673.

13. Review.

Where county court renders judgment against administrator and certain creditors of the estate administrator's failure to appeal does not deprive district court of full jurisdiction over the appeal of the creditors. *Ruhl v. Kauffman*, 65 Tex. 723, 736.

14. Injunction against Enforcement of Claim.

See ante, "Debts Which May Be Pleaded as Set-Offs," V, S. 11, a.

VI. Allowance to Surviving Spouse and Children and in Lieu of Exemptions.

A. STATUTORY PROVISIONS.

The object of Hart. Dig., art. 1154, directing that all the property exempt from execution except the years support to the widow and minor children should be set apart for the use of the widow and children without discriminating between minor and adult children, was to secure the family in the home of the decedent whether the family consisted of a widow, or children, or of either, or whether the children at home be minors or adults. *James v. Thompson*, 14 Tex. 463. See, also, *Mabry v. Ward*, 50 Tex. 404, 410; *Hubbard v. Horne*, 24 Tex. 270.

Statute Unconstitutional as to Homestead.—Article 2055, Rev. Stat.,

which provides that should an estate upon final settlement prove to be insolvent, the title to the widow and children to all the property set apart to them as exempt should be absolute, is held, as to the homestead, to be in contravention of art. 16, § 52, const. *Bell v. Read*, 23 Tex. Civ. App. 95, 56 S. W. 584. See, also, *Zwernemann v. Von Rosenberg*, 76 Tex. 522, 13 S. W. 485; *Roots v. Robertson*, 93 Tex. 365, 55 S. W. 308. See, generally, the title **HOMESTEAD EXEMPTIONS**.

Lands Granted to Soldiers in Battle of San Jacinto.—The 45th section of the act of March 20, 1848, concerning the estates of deceased persons, requiring the chief justice to set apart, for the use of the widow and children, all such property as may be exempted from execution or forced sale, by the constitution or laws of the state, etc., does not embrace lands granted "to those who were in the battle of San Jacinto, and other battles." *Hubbard v. Horne*, 24 Tex. 270.

B. RIGHT TO ALLOWANCE AND EXEMPTIONS.

1. In General.

See the titles **HOMESTEAD EXEMPTIONS**; **HUSBAND AND WIFE**.

Property required to be set aside for family must not be taken in possession of administrator adversely to those entitled to receive it. *Mitchell v. Harrison*, 32 Tex. 331, 332.

2. Allowance in Lieu of Exempt Property.

Insolvent Estates.—Under the laws of 1848, a homestead or substituted allowance is not to be designated out of every estate for the widow and children but only in cases where the estate is insolvent. *Green v. Crow*, 17 Tex. 180.

Sayles' Rev. Civ. Stat. of 1888-89, art. 2053, relative to exemptions to the widow and children of a decedent in property on which there are liens, held to apply to insolvent estates (arts. 2046,

2049, 2055, 2056, 2061). *Parlin & Co. v. Davis* (Civ. App.), 74 S. W. 951, affirmed in 97 Tex. 643, no op.

Where no Exempt Property Exists.

—Under the probate law of 1848, Paschal's Dig., 1305, the widow and children are entitled to an allowance in lieu of property exempt from forced sale, when no such property exists. *Mabry v. Ward*, 50 Tex. 404.

When Personalty Used Only for Support of Widow and Children.

—There should be set over to the widow and children the exempt property, and an allowance in lieu of exemptions not on hand, where it appears that they have used the personal property only to supply themselves with the necessities of life. *Crocker v. Crocker*, 19 Tex. Civ. App. 296, 46 S. W. 870.

3. Testamentary Provisions and Effect of Will on Right

The right of minor children and widow to have an allowance set apart for their support is not affected by an attempt of testator to devise all of his property to his widow. Judgment (Civ. App.), 43 S. W. 919, affirmed in part and reversed in part in *Woolley v. Sullivan*, 45 S. W. 377, 92 Tex. 28. See, also, *Zwernemann v. Von Rosenberg*, 76 Tex. 522, 13 S. W. 485; *Hall v. Fields*, 81 Tex. 553, 17 S. W. 82; *Runnels v. Runnels*, 27 Tex. 515, 516; Rev. Stat., art. 2009.

4. Additional Allowance.

Order for Additional Allowance Void.—In an administration granted May, 1840, the probate court made an order in 1851, setting aside personal property at its appraised value to the widow, as a year's allowance for the support of herself and her minor children. There was no evidence that the administration had been extended. Held, that the order was void. *Marks v. Hill*, 46 Tex. 345.

After a homestead had been allowed to decedent's widow, the probate court entered an order setting \$2,000 aside to her "as an allowance secured to her

by the constitution of the state" for the benefit of herself and children, and permitting her to receive, in part payment thereof, the lots and building occupied as a homestead. Held that, the order being unauthorized and void, the widow acquired no title to property taken at an appraised valuation to satisfy the allowance. *Newcomb v. Newcomb*, 38 Tex. 561.

Effect of Accepting Devise.—A widow held not entitled to accept a devise of real estate in a will, and obtain an additional allowance for a year's support from notes bequeathed to another. *Nelson v. Lyster*, 32 Tex. Civ. App. 356, 74 S. W. 54.

A widow, after having received and enjoyed, by the provisions of a will, an allowance for a year's support, can not, after the expiration of the year, have another allowance set apart to her under the statute. *Little v. Birdwell*, 27 Tex. 688.

Sufficient Property for Year's Support Used.—Where a widow and children used sufficient property to live upon for one year, before administration was opened upon the estate, an additional allowance for another year should not be granted. *Crocker v. Crocker*, 46 S. W. 870, 19 Tex. Civ. App. 296.

5. Persons Entitled to Allowance.

Must Be Constituents of Family.

Minor children of T. are not entitled to any allowance out of estate of T.'s father, deceased, in lieu of exempt property, where T. and his family were not constituents of father's family. *Glasscock v. Stringer* (Civ. App.), 33 S. W. 677, affirmed in 93 Tex. 684, no op.

Whether Marriage Lawful or Not.

Creditors can have no interest in contesting an allowance to the alleged widow and the child of a decedent, on the ground that she was not his lawful wife, as the child would be entitled to the same allowance. *Lockhart v. White*, 18 Tex. 102.

Wife Separated from Husband at Time of His Death.—A widow is not entitled to the statutory allowance from her deceased husband's estate where she was not living with the husband at the time of his death in the family relation, unless her separation was involuntary and through no fault of hers. *Earle's Ex'rs v. Earle*, 9 Tex. 630.

Minor Children.—On the death of a widower, leaving minor children, they are entitled not only to the homestead, but also to the other property exempt from forced sale, or to an allowance in lieu thereof, when the estate has not the property in kind. *Moore v. Owsley*, 37 Tex. 603.

Children of Whom Widow Not Mother.—Since the statute governing the administration of a decedent's estate provides that if there be children of the decedent, of whom the widow is not the mother, the share of such children in the exempt property, except the homestead, shall be delivered to them, or if minors, to their guardian, the minor children of a decedent are entitled to recover, through their guardian, of the decedent's widow, their stepmother, their share of the proceeds of exempt personal property which, without administration, has been sold and used by her. *Rev. Stat.* art. 2049 (4). *Burns v. Falls*, 23 Tex. Civ. App. 386, 56 S. W. 576, affirmed in 93 Tex. 636, no op.

Minor Son Earning Wages Sufficient for Support.—Under the statute allowing to the widow and minor children of a decedent who have no property adequate to their maintenance one year's support from decedent's estate, a minor son is entitled to such allowance, though he is earning wages sufficient for his support, and is allowed to appropriate them to his own use. *Cooper v. Pierce*, 74 Tex. 526, 12 S. W. 211.

Children of Second Marriage.—Entire allowance to family, though furnished from community property of

first marriage, can not be appropriated to exclusive use of children of first if there be children of second marriage. *Harmon v. Bynum*, 40 Tex. 324, 326.

6. Allowance for Maintenance and Support.

Widow Preferred Creditor for a Year's Maintenance.—An account for medical services rendered to a widow is not a charge against her deceased husband's estate; but she is herself a preferred creditor of the estate to the extent of a year's maintenance, and such other allowances as the law gives her, and one who furnishes her with necessities, and thus becomes her bona fide creditor, will, on her death, be substituted to her rights against the estate of her deceased husband. *Baker v. Rust*, 37 Tex. 242.

Administrator's Failing to Set Aside Property for Minor Children.—The claim of an administrator, who was not the guardian of the minor children of his intestate, for their support, was properly disallowed, it appearing that he did not set aside to the children property of the estate for their support as required by *Pasch. Dig.* art. 1305. *Mitchell v. Harrison*, 32 Tex. 331.

Allowance to Board and Clothe Infant Heirs.—It is no part of the duty of an executor or administrator to board and clothe infant heirs, and he can have no allowance for it in his administration accounts. *Mitchell v. Harrison*, 32 Tex. 331.

C. PROPERTY SUBJECT.

Husband's Interest in Estate.—After deducting one-half of husband's interest in household goods court must make widow, who was second wife, allowance out of husband's interest in estate in lieu of such articles of personal estate as are not found to exist in kind. *Hoffman v. Hoffman*, 79 Tex. 189, 192, 14 S. W. 915, 15 S. W. 471.

Estate of First Wife for Allowance to Second.—Estate of first wife can not be made to contribute indirectly

to allowance to second wife in lieu of exempt property by allowing husband's creditors access to excess over amount of assets which went to make up losses to first wife's heirs. *Hoffman v. Hoffman*, 79 Tex. 189, 194, 14 S. W. 915, 15 S. W. 471.

Interest of Children of First Marriage for Allowance to Widow of Second.—

The interest of the children of the first marriage in their mother's share of the community property can not be made to contribute to the allowances of the widow of a second marriage. *Hoffman v. Hoffman*, 79 Tex. 189, 192, 14 S. W. 915, 15 S. W. 471. See, also, *Gilliam v. Null*, 58 Tex. 298, 299; *Pressley v. Robinson*, 57 Tex. 453; *Putnam v. Young*, 57 Tex. 461; *King v. Gilleland*, 60 Tex. 271.

Property Subject to Lien.—Property not homestead though covered by lien may be sold to provide widow's allowance unless liens were properly executed. *Griffie v. Maxey*, 58 Tex. 210, 214; *Reeves v. Petty*, 44 Tex. 249, 250; *McLane v. Paschal*, 47 Tex. 365, 370.

Article 2000, Rev. Stat., providing that no property upon which liens have been legally given shall be set aside to widow or children as exempted property or appropriated to make up allowance in lieu of exempted property, until such debts are discharged applies only to solvent estates. *Krueger v. Wolf*, 12 Tex. Civ. App. 167, 177, 33 S. W. 663, affirmed in 93 Tex. 688, no op.; *Scott v. Cunningham*, 60 Tex. 566; *Horn v. Arnold*, 52 Tex. 161, 164; *Rainey v. Chambers*, 56 Tex. 17, 20; *Griffie v. Maxey*, 58 Tex. 210, 211; *Watson v. Rainey*, 69 Tex. 319, 321, 6 S. W. 840; *Hoffman v. Hoffman*, 79 Tex. 189, 194, 14 S. W. 915, 15 S. W. 471.

Mortgaged Property.—A suit by the holders of notes of the decedent secured by deed of trust, against his widow, independent executrix, for the sale of the mortgaged property for payment of their claims, put in issue

her right to subject such application of its proceeds to her allowance for support and exemptions, and a decree for foreclosure, sale, and application of the proceeds to the mortgage debt determined that no such right to an allowance existed, whether her claim for allowance was presented and urged or not. *Woolley v. Sullivan & Co.*, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629, reversing in part 43 S. W. 919.

Note Taken by Administrator.—A widow, showing her right to allowances from the estate of her deceased husband, and that the property of the estate had been sold by the administrator without regard to her rights, consented that the notes taken by the administrator for the property should be set apart to her, instead of the specific property or its money equivalent. Held, that the supreme court should not reverse for error in decreeing such relief, substantial justice thereby being accomplished. *Williams v. Hall*, 33 Tex. 212.

Mules and Wagons.—Decedent's widow and her children were entitled to mules and a wagon belonging to him, without regard to value. *Cooper v. Pierce*, 74 Tex. 526, 12 S. W. 211.

D. ALLOWANCE BY COURT AND PROCEEDINGS THEREFOR.

1. Duty to Set Apart Allowance.

It is the absolute duty of the chief justice of a county without any request to make an allowance for the widow or children of a deceased person, and to set apart for their use the property exempt. *Connell v. Chandler*, 11 Tex. 249.

Under the statutes, after the inventory and list of claims have been filed, it is the duty of the court to make such an allowance to the widow for support and in lieu of exempt property as she may be found entitled to receive, and the creditors have no right to delay such orders by an application to exhibit the condition of the estate.

Chefflet v. Willis, 74 Tex. 245, 11 S. W. 1105.

While a widow and children are entitled to an allowance for support and in lieu of exempt property, it is for the court to make the order and designate the property to be taken, and not for the parties entitled to arbitrarily take it out of the administration. *Chifflet v. P. J. Willis & Bro.*, 74 Tex. 245, 11 S. W. 1105; *Fowler v. Gilmore*, 30 Tex. 432; *Champion v. Shumate*, 90 Tex. 597, 601, 39 S. W. 128, 40 S. W. 394, affirming 39 S. W. 128, 90 Tex. 597; *Roots v. Robertson*, 93 Tex. 365, 373, 55 S. W. 308; *Leaverton v. Leaverton*, 40 Tex. 218, 224; *Pas. Dig.*, art. 1305, note 481.

The probate act of 1848 did not authorize probate courts to allow a widow to select property of an estate for a year's allowance, which had not been made at the passage of the law. *Marks v. Hill*, 46 Tex. 345.

2. Jurisdiction.

Probate Courts.—The statute confer upon the probate courts the right to set apart, for the family of an intestate, property exempt from execution; and where a widow fails to appear and assert her rights, and the estate is administered, the widow, no fraud being charged, can not maintain an action against the administrator for converting such property. Her remedy, if any, must be in the probate court. *McGowen v. Zimpelman*, 53 Tex. 479.

Application was made by a widow to the probate court to have a homestead of 115 acres and other exempt property set apart to her. She contracted with attorneys, giving half that should be recovered for their fee. Pending the application the widow and the executor settled, she receipting in full of all claims. The lawyers intervened, setting up claim to one-half the exempt property. The widow by amendment pleaded that her release to the executor had been obtained by fraud. The executor excepted to the interven-

tion of the lawyers, set up the settlement, denied that the land was the homestead of the deceased husband of the widow, denying fraud, etc. On trial the court sustained the settlement against the widow, and sustained exceptions to the intervention by the lawyers. Held, the intervention sought to litigate title to land, and was not within the jurisdiction of the probate court. *Cox v. Cox*, 77 Tex. 587, 14 S. W. 201.

District Court.—Where a widow, who was also a legatee under the will of the deceased husband, brought suit against the executor in the district court for the allowance provided as a substitute for the homestead and other property exempt by law from forced sale, and alleged that the estate of said deceased was wholly insolvent, and that the will provided that the executor should not enter into any bond but only file an inventory, and there was a judgment by default, the district court had jurisdiction, and it was error to dismiss the case. *Runnels v. Runnels*, 27 Tex. 515.

A widow who refuses the provisions of a will need not have made an election to claim her statutory rights by a proceeding in the county court before instituting a suit for that purpose in the district court, though *Old & W. Dig. arts. 752, 753*, directing the allowance claimed by the widow, are a part of the act regulating proceedings in the county court. *Runnels v. Runnels*, 27 Tex. 515.

When the county court can not for any reason secure the allowance to the widow and heirs, she unquestionably may call in aid the general equity jurisdiction and supervising power and control of the district court over estates of deceased persons, executors, administrator's, etc. *Runnels v. Runnels*, 27 Tex. 515, 522.

Executor Administering in a County Court.—Under const., art. 5, § 16, and *Sayles' civil statutes*, ch. 17, 18, 25, 26,

where the estate of decedent was being administered in county court by the executor, the district court held to have no authority to entertain proceedings by the widow and minor children for the setting apart of an interest in the estate. *McCorkle v. McCorkle*, 25 Tex. Civ. App. 149, 60 S. W. 434, affirmed in 94 Tex. 700, no op.

Estate Administered by Independent Executor.—County court can not set aside exempted property or substituted allowance, while estate is being administered by independent executor. *Runnels v. Runnels*, 27 Tex. 515, 521; *Haby v. Fuos* (Civ. App.), 25 S. W. 1121; *Roy v. Whitaker*, 92 Tex. 346, 48 S. W. 892, 49 S. W. 367.

Where a will provided that no action should be had in the probate court with reference to the estate, or other than the probate and record of the will and the filing of an inventory of the estate, the county court had no jurisdiction of a widow's application to annul or suspend a clause bequeathing certain notes to another, and to have such notes sold and a year's support allowed to her from the proceeds thereof. *Nelson v. Lyster*, 74 S. W. 54, 32 Tex. Civ. App. 356.

3. Parties.

Minor Children.—Minor children are necessary parties to a legal proceeding to fix their right to an allowance for a year's support out of their deceased father's estate. Judgment (Civ. App.), 43 S. W. 919, affirmed in part and reversed in part. *Woolley v. Sullivan*, 45 S. W. 377, 92 Tex. 28.

Creditors.—The creditors of a decedent need not be made parties to a suit by a widow against the executor of her husband's will for her statutory allowance. *Runnels v. Runnels*, 27 Tex. 515.

4. Pleading.

Petition in Nature of Bill in Equity Sufficient.—A petition in the nature of a bill in equity or a new trial, by minor children of an insolvent decedent,

asking that a judgment of foreclosure in which they were not made parties be set aside, and also asking the court to fix and pay for out of certain property their allowance, is sufficient as to the prayer for allowance, although they are not entitled to have the judgment set aside. Judgment (Civ. App.), 43 S. W. 919, affirmed in part and reversed in part. *Woolley v. Sullivan*, 45 S. W. 377, 92 Tex. 28.

Averment That Plaintiff Refused to Accept under Will.—A suit against an executor by the testator's widow for the allowance provided as a substitute for the property which is exempt from a forced sale should not be dismissed for want of an averment that the plaintiff has refused to accept under the will, when the testator was insolvent. *Runnels v. Runnels*, 27 Tex. 515.

5. Hearing.

A motion filed to compel an administrator to pay over to the widow the allowance for support of herself and child may be called for disposal before it is regularly reached in the call of the docket. *Leaverton v. Leaverton*, 40 Tex. 218.

6. Order or Decree and Review.

Presumption of Regularity.—A prior owner of land, through whom plaintiff claimed, devised the same to his wife, and appointed her executrix. She refused to act, and the land, which was the homestead of decedent and his wife, was included in the inventory of the administrator with the will annexed. The court awarded the land to the wife, and made an allowance of \$800 for maintenance for one year, and thereafter ordered the administrator to sell the land to raise the amount of the allowance, which was done, and the sale approved. Held, that since the court was authorized to sell the land under Rev. St. 1895, arts. 2037, 2043, to raise the allowance, under certain conditions, it would be presumed that those conditions existed, and therefore that the widow had no title as

against the purchaser from the administrator. *Johnson v. Weatherford*, 71 S. W. 789, 31 Tex. Civ. App. 180.

Collateral Attack.—Decedent's creditors could not impeach collaterally the decree of the county court ordering an allowance to the widow, who was administratrix, by bringing action on her bond for waste, where such action was instituted more than two years after the decree, and their attorney resided in the county where the succession was opened, and was notified of the administratrix's application to resign, and raised no objection. *Lockhart v. White*, 18 Tex. 102.

Allowance for support of widow of intestate made by court at previous term is judgment impeachable only by direct proceeding for that purpose. *Leaverton v. Leaverton*, 40 Tex. 218, 223; *Pitner v. Flanagan*, 17 Tex. 7; *Gray v. McFarland*, 29 Tex. 163; *Smith v. Downes*, 40 Tex. 57.

An order granting an allowance for the support of the widow and children is a judgment, and cannot be impeached in an answer to an application to compel its payment. *Leaverton v. Leaverton*, 40 Tex. 218.

Heirs Can Not Inquire into Purpose for Which Sums Paid to Wife.—In an action by the heirs against the administrator for a revision of the proceedings in the probate court, the heirs can not inquire into the purpose for which certain sums were paid to the wife after the death of the intestate; it not being shown that she received more than her community interest. *Stonebraker v. Friar*, 70 Tex. 202, 7 S. W. 799.

Allowance Res Judicata as to Classification of Claims.—Where a court sitting in probate removed the independent executrix and appointed her administratrix, a subsequent allowance to testator's widow and children was res judicata in a contest over the classification of claims. *King v. Battaglia*, 84 S. W. 839, 38 Tex. Civ. App. 28.

Conclusive against Parties Interested.

—If in the exercise of its general jurisdiction over an estate the district court decreed in lieu of the exempt property not belonging to the estate that title to land should be vested in the surviving widow, though its decree may have been erroneous, it was conclusive against those interested in the estate until reversed to set aside. *Helham v. Murray*, 64 Tex. 477.

Mere Assertion of Claim Confers No Right of Appeal.—One whose claim against the estate of one deceased has neither been recognized by the administrator nor approved by the probate court, does not, by merely asserting his claim, show himself a creditor with an interest sufficient to entitle him to appeal from a decree of the court in setting apart to the family of the deceased the property of the estate. *Stark v. Seale*, 59 Tex. 1.

Irregular Joinder of Parties.—On an appeal by certiorari from the district court to the county court to review an order setting apart homestead and exempt property, which had been placed in plaintiff's possession by injunction proceedings in the district court, the administrator filed an amendment demanding the return of the property and the value of its use. No exceptions were taken to the amendment and trial was had and judgment rendered in reference to it. Held, that while the joinder of the two remedies may have been irregular, it was not reversible error. *Oldham v. McIver*, 49 Tex. 556.

E. AMOUNT.

The object of Hart. Dig., art. 1153 providing that there be allowed to the widow and minor children, if there be either or any, an amount sufficient for their support for one year, to be paid to the widow if there be one, if not to the guardian of the child or children, was to allow a year's support for the widow, and minor children, or for the minor children if there were no widow,

and if there were a widow she was to receive the whole for the joint benefit of herself and the minor children. *James v. Thompson*, 14 Tex. 463.

Widow must have full amount of allowance in lieu of exempt property if estate be sufficient and creditors must be postponed thereto. *Hoffman v. Hoffman*, 79 Tex. 189, 193, 14 S. W. 915, 15 S. W. 471.

Exempt Property.—In estimating the allowance to be made the widow and children in lieu of exempt property, not found among assets, the value of the exempt property existing and turned over in kind should not be included in the five hundred-dollar exemption allowed. *Cooper v. Pierce*, 74 Tex. 526, 529, 12 S. W. 211.

The exempt property of deceased husband's estate should be turned over to the widow and children without regard to its value. *Cooper v. Pierce*, 74 Tex. 526, 529, 12 S. W. 211.

Child's Estate and Social Condition Considered.—Amount of estate belonging to child, and its social condition are to be considered in making allowance for its support. *Johnson v. Hogan*, 37 Tex. 77, 81.

Value of Property Considered.—In estimating the amount to be allowed, it would be competent for the court to ascertain, through witnesses, what would be the average value of homesteads in the town, city, or neighborhood where the deceased died, owned by persons in like conditions and circumstances; and also what would be the average value of the personal property, to be estimated at the place where the deceased last resided. *Terry v. Terry*, 39 Tex. 310, 314.

Setting Aside Property at Appraised Value.—No law existed, prior to the probate act of 1848, authorizing the setting aside of property at its appraised value for the support of the widow and children. *Marks v. Hill*, 46 Tex. 345.

Postponement of Payment—Partial Payment.—"While it will not probably

become often necessary to postpone the payment of the allowances to the widow and minor children to ascertain what amount can be paid them, and while postponement of the payment of such allowances should never be made when it can be properly avoided, still it should be done when necessary to ascertain the true condition of the estate in order to determine how much of the allowance can be lawfully paid. In such cases even partial payments may be made, as it can be ascertained with certainty that any specified portion of the allowance may be lawfully paid. For the purpose of ascertaining how to make as well as to actually make distribution, the land and other property belonging to the estate may be sold when the condition of the estate and the nature of the claims against it demand that remedy." *Hoffman v. Hoffman*, 79 Tex. 189, 194, 14 S. W. 915, 15 S. W. 471.

Amounts Held Not Excessive.—*Hoffman*, senior, died leaving children and a widow, the widow a second wife who had no children. The estate was largely indebted. During the second marriage about \$150 in value of property was acquired. At the death of the first wife no constituent of the family remained but the husband. The homestead was encumbered at the death of *Hoffman*, senior. The debt was paid by his administrator. The household goods were taken and divided by the children. The widow applied to the probate court for such allowances as she was entitled to. The probate court made an allowance in lieu of homestead and of other exempt property. On appeal to the district court a judgment was rendered allowing the widow \$1,200 in lieu of homestead and \$450 in lieu of other exempt property, to be paid only after the community debts of the first marriage were all paid, and out of the one-half of the surplus remaining. The widow appealed. Held, under the facts it was proper to make an allowance,

and the amounts were not excessive. *Hoffman v. Hoffman*, 79 Tex. 189, 14 S. W. 915, 15 S. W. 471.

The supreme court will not determine, in absence of testimony, that thirteen hundred dollars is too small an allowance to be made to two minors in lieu of exempt property in the administration of their father's estate. *Ross v. Smith*, 44 Tex. 398.

F. APPORTIONMENT BETWEEN WIFE AND CHILDREN.

Rev. St. 1895, art. 2045, provides that if there be both widow and minor children, the widow is entitled to one-half, and the minor children to the other half, of the allowance for year's support; and article 2055 provides that, should the estate prove insolvent, the title of the widow and children to the allowances set apart to them shall be absolute. Held, that the widow is entitled to one-half of such allowance absolutely, and the children to the other half absolutely. Judgment (Civ. App.) 43 S. W. 919, affirmed in part and reversed in part. *Woolley v. Sullivan*, 45 S. W. 377, 92 Tex. 28; *Zwernemann v. Von Rosenberger*, 76 Tex. 522, 13 S. W. 485.

G. WAIVER OR BAR.

Widow may abandon and relinquish to the use of the estate of her deceased husband her right to demand or receive the benefit of the allowance that was made to her. *Tiebout v. Millican*, 61 Tex. 514, 516.

Long Delay in Asserting Claim.—A claim by a widow to an unpaid balance of an allowance granted in lieu of homestead, made 25 years after such allowance, is a stale demand. *Tiebout v. Millican*, 61 Tex. 514. See *Vogelsang v. Dougherty*, 46 Tex. 466, 467.

Accepting under Will Waives Right to Allowance.—The widow, after accepting under the will, is not entitled in addition to the widow's award conferred by statute. *Trousdale v. Trousdale's Ex'rs*, 35 Tex. 756.

Where a testator provided by will for the support of his widow and children, and the widow probated the will and received the benefit of such provision for more than a year, she was not then entitled to an allowance in lieu of the year's support. *Little v. Birdwell*, 27 Tex. 688, 689.

Effect of Ownership of Separate Estate Sufficient for Support.—The right of a widow and children to an allowance in lieu of property exempt from forced sale is not affected by their ownership of separate estates sufficient for their support. *Mabry v. Ward*, 50 Tex. 404.

But under Hart. Dig. art. 1153, declaring that, when a widow and children have separate property adequate to their maintenance, no allowance for maintenance shall be made to them, where two minor children had separate property of the value of \$2,300 they were not entitled to an allowance for maintenance. *Sloan v. Webb*, 20 Tex. 189.

Mother's Leaving Homestead Does Not Deprive Children of Allowance.—That the mother of children of a second marriage left a homestead, and permitted the children of the first marriage to occupy it, does not deprive the former of their pro rata interest in the amount allowed for the one year's support, nor from recovering against the administrator on the joint estates of their deceased father and his first wife their pro rata share of the value of the use and occupation of the homestead land, all of which had been appropriated by the administrator to support the children of the first marriage. *Harmon v. Bynum*, 40 Tex. 324.

Failure of Chief Justice to Make Allowance Not a Bar.—The right of widow and children to an allowance in lieu of property exempt from forced sale is not affected by the probate judge's failure to make the allowance at the time required. *Mabry v. Ward*,

50 Tex. 404; *Little v. Birdwell*, 27 Tex. 688, 691.

Application of Administratrix and Secured Creditor to Have Land Sold No Bar.—That the administratrix with the will annexed joined in an application by a secured creditor to have certain land covered by the creditor's deed of trust sold did not preclude her and her minor children from having the proceeds of the sale appropriated to the payment of her net allowance; there being no other property from the proceeds of which such allowance could be satisfied. *King v. Battaglia*, 84 S. W. 839, 38 Tex. Civ. App. 28.

Acknowledgment by Married Women of Deed of Trust No Bar.—Acknowledgment by a married woman of a deed of trust given her husband does not deprive her or his minor children of the right to have the proceeds of the sale of the property on which the deed was given applied to the payment of the widow's and children's allowance for a year's support after the husband's death, leaving an insolvent estate. *King v. Battaglia*, 84 S. W. 839, 38 Tex. Civ. App. 28.

Administrator's Pleading Widow's Indebtedness to Estate.—An administrator can not defeat a motion to compel the payment of the widow's allowance by pleading in set-off an indebtedness of the widow to the estate. *Leaverton v. Leaverton*, 40 Tex. 218.

Testator Can Impose No Bar.—The testator can not, by will, impose an insuperable barrier to the assertion of the widow's claims to exempt property or an allowance in lieu thereof. *Runnels v. Runnels*, 27 Tex. 515.

Desertion by Wife for Good Cause No Bar to Allowance.—In *Earle v. Earle*, 9 Tex. 630, it is held that the wife, by voluntary abandoning her husband for a series of years without cause, loses her right to the homestead and to the widow's allowance. On the other hand, there are decisions which recognize the rule that the separation of the wife from the husband does not forfeit her rights as a wife where there is a sufficient cause to justify such separation. *Linares v. Linares*, 93 Tex. 84, 87, 53 S. W. 579, affirming 51 S. W. 510. See, also, *Wheat v. Owens*, 15 Tex. 241; *Sears v. Sears*, 45 Tex. 537.

Evidence Sufficient to Show Desertion for Good Cause.—When the trial court finds that a husband and wife are living apart by agreement, and that the wife was induced thereto by reason of the cruel treatment of the husband, it will be presumed the cruelty was sufficient to justify the separation, and that she had not thereby forfeited her right, as surviving widow, to an allowance from the estate. Judgment, *Linares v. Linares* (Civ. App.), 51 S. W. 510, affirmed. *Linares v. De Linares*, 53 S. W. 579, 93 Tex. 84.

Burden on Claimant to Show Separation without Good Cause.—It is incumbent on one who claims that a wife has forfeited her right to allowance from her husband's estate by reason of her separation from him to show that there was no sufficient cause to justify such separation. Judgment, *Linares v. Linares* (Civ. App.), 51 S. W. 510, affirmed. *Linares v. De Linares*, 53 S. W. 579, 93 Tex. 84.

Application for Allowance Made after Property Ready for Partition.—Widow and children can not apply for allowance in lieu of exempt property after property is ready for partition, if estate is solvent. *Little v. Birdwell*, 27 Tex. 688, 691.

H. PRIORITY AS TO OTHER CLAIMS.

H. PRIORITY AS TO OTHER CLAIMS.

1. In General.

The right of a widow and children of a deceased person, or the widow alone, when there are no children entitled to participate with her to a provision for a year's support together with the homestead and other property exempt by law from execu-

tion, or a substitute allowance therefor, is superior to that of the creditors or the heirs until such time as that part of it in which they can claim an interest must be brought into partition. *Runnels v. Runnels*, 27 Tex. 515; *Sossaman v. Powell*, 21 Tex. 664, 665; *O'Docherty v. McGloin*, 25 Tex. 67; *James v. Thompson*, 14 Tex. 463, 466; *Lackhart v. White*, 18 Tex. 102, 108; *Robertson v. Paul*, 16 Tex. 470; *Reeves v. Petty*, 44 Tex. 249, 253; *McMiller v. Butler*, 20 Tex. 402; *Cunningham v. Taylor*, 20 Tex. 126; *Green v. Rugely*, 23 Tex. 539; *Williams v. Hall*, 33 Tex. 212.

An allowance by order of the court for the support of the widow and children is not subject to the demands of creditors. *Leaverton v. Leaverton*, 40 Tex. 218. See, to the same effect, *Hoffman v. Hoffman*, 79 Tex. 189, 194, 14 S. W. 915, 15 S. W. 471; *Green v. Crow*, 17 Tex. 180; *Johnson v. Taylor*, 43 Tex. 121.

The payment and division of the allowance to widow and children of a deceased person, where the property of the estate of such person, exclusive of the allowance, is insufficient to pay the debts, is final and absolute, without remainder or ultimate liability to creditors, or others interested in the estate. *Green v. Crow*, 17 Tex. 180. And see *Cox v. Cox*, 77 Tex. 587, 14 S. W. 201.

Funeral Expenses—Expenses of Last Illness.—The property of a decedent's estate consisted of \$505 in money, of which \$300 was the proceeds of a sale of certain bar fixtures, on which a brewing company held a lien for a larger amount. The balance was the proceeds of the sale of a stock of liquors, on which such brewing company claimed a landlord's lien amounting to \$125. Held, that it could not complain of an allowance of \$205 to the widow for a year's support of herself and child, since Rev. Stat. 1895, arts. 2044, 1069, make such allowance

payable in preference to all other debts and charges against the estate, except funeral expenses and expenses of last sickness. In *re Laurence's Estate*, 74 S. W. 779, 32 Tex. Civ. App. 465.

Allowance of Claim as Executrix Does Not Estop Widow from Asserting Priority.—An independent executrix, while acting as such, allowed a claim against the estate of her deceased husband and thereafter the administration was changed—she being appointed administratrix with the will annexed—whereupon the court made an allowance for a year's support to her and her minor children. Held, that her prior allowance of such claim did not estop her from afterwards claiming priority over the same for her widow's allowance. *King v. Battaglia*, 84 S. W. 839, 38 Tex. Civ. App. 28.

2. Mortgages and Liens.

a. In General.

A lien on property, held by a bank for money furnished by it, held superior to any claim for allowances by the widow of the pledgor, under *Sayles' Civ. Stat.* 1897, art. 2053. *Fulton v. National Bank*, 26 Tex. Civ. App. 115, 62 S. W. 84, affirmed in 94 Tex. 704, no op.; *State v. Pierce*, 26 Tex. 114, 115; *Champion v. Shumate*, 90 Tex. 597, 602, 39 S. W. 128, 40 S. W. 394, affirming 39 S. W. 128, 90 Tex. 597.

b. Landlord's Lien.

The landlords' statutory lien on the crop for rent of the premises is superior to the allowance in administration to widow, minor children and unmarried daughter of deceased, in lieu of exempt property. *Champion v. Shumate*, 90 Tex. 597, 601, 39 S. W. 128, 362, 40 S. W. 394, affirming 39 S. W. 128, 90 Tex. 597.

Costs incurred in enforcing landlord's lien on crop on leased premises superior to allowance to widow and minor children. *Champion v. Shumate*, 90 Tex. 597, 601, 39 S. W. 128, 362, 40

S. W. 394, affirming 39 S. W. 128, 90 Tex. 597.

Under Rev. Stat., art. 2342, providing that exemptions of personal property shall not override claims for rent, a landlord's lien is superior to the claim of a widow and her minor children to an allowance in lieu of property exempt from forced sale. *Stokes v. Burney*, 3 Tex. Civ. App. 219, 22 S. W. 126.

A landlord's lien on the tenant's crop for supplies and advances during the year in which the crop was raised is superior to the claim for an allowance for the support of the tenant's widow and children. *Walker v. Patterson's Estate*, 77 S. W. 437, 33 Tex. Civ. App. 650.

c. Vendor's Lien.

A. by the bond contracted to sell land to B., who gave a vendor's lien note. Later B. arranged with C. for a loan of money to pay A. In furtherance of this arrangement A. executed to B. a "release and deed of correction," reciting a satisfaction of the vendor's lien and quitclaiming the property. The instrument also recited that the money received in satisfaction of the lien was paid by C. Contemporaneously with this instrument B. executed a note and deed of trust to C., reciting the satisfaction of the vendor's lien by C., and purporting to subrogate him to the rights of A. There was evidence that it was understood between all of the parties that C. was to acquire A's rights. Held that, while the instrument executed by A. by its terms released the vendor's lien, so that it could not be resurrected in favor of C., whose only security was the deed of trust, yet, in view of the understanding of the parties, the instruments together would be construed as transferring to C. A's vendor's lien, so that C.'s lien on the land would be superior to the claim of B.'s widow and minor children for an allowance under Rev. Stat. 1895, arts. 2037, 2038,

2093, which in effect make claims for the widow's and minor's allowance superior to all others, except those for funeral expenses, and expressly reserved the vendor's liens. *Zieschang v. Helmke* (Civ. App.), 84 S. W. 436.

Under Rev. Stat. 1895, arts. 2037, 2038, authorizing an allowance for the support of the widow and minor children, and art. 2093, classifying such allowance as a claim of the second class, postponing it only to claims for funeral expenses and expenses of last sickness, the widow's and minor's allowance is prior to all other claims against the estate of a decedent, except claims for expenses of funeral and last sickness, and the claims of a vendor, or one subrogated to his right, who expressly reserves a vendor's lien on land sold to the decedent. *Zieschang v. Helmke* (Civ. App.), 84 S. W. 436; *Toullerton v. Mahncke*, 11 Tex. Civ. App. 148, 32 S. W. 238; *Hoffman v. Hoffman*, 79 Tex. 189, 193, 14 S. W. 915, 15 S. W. 471; *Chifflet v. Willis & Bro.*, 74 Tex. 245, 251, 11 S. W. 1105; *King v. Battaglia*, 38 Tex. Civ. App. 28, 84 S. W. 839, affirmed in 101 Tex. 645, no op.

The county court in an administration proceeding has no authority, as against the holder of a valid lien on decedent's real estate, to set aside such real estate to decedent's widow. *Wade v. Freese* (Civ. App.), 71 S. W. 69.

Where a bank furnished a person with money to purchase property, holding the property as collateral for the payment of the loan, the lien has the character of a vendor's lien, and is superior to any claim for allowances by the widow of the pledgor; *Sayles' Civ. Stat. 1897, art. 2053*, providing that no property on which a vendor's lien exists shall be set aside to the widow as exempt property, or appropriated to make up allowances made in lieu thereof, until the debts secured by such lien are first discharged. *Fulton v. National Bank of*

Denison, 62 S. W. 84, 26 Tex. Civ. App. 115.

Sayles' Rev. Civ. Stat. 1888-89, art. 2046, provides that, at the first term after the return of an inventory, appraisal, and list of claims in the matter of a decedent's estate, the court shall enter an order setting apart for the widow and children all property exempt from execution. Article 2049 directs the delivery of property to the widow. Article 2053 provides that no property on which liens have been given by the husband and wife, so as to be binding on her, or on which a vendor's lien exists, shall be set aside to the widow or children as exempt, till discharge of the debts secured by the liens. Article 2055 declares that, should the estate prove insolvent, the title to the property set aside to them shall be absolute, and shall not be taken for any of the debts, except, as provided by art. 2061, for expenses of sickness and funeral of deceased. Article 2056 excludes the exempt property and allowances from the computation in ascertaining the solvency or insolvency of the estate. Held, that art. 2053 applies to insolvent estates. *Parlin & Orendorff Co. v. Davis' Estate* (Civ. App.), 74 S. W. 951; *Griffle v. Maxey*, 58 Tex. 210; *Ford v. Sims*, 93 Tex. 586, 57 S. W. 20; *Champion v. Shumate*, 90 Tex. 597, 39 S. W. 128, 40 S. W. 394, affirming 39 S. W. 128, 90 Tex. 597.

d. Mortgage.

Paschal's Dig., art. 5487, providing that exempt property is no part of estate, does not permit mortgage lien to be enforced against widow's allowance. *Abney v. Pope*, 52 Tex. 288, 292.

I. EFFECT OF SETTING APART ALLOWANCE.

Withdraws Property from Administration.—Where a county court sets apart the homestead and other exempt property of a deceased, under Rev. Stat., arts. 2046, 2049, to the widow

and children of decedent, such order withdraws such property from administration, but does not affect the rights of those owning the property. (Civ. App.), *Simms v. Hixon*, 65 S. W. 36, judgment affirmed *Sims v. Same*, Id. 35; *Swerneman v. Von Rosenberg*, 76 Tex. 522, 13 S. W. 485; *Woolley v. Sullivan & Co.*, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629.

Vests Complete Title in Widow.—

Articles assigned to a widow as a part of her allowance vests in her a complete title to them. *Green v. Crow*, 17 Tex. 180.

Power of Widow to Sell Interest of

Children.—An order of the probate court setting apart certain land of a decedent to his widow as an allowance in gross, free from all claims against the estate, does not give the widow the right to sell the interest of decedent's children in such land. *Nanny v. Allen*, 77 Tex. 240, 13 S. W. 989.

J. RIGHTS OF HEIRS, WIDOW, CHILDREN AND CREDITORS.

Where one-half of husband's interest in household goods has become property of widow, no allowance in lieu thereof can subsequently be made to detriment of creditors. *Hoffman v. Hoffman*, 79 Tex. 189, 192, 14 S. W. 915, 15 S. W. 471.

"The widow can resort only to her husband's share of the community estate. The children can resort, as against the widow's claim for exemptions and allowances, only to their mother's share. The creditors may resort to both shares, with the difference that as to the first wife's share their claims are superior to those of her heirs, while as to the husband's share they are inferior to the widow's right to the allowances. The relative rights of the respective parties may be stated as follows: When not affected by a subsequent marriage the claims of the creditors must be fully discharged before the heirs of the first wife can receive anything. The widow

must have her allowances for exempt property before the creditors can be paid anything out of her husband's share of the estate. The interest of the heirs of the first wife in the estate must not be diminished to create or help to create an allowance for the widow or second wife. Under these rules the heirs of the first wife will take nothing when the amount of the indebtedness of the community, including the expenses of its administration, is greater than the entire value of the estate." *Hoffman v. Hoffman*, 79 Tex. 189, 193, 14 S. W. 915, 15 S. W. 471.

If there is an excess of value above the whole amount of debts and expenses of administration there should be allotted to each of the heirs of the first wife who were settled with by the husband his or her proportionate part of one-half of such excess. In the second place, there should be paid to the widow the full amount of her allowance if it can be done with the entire remainder of the estate. And in the third place there should be paid to the creditors out of what remains, according to their respective priorities. If anything remains after the three classes are provided for, it must be distributed to the husband's heirs according to the status of decedent and distribution. The foregoing general directions are subject to some qualifications. When there is a lien creditor with rights superior to the claims of other parties, such rights will of course be enforced against the property subject thereto, and the surplus only, if any results, should be administered in the manner suggested. *Hoffman v. Hoffman*, 79 Tex. 189, 193, 14 S. W. 915, 15 S. W. 471.

Property Not Required to Be Set Apart.—Rev. Stat. 1895, art. 1869, provides that all intestate's estate, except such as may be exempt by law from the payment of debts, descends to the heirs, subject in their hands to

the payment of the testator's debts. Article 2037 makes it the duty of the court to fix the allowance for the support of the widow and minor children of the deceased, which art. 2044 requires to be paid in preference to all of the other debts, except, etc., and art. 2046 requires that the court shall set apart for the benefit of the widow and minor children and unmarried daughters remaining with the family of the deceased all exempt property, etc. Article 2049 directs that if there be a widow and no minor children the property shall be paid to the widow, and if there are children and no widow, to the children or their guardian if they be minors, and if there be children of the deceased of whom the widow is not the mother the share of such children in such exempt property excepting the homestead shall be delivered to them, or their guardians if they be minors, and the homestead shall be delivered to the widow if there be one, and if there is none to the guardian of the minor children and unmarried daughters remaining with the family. Held, that it is only that portion of intestate's estate that the court is required to set aside for the widow and minor children and unmarried daughters remaining with the family of deceased that is to be considered exempt from the payment of debts under art. 1869. *Wilkins v. Briggs*, 48 Tex. Civ. App. 596, 107 S. W. 135.

Allowance to Widow Must Not Disturb Rights of Children of First Wife.

—In making allowance to widow in lieu of articles of exempt property in household goods, care must be taken that interest of children of first wife are not disturbed thereby. *Hoffman v. Hoffman*, 79 Tex. 189, 192, 14 S. W. 915, 15 S. W. 471.

Superior Lien of Deed of Trust.—

The act of the county court in setting aside property of a deceased person, subject to the lien of a deed of trust to the widow, did not constitute a

partition and distribution of the estate, so as to divest the court of authority to charge the property with the superior lien of such deed. *Wade v. Freese* (Civ. App.), 71 S. W. 69.

Where land of a decedent which is subject to a deed of trust was erroneously awarded to the widow by the county court, as against the holder of the lien, the latter was entitled to have such order set aside in such court, where the administration proceedings are pending, and have the land sold to enforce his lien. *Wade v. Freese* (Civ. App.), 71 S. W. 69. See, also, *Harrison v. Oberthier*, 40 Tex. 385; *Hensel v. International Bldg., etc., Co.*, 85 Tex. 215, 20 S. W. 116; *Fossett v. McMahan*, 86 Tex. 652, 26 S. W. 979.

Heirs' Right to Rent for Property Improperly Set Aside to Widow.—The surviving widow is liable to the minor heirs of her deceased husband for reasonable rents of improved property improperly set aside to her as homestead by order of the probate court, when such order is corrected by direct proceeding for that purpose. *Linch v. Broad*, 70 Tex. 92, 6 S. W. 751.

Subrogation of Creditor to Rights of Widow.—One furnishing widow necessities, e. g., medical services, has right in equity to be substituted after her death, as preferred creditor of husband's estate. *Baker v. Rust*, 37 Tex. 242, 244.

VII. Claims against Decedents' Estates.

A. ASSIGNABILITY.

See ante, "Purchase of Claims against Estate," V, M, 5, h; "Set-Off and Counterclaim," V, S, 11.

There is no inhibition by law against the sale, by creditors, of their claims against an estate. Any such restriction would produce the most serious embarrassments, as years may elapse before such claims can be collected or

realized. But this would be the virtual effect of a denial of jurisdiction in the county court to recognize the rights of an assignee of a debt of an estate. *Key v. Craig*, 21 Tex. 491, 492.

An account which had been allowed by an administrator approved by the chief justice, is assignable within the meaning of Pas. Dig., art. 222, note 283, requiring the assignee to use due diligence to collect the same. *McDonough v. Tutt*, 31 Tex. 199. See the title ASSIGNMENTS, vol. 2. p. 104.

B. WHAT CONSTITUTES DEBTS OF ESTATE.

1. Medical Bills.

An account for medical services rendered a widow is not a charge against her deceased husband's estate. *Baker v. Rust*, 37 Tex. 242.

2. Funeral Expenses.

Funeral expenses of a husband, which are paid by the wife, are community expenses, and can not be charged against land descending to his heirs. *Gilroy v. Richards*, 63 S. W. 664, 26 Tex. Civ. App. 355.

3. Allowance in Lieu of Homestead and Exempt Property.

See ante, "Allowance to Surviving Spouse and Children and in Lieu of Exemptions," VI.

4. Expenditures by Executor or Administrator.

See ante, "Expenditures," V, M, 7.

5. Attorney's Fees and Costs of Litigation.

See ante, "Attorney's Fees and Court Costs," V, M, 7, b.

Executor may employ attorney to settle estate and contract to pay him reasonable fee, which will be part of expense of administration entitled to preference. *Callaghan v. Grenet*, 66 Tex. 236, 238, 18 S. W. 507.

Executors are entitled to be indemnified from the estate of their testator

for reasonable charges for legal counsel incurred by them in its management. *Gammage v. Rather*, 46 Tex. 105.

Attorney seeking compensation for services rendered an estate may look to estate or directly to administrator for payment of claims. *Gammage v. Rather*, 46 Tex. 105, 107.

Where Attorney Conducts Administrator's Business.—Attorney's fees, reasonable in amount and shown to have been necessarily incurred in the administration of the estate, are allowable to an administrator; but, where liberal commissions are allowed to an administrator, his attorneys should not be paid out of the estate for conducting the administrator's business. *Trammel v. Philleo*, 33 Tex. 395.

Costs.—A decedent's estate is liable for expenses incurred in defending suit. *Williams v. Robinson*, 56 Tex. 347; *Gallagher v. Bowie*, 66 Tex. 265, 17 S. W. 407; *Manning v. Mayes*, 79 Tex. 653, 15 S. W. 638.

Fees Paid for Resisting Contest of Will Not Allowed.—Attorney's fees paid by a wife in resisting the contest of her husband's will can not be charged against intestate real estate passing to the heirs of the husband, since the wife is individually liable therefor. *Gilroy v. Richards*, 63 S. W. 664, 26 Tex. Civ. App. 355.

Where heirs successfully contest will, estate is not liable for attorney's fees and costs. *Renn v. Samos*, 37 Tex. 240, 242.

6. Claims Arising after Death of Decedent.

A claim for an excess paid at an administrator's sale is not one which can be enforced against the estate of decedent. *Giddings v. Heiskill*, 44 Tex. 386.

7. Claims Barred by Statute of Limitations.

See, also, post, "Power of Executor or Administrator to Suspend," VII, J, 8, b, (5), (a).

7 Tex—35

Neither an executor nor an administrator can rightfully allow a claim which is barred by statute of limitations. *Howard v. Johnson*, 69 Tex. 655, 657, 7 S. W. 522; *Moore v. Hardison*, 10 Tex. 467; *Moore v. Hillebrant*, 14 Tex. 312; *Cone v. Crum*, 52 Tex. 348; *Titus v. Johnson*, 50 Tex. 224.

Where a claim has become barred under the statute of limitations, the bar can not be waived by an acknowledgment of the debt by the administrator. *Moore v. Hardison*, 10 Tex. 467; *Moore v. Hillebrant*, 14 Tex. 312.

No acknowledgment by administrator will bind estate to pay claim barred by statute, and even if it is offered by the chief justice and thus become a quasi judgment, yet on proper proceedings in the district court, this may be set aside. *Yarborough v. Leggett*, 14 Tex. 677, 681; *Moore v. Hardison*, 10 Tex. 467, 472; *Jones v. Underwood*, 11 Tex. 116; *Neill v. Hodge*, 5 Tex. 487, 490.

The reasonable value of each service rendered by an attorney to an administrator in conducting the administration of an estate becomes due on its performance, and where the administrator is removed before paying the attorney's claim, and suit is brought to recover the value thereof from the estate, only such items as were rendered within two years from the commencement of such proceedings can be recovered. *Mott v. Riddell*, 2 Posey, Unrep. Cas. 107.

In suit upon claim against an estate, party must prove a claim within the statute. *Coles v. Portis*, 18 Tex. 155, 157.

Where Directed by Will to Disregard Statute.—A direction in a will to "disregard the statute of limitations as to the principal" authorizes the executor to pay all just debts, though barred by limitation. *Campbell v. Shotwell*, 51 Tex. 27.

Under will authorizing executor to disregard statute of limitations with

regard to debts, annulment of approval of claim thereunder require clear abuse of discretion by executor in allowing debt. *Campbell v. Shotwell*, 51 Tex. 27, 36.

8. Claims Based on Contracts of Decedent.

a. Personal Contracts.

Implied Contracts for Services.—

Though the nursing of a husband was performed under a contract with the wife void because of her inability to contract, his estate was liable for the services under an implied promise. *Flannery v. Chidgey*, 77 S. W. 1034, 33 Tex. Civ. App. 638.

Evidence Held Sufficient to Show Employment.—In an action against an executrix for an architect's services rendered to her testator, circumstantial evidence held sufficient to show plaintiff's employment and the rendition of the services at decedent's request. *Buckler v. Kneezell* (Civ. App.), 91 S. W. 367.

b. Joint Contracts.

Act Feb. 5, 1840 (Hart. Dig., art. 635), declaring bonds joint in form to be joint and several, and charging the "representatives" of a deceased surety with liability thereon, did not intend to charge the administrator, and not the estate, in the hands of the heirs, but the common-law liability of the estate for breaches occurring after the death of the surety continues after the administration is closed and the estate is in the hands of the heirs. (Civ. App.) *Allen v. Stovall*, 62 S. W. 87, judgment reversed in 63 S. W. 863, 94 Tex. 618.

Laws 1839-40, provides that, where one jointly bound with another for the payment of a debt or for the performance or forbearance of any act should die in the lifetime of his co-obligor, the representative of the deceased might be charged by virtue of such obligation in the same manner as if the obligors had been bound severally as well as jointly. Held, that

where R. and C. executed a joint bond, and administration was closed on R.'s estate before a suit was instituted for breach of the bond, R.'s heirs were liable for the breach, since the word "representative," as used in the statute, included heirs as well as executors and administrators. Judgment (Civ. App.), 62 S. W. 87, reversed. *Allen v. Stovall*, 63 S. W. 863, 94 Tex. 618; *Stovall v. Allen*, Id.

A tripartite contract was made between A., B., and C., by which A. and B. conveyed to C. an undivided third of certain land claims, in consideration of which the said C. advances to the said A. and B. the sum of \$1,778; and it was further stipulated that the said A. and B. should refund to the said C. the said sum out of the first sales; and, to secure payment out of the first sales, the said A. and B. mortgaged their portions of said lands for the reimbursement of said sum; and the said A. and B. agreed to locate the said lands on the said C.'s advancing the charges and expenses to be refunded in the same manner and on the said conditions. The said A. having died, it was held that the contract was a claim for money against the estate which might be established by suit, although none of the lands had been sold. *Dunn v. Dublett*, 14 Tex. 521.

After Adoption of Revised Statutes.

—Since the adoption of the Revised Statutes the common law must be looked to in ascertaining the liability of the personal representative of a deceased joint obligor; at common law he is discharged, and if he be a surety his estate can not be liable for the debt. *Boyd v. Bell*, 69 Tex. 735, 7 S. W. 657. See post, "Contracts of Suretyship," VII, B, 8, d.

Where Decedent Participated in Consideration.

—If, however, the surety participates in the consideration for which the joint obligation was made, his estate is liable. If the considera-

tion for which the joint obligation was given was the discharge of a prior obligation on which the surety was liable, such discharge would be sufficient to render the estate of the surety liable. *Boyd v. Bell*, 69 Tex. 735, 7 S. W. 657. See post, "Contracts of Suretyship," VII, B, 8, d.

Contract of Husband and Wife.—A note given by a husband and wife in consideration of community property is not absolutely void as to the wife though it may be avoided by her on suit being brought against her in her lifetime, or by her administrator after her death by refusing to allow it. *Snow v. Mather*, 52 Tex. 630. See the title HUSBAND AND WIFE.

Questions for Jury.—Where the evidence on the issue whether a decedent was the sole owner of a business so as to make her estate liable on a note executed by her independent executor, or a mere partner and hence not liable, was conflicting, the issue should be determined by the jury. *Altgelt v. D. Sullivan & Co.* (Civ. App.), 79 S. W. 333.

c. Partnership Contracts.

The estate of a decedent is liable for money loaned to be used in the business in which she was interested, whether she owned the entire business, or was merely a partner therein. *Altgelt v. Elmendorf* (Civ. App.), 84 S. W. 412.

But the estate of one partner is not liable for money loaned to another partner as an individual. *Altgelt v. Elmendorf* (Civ. App.), 84 S. W. 412.

Question of Fact.—In an action against an administrator to recover money loaned, whether the money was loaned by plaintiff, and, if so, whether it was loaned to the firm of which defendant's decedent and plaintiff's husband were members, or was loaned merely to plaintiff's husband individually, held, under the evidence, a question of fact. *Altgelt v. Elmendorf* (Civ. App.), 84 S. W. 412.

Evidence.—In an action on a claim against a decedent's estate, a memorandum evidencing the loan sued for, and showing a consideration on its face, was admissible, though it might also tend to show a partnership between plaintiff and deceased. *Altgelt v. Elmendorf* (Civ. App.), 86 S. W. 41.

d. Contracts of Suretyship.

Where claimant and deceased were cosureties on the note of a third person and claimant was compelled to pay the entire indebtedness, he was only entitled to contribution against decedent's estate to the extent of one-half of the amount so paid. *Smart v. Panther*, 42 Tex. Civ. App. 262, 95 S. W. 679.

e. Covenants and Warranties.

See post, "Liability on Ancestor's Warranty," VII, D, 4.

f. Agreements to Make Will.

May Recover for Services Though Agreement Void.

Where a person rendered services and incurred expenses for the benefit of deceased, upon the latter's promise to devise land to him, the claim for reasonable compensation and reimbursement is a valid charge against the estate. *Moore v. Bryant*, 10 Tex. Civ. App. 131, 31 S. W. 223.

A niece, performing services for her uncle on the faith of his promise to give her at his death his estate, is entitled, on the death of the uncle without performing his agreement, to sue for the reasonable value of the services, though the agreement was void under statute of frauds. *Raycraft v. Johnston*, 93 S. W. 237, 41 Tex. Civ. App. 466.

Where defendants contracted to make plaintiff their heir if she would perform services for them until she became of age or married, and thereafter defendant's wife made a will in which plaintiff was not remembered, and defendant attempted to disinherit her by will, such acts constituted a breach of the contract, and entitled

plaintiff to recover for the reasonable value of her services. (Civ. App.), *Clark v. West*, 72 S. W. 100, judgment reversed in 73 S. W. 797, 96 Tex. 437.

Deceased was an invalid for years, and plaintiff kept house for her and her husband, and nursed and cared for her five years, until her death. The husband died first, willing all his property to deceased. Plaintiff received no compensation, and deceased left no will. There was evidence that the husband and wife both repeatedly stated that plaintiff had to do everything for them, that they could not do without her, and that everything they had was to go to her on their death. Held, that a finding that the services were rendered in expectation of a legacy, induced by the declarations of deceased, and hence that plaintiff was entitled to compensation, was justified. *Von Carlowitz v. Bernstein*, 66 S. W. 464, 28 Tex. Civ. App. 8.

g. Failure of Consideration.

See ante, "Consideration," V, M, 2, b, (1).

h. Note for Community Indebtedness.

After the death of the maker of certain notes representing a community indebtedness, his widow made an agreement with certain of her husband's creditors, including the holders of the notes, for an extension until January 1, 1901. The agreement also provided that the parties should make certain further advancements in cash and merchandise, which should be paid before payment of the old indebtedness. Held, that such provision for preferred payment did not indefinitely postpone the maturity of the old indebtedness, and was, therefore, no obstacle, after the widow's removal as survivor of the community and the appointment of an administrator, to the right of the holders of the notes to prevent and establish them as a claim against the maker's estate. *Dashiell v. W. L. Moody & Co.*, 44 Tex. Civ. App. 87, 97 S. W. 843.

i. Note from Husband to Wife.

A note executed by the husband to the wife, in consideration of money, the separate property of the wife, loaned to the husband, is binding upon the estate of the husband, and both the principal and accrued interest remain separate property of the wife. *Hall v. Hall*, 52 Tex. 294.

9. Claim by Heirs for Rent of Community Property.

A claim by heirs for proceeds and rent of community property appropriated by their father after the death of their mother is not, it seems, a claim valid against the creditors of the estate. *Rose v. England*, 51 Tex. 617.

10. Claims of Executor or Administrator.

Administrator may retain money of estate coming into his hands in discharge of debt due him, if estate be solvent. *Brown v. Walker*, 38 Tex. 109, 110.

Claims Purchased at Discount before Becoming Administrator.—Administrator who acquired claims against estate at discount before becoming administrator is not bound to enter satisfaction thereof upon being reimbursed. *Byars v. Thompson*, 80 Tex. 468, 475, 15 S. W. 1087.

11. Claims for Trust Fund.

A claim against an undistributed estate for a debt due from decedent to his ward is a lien on the property itself, and not merely a claim against the heirs. *Moore v. Moore*, 89 Tex. 29, 33 S. W. 217.

Proof that money raised by a church committee was deposited with decedent for safe keeping and that his books showed that the money was in his hands at the time of his death to the credit of the church, amounted to no more than a debt against the estate to be enforced against its property subject to process of law, it appearing that the executor did not receive the specific trust money sued for and that there

was no money belonging to the estate in their hands, and there being no evidence to charge either of them with knowledge of the trust and conversion of the money committed by themselves or of any default or fraud whereby they might be rendered personally liable. *Kendall v. Calder*, 2 Posey, Unrep. Cas. 732.

Diversio of Trust Funds.—Upon death of a trustee his liability for a diversion of the trust fund rests upon his legal representative and must be satisfied out of such funds in his hands as are subject to payments of debts generally. *Richardson v. Hutchins*, 68 Tex. 81, 89, 3 S. W. 276.

Need Not Expressly Promise to Pay.—"A rule which would deny a wife's right to recover from a deceased husband's estate the value of her separate estate which he diverted, unless he expressly promised to pay for it, would make her right to depend upon the sense of justice or arbitrary will of a husband, and not upon facts which will ordinarily entitle a beneficiary to recover from a trustee." *Richardson v. Hutchins*, 68 Tex. 81, 91, 3 S. W. 276.

12. Contingent Claims.

Contingent claims can not be presented nor allowed against estate. *Dunn v. Sublett*, 14 Tex. 521, 529.

13. Debts Contracted by Surviving Partner.

See the title PARTNERSHIP.

14. Debts Created by Executor or Administrator.

See ante, "Contracts," V, M, 2. See, also, ante, "Attorney's Fees and Costs of Litigation," VII, B, 5.

In cases of debts created by the administrator, the liability of the estate is not measured by the contract of the administrator, but is dependent on its reasonableness. *Adrian v. Crews*, 45 Tex. 181, 183. See *Price v. McIver*, 25 Tex. 769, 771.

"On general principles of equity it has been held that the estate may be

held responsible to third persons with whom the administrator has created debts properly chargeable against the estate. But to enable a third person to hold the estate so responsible he must take upon himself the burden of proving that it was a reasonable expense incurred for the benefit of the estate, in the same manner as the administrator must have done had he incurred the expense and presented his claim for allowance by the chief justice. *Caldwell v. Young*, 21 Tex. 800." *Price v. McIver*, 25 Tex. 769, 771.

Execution of note by administrator for services to be rendered estate by third person, does not bind estate, and administrator may set up any valid defense to note. *Price v. McIver*, 25 Tex. 769, 772.

15. Improvements.

See ante, "Contracts for Repairs and Improvements," V, M, 2, d, (4), (a).

16. Judgments.

Judgments Rendered after Death of Decedent.—Where suits on notes were instituted against a party who died after being served with process, and his death was suggested to the court, but his legal representative was not made a party in his stead (*Pas. Dig.*, art. 7, note 225), and judgments on the notes were rendered against the deceased defendant, the judgments so rendered were not absolutely void, but only voidable, and on writs of error, coram nobis in the court where rendered, they might have been set aside and correctly rendered against the representative of the deceased defendant. It was error, therefore, to instruct the jury that such judgments were void, and could not constitute valid demands against the estate of the deceased defendant, but that the original notes on which the judgments were rendered were the evidence of indebtedness instead of the judgments themselves, and that, if such notes were barred by limitation at the date of the appointment of the adminis-

trator, they could not be made, even by allowance and approval, valid claims against the decedent's estate, so as to authorize the grant of an order of sale of property to provide for their payment. *Giddings v. Steele*, 28 Tex. 732, 733.

Where judgment lien has been preserved, debtor's death will not disencumber property. *Hall v. McCormick*, 7 Tex. 269, 278.

A judgment rendered in another state against a defendant on personal service in his lifetime is not only sufficient, after his decease, to support an action against his personal representative in this state, but must, if not reversed or annulled, be held to be conclusive of all matters therein adjudicated, unless it be void for fraud. *Cherry v. Speight*, 28 Tex. 503.

Where a claim against an executor in this state comprised both a judgment of the vice chancery court of Mississippi against his testator on personal service, affirmed after the testator's death by the high court of errors and appeals of that state, and also a judgment of said high court for damages on the affirmance rendered against the representative in Mississippi of the deceased testator, the judgment of the vice chancery court, property authenticated, constituted a valid claim against the executor in this state; but the judgment of the high court, having been rendered after the testator's death against his representative in Mississippi, and no assets formerly in the hands of such representative being traced to the possession of the executor in this state, does not constitute a valid claim against the executor in this state. *Cherry v. Speight*, 28 Tex. 503.

Claim Based on Joint Judgment—Assignment to Wife.—Where a widow procured an assignment of a claim against her husband's estate, based on a judgment against her husband and another, she was entitled to collect the

entire amount thereof from her husband's estate. *McCormick v. National Bank of Commerce* (Civ. App.), 106 S. W. 747.

17. Legacies Charged on Land.

See post, "Primary Fund," VII, C, 3.

18. Loans or Advances to Estate.

See ante, "Advances by Executor or Administrator," V, M, 6.

Where one has furnished money or goods to the executor or administrator of an estate on the credit of the estate, such claim becomes a claim against the estate which the executor or administrator may approve, and the probate court may allow, and cause to be paid, or, on which in the event this be refused, a suit may be maintained in any court having jurisdiction. *Reinstein v. Smith*, 65 Tex. 247.

One who, upon the credit of an estate, has furnished money or goods to the executor or administrator thereof, to enable him to conduct plantations belonging to the estate, is entitled to be reimbursed therefor. *Reinstein v. Smith*, 65 Tex. 247.

Administrator Entitled to Subrogation.—Where an administrator pays the debts of the estate with his own property, he is entitled to be subrogated to the rights of the creditor, whose debts are so paid, to the extent that his interest is appropriated for that purpose. *Gray v. Cockrell*, 20 Tex. Civ. App. 324, 49 S. W. 247. See, generally, the title SUBROGATION.

19. Note from Husband to Wife.

See ante, "Note from Husband to Wife," VII, B, 8, i.

20. Obligations Payable in Confederate Money.

Confederate notes can not be allowed as claim against an estate. *Kyle v. House*, 38 Tex. 155, 156.

21. Taxes.

An administrator is entitled to

credit for taxes paid on unproductive property. *Smith v. Smith*, 10 Tex. Civ. App. 485, 32 S. W. 28.

Taxes Paid by Mortgagee under Authority of Mortgagee. — Where cross bill in an action by an administratrix to recover double the amount of usurious interest paid on a contract, and to cancel a note, showed that decedent had delivered such note to the cross-petitioner, securing the same by a deed of trust, and that the cross-petitioner had been compelled to pay taxes due on the property, plaintiff's exception to the cross-petitioner's right to collect such taxes from the estate was properly overruled. *Cassidy v. Scottish-American Mortg. Co.*, 64 S. W. 1023, 27 Tex. Civ. App. 211.

C. ASSETS OR PROPERTY SUBJECT TO PAYMENT OF DEBTS.

1. General Rule.

"In this state all property belonging to the estate of a deceased person which is not exempt from forced sale by law is liable in the hands of the executor or administrator to the payment of debts." *Minter v. Burnett*, 90 Tex. 245, 248, 38 S. W. 350. See to the same effect *Roberts v. Stuart*, 80 Tex. 379, 387, 15 S. W. 1108; *Howard v. Johnson*, 69 Tex. 655, 7 S. W. 522; *State v. Lewellyn*, 25 Tex. 797.

In Texas both real and personal property of deceased is liable for his debts. *Courand v. Vollmer*, 31 Tex. 397, 400; *Peevy v. Hurt*, 32 Tex. 146, 152; *Boyle v. Forbes*, 9 Tex. 35, 40; *Fisk v. Norvel*, 9 Tex. 14, 15. See ante, "Under Statutes of Texas," V, K, 1, b.

The debts against a decedent constitute a lien upon all the property of the estate subject to the payment of debts, and this lien may be enforced by the creditors by means of administration. It is true that no creditor has a lien upon any specific property, but there is a general lien, so to speak, in favor of all the creditors

upon all of the property, from which these debts are to be discharged pro rata, or in accordance with their rights of priority, if any exist. Although no creditor has a lien for his debt upon a particular piece of property, it is none the less true that all of the debts have a lien upon all of the property of the estate, and so long as the property remains undistributed it is subject to this lien in favor of each creditor. *Moore & Son v. Moore*, 89 Tex. 29, 33, 33 S. W. 217, affirming 31 S. W. 532.

Creditors of an estate have greater right to have their debts paid than heirs have to inherit the estate. *Hoffman v. Neuhaus*, 30 Tex. 633, 636; *Peevy v. Hurt*, 32 Tex. 146, 153.

Creditors' claims for payment from decedent's estate are superior to rights of heirs, legatees and devisees. *Roots v. Robertson*, 93 Tex. 365, 373, 55 S. W. 308.

Where the record of the administration of an estate showed that on September 6, 1877, there were a large number of creditors whose claims had been established against the estate, and that the estate was insolvent, but none of the creditors appeared or contested the administrator's accounts, though duly notified, and for over 25 years such creditors remained inactive, and acquiesced in the action of the administrator, and did not join in a suit by heirs to compel a settlement of the estate, in which a large sum was found to be due from the administrator, a judgment directing that such sum should be paid to the heirs was proper. *Thomas v. Hawpe*, 80 S. W. 129, 35 Tex. Civ. App. 311.

2. Real Property—At Common Law.

At common law real property was liable only for such debts as ancestor contracted under seal, binding his heirs. *Courand v. Vollmer*, 31 Tex. 397, 400. See, also, *Thompson v. Duncan*, 1 Tex. 485, 488. See ante, "At Common Law," V, K, 1, a, (1).

At common law in absence of per-

sonal liability for debt secured by land, land is liable, not the estate. *Minter v. Burnett*, 90 Tex. 245, 248, 38 S. W. 350.

3. Primary Fund.

a. At Common Law.

Personal estate of testator is primary fund to be resorted to for payment of legacies and debts. The same rules at common law apply to both debts and legacies. *Arnold v. Dean*, 61 Tex. 249, 253; *Minter v. Burnett*, 90 Tex. 245, 250, 38 S. W. 350.

At common law, where notes given for the price of land reserve a vendor's lien, and the vendee dies intestate, as between those who may take the personal property and those taking the real estate, the personal property is the primary fund out of which to pay the debt secured, and the heir who takes the land may enforce the application of the personal property to its payment. *Minter v. Burnett*, 88 S. W. 350, 90 Tex. 245.

"The rule at common law is that when the contract of purchase is such that the vendee could be compelled to take the land, upon his decease that right descends to the heir, who can require the administrator to pay the purchase money, and perfect the title." *Minter v. Burnett*, 90 Tex. 245, 249, 38 S. W. 350.

b. In Texas.

(1) In General.

In this state common-law rules as to payment of debts of estate affecting relative rights of heirs, is in force. *Minter v. Burnett*, 90 Tex. 245, 253, 38 S. W. 350.

As Between Those Who Take the Personalty and Those Taking the Realty.—"The question as to what property is first liable to the payment of debts against the estate of a deceased person usually arises between the persons who take such estate by descent or by will from the decedent. Under our law of descent and distri-

bution this question will rarely arise, because both real and personal property descend alike to all the heirs, but in case of disposition of the property by will the question may often be of importance." *Minter v. Burnett*, 90 Tex. 245, 248, 38 S. W. 350.

As to Creditors.—Creditors are not interested in the question as to what fund is primarily liable for the payment of debts, except in cases of insolvent estates, in which event there might arise a question as to the enforcement of the lien upon specific property before admitting debts secured thereby to participate in the general fund. *Minter v. Burnett*, 90 Tex. 245, 248, 38 S. W. 350.

Preference between Real Estate and Chattel Mortgage.—Under Rev. St. 1895, art. 2091, regulating claims against decedents' estates, and providing that no preference shall be given to claims secured by mortgage or lien further than regards the property subject to the mortgage or lien, a real estate mortgage creditor of an estate, the unincumbered personalty of which is insufficient to pay the first and second class claims, is not entitled to have all the funds derived from the sale of personalty applied before any funds derived from the sale of realty are used, but mortgaged realty should contribute equally with mortgaged personalty to the payment of the superior claims; the rule that the personalty constitutes the primary fund for the payment of debts being in the interest of heirs and devisees only, and not operating to give a real estate mortgagee any preference over a chattel mortgage creditor. *Barnes v. Scottish-American Mortg. Co.*, 68 S. W. 529, 29 Tex. Civ. App. 443.

Same Rule Applicable to Debts and Legacies.—In the case of *Arnold v. Dean*, 61 Tex. 249, it was sought to have certain special legacies satisfied out of land belonging to the estate, there being sufficient personal prop-

erty to pay the debts and the legacies; this court held that the personal property was the primary fund for the payment of debts and legacies. *Minter v. Burnett*, 90 Tex. 245, 250, 38 S. W. 350.

(9) Incumbrances on Land.

At common law heir to realty has right to require application of personalty to payment of encumbrance, unless otherwise provided by will, and same rule prevails in this state. *Minter v. Burnett*, 90 Tex. 245, 249, 38 S. W. 350.

Notes Secured by Vendor's Lien.—

In 1840 the republic of Texas enacted that the common law, so far as not inconsistent with its constitution and laws, together with such constitution and laws, should be the rule of decision. Act February 5, 1840, made the personal property of a decedent, except slaves, the primary, and the slaves and land the secondary, fund for payment of his debts. Act Tex. March 20, 1848, provided that sales to pay debts should be of property most advantageous to the estate, but no order to sell slaves should be made until all other property was exhausted. In 1863, such act was amended by omitting all following the word "estate," and as amended, it constitutes Rev. St. 1895, art. 2112. Act 1876, carried into the revision of 1879 (Rev. St. 1879, art. 3129), provides that the rights, powers, and duties of executors and administrators shall be governed by the common law when not otherwise provided by statute. Held, that the common law obtains in Texas as to the right of an heir of real estate, as between him and one who may take the personal property of the decedent, to enforce the application of the personal property to payment of a debt secured by a vendor's lien on the land, reserved by notes of the decedent. *Minter v. Burnett*, 38 S. W. 350, 90 Tex. 245.

Rev. St. 1895, art. 1689, provides that, at the death of a person intestate, hav-

ing title to an estate of inheritance, leaving a wife, but no child or children, nor their descendants, the wife shall be entitled to all the personal estate and half the land of the intestate, and the other half shall go according to the rules of descent. Held, that a widow takes the personal property of her deceased husband, who leaves no child or descendant of a child, subject to the right of the heirs, who share the real estate with her, to have an incumbrance on the land, consisting of a vendor's lien reserved in notes executed by deceased, discharged by the personal property. *Minter v. Burnett*, 38 S. W. 350, 90 Tex. 245.

Proceeds of Decedent's Interest in Partnership Is Personalty.—The rule requiring liens to be settled out of the personalty, applies where the funds in question were the proceeds of decedent's interest in cattle held in the Indian Territory at the time of his death, and sold by his surviving partner, who, after paying the partnership debts, brought the money to Texas, and placed it in the hands of the administrator. *Minter v. Burnett*, 90 Tex. 245, 38 S. W. 350.

Discharge of Lien upon Homestead.—An administrator has no right, without an order of court, to apply the general assets of the estate to the discharge of a debt secured by vendor's lien upon the homestead set apart to the family of the deceased. *Mullins v. Yarborough*, 44 Tex. 14; *Minter v. Burnett*, 90 Tex. 245, 250, 38 S. W. 350.

The right of those who received the homestead from the estate to have the lien discharged out of the personal property was not decided in the case of *Mullins v. Yarborough*, 44 Tex. 14; *Minter v. Burnett*, 90 Tex. 245, 250, 38 S. W. 350.

Payment of Special Lien Beneficial to General Estate.—It seems that under Paschal's Dig., art. 5706, providing that payment of a decedent debt secured by special lien may be or-

dered out of the general assets when beneficial to the estate, such order should only be made when beneficial to the general estate, of which the homestead forms no part. *Mullins v. Yarborough & Wimberly*, 44 Tex. 14.

4. Property in Hands of or Distributed Among Heirs.

"In this state, the whole estate of the ancestor, both real and personal, is liable for his debts, the same may be subjected in the hands of the administrator, executor, or heir." *State v. Lewellyn*, 25 Tex. 797.

"The partition of a particular part, or of the whole of the estate of a deceased person, by his heirs or devisees under his will, could not affect the right of creditors to have it subjected to the payment of their claims." *Fortune v. Killebrew*, 70 Tex. 437, 441. 7 S. W. 759.

It has been said that a creditor has no lien upon property in the hands of the heirs when once distributed among them, but this has reference more to the method of enforcing the lien than to the fact of the existence of such lien. *Moore & Son v. Moore*, 89 Tex. 29, 33 S. W. 217, affirming 31 S. W. 532.

Failure to Require Bond.—The failure of creditors to protect themselves by compelling devisees and heirs, and, under certain circumstances, independent executors, to give bond or accept the alternative of a regular administration in the probate court, does not relieve the property from the trust impressed upon by art. 1869. *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803; *Callaghan v. Grenet*, 66 Tex. 236, 18 S. W. 507; *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75; *Roy v. Whitaker*, 92 Tex. 346, 48 S. W. 892, 49 S. W. 367; *Swearingen v. Williams*, 28 Tex. Civ. App. 559, 67 S. W. 1061; *Farmers, etc., Nat. Bank v. Bell*, 31 Tex. Civ. App. 124, 127, 71 S. W. 570, affirmed in 97 Tex. 632, no op.

Not Subject to Payment of Debts Through Probate Court.—Property once partitioned according to the law in administration under § 94, Act of August 9, 1876, authorizing partial partitioning in county court, should be deemed as effectually administered as if sold by the administrator, and should not be again subjected to the payment of debts through the jurisdiction of the probate court. *Henderson v. Lindley*, 75 Tex. 185, 12 S. W. 979. See post, "Persons Liable for Debts of Intestate and Incumbrances on Property," VII, D.

5. Community Property.

The community property of an estate in administration was subject to sale for the separate debts of the husband, both before and after the enactment of the Revised Statutes. *Lee v. Henderson*, 75 Tex. 190, 12 S. W. 981; *Taylor v. Murphy*, 50 Tex. 291. See the title HUSBAND AND WIFE.

6. Land Conveyed to Estate of Deceased, His Heirs and Assigns.

A deed conveying property to "the estate of E., deceased, his heirs and assigns," makes the land assets of E.'s estate. *McKee v. Ellis* (Civ. App.), 83 S. W. 880. See, also, post, "Head-right Certificates and Grants to Heirs," VII, C, 8, c.

7. Lands Conveyed to Grantees as Heirs of Deceased.

A conveyance to plaintiffs as heirs is prima facie a conveyance for the benefit of the estate of plaintiff's ancestor, and hence subject to the payment of his debts. *Soye v. McCallister*, 18 Tex. 80.

Where the grantees in a deed of land are described as the "heirs and legal representatives of J. S., deceased, "of the second part," and the consideration is recited as paid by said party of the second part to the party of the first part, it must be taken prima facie that the consideration moved from the ancestor, J. S., and that the property is assets in the hands of his adminis-

trator. *Saye v. McCallister*, 18 Tex. 80.

3. Bounty Warrants, Donations, Certificates, Gratuities, etc.

a. Bounty and Pension Warrants.

Bounty warrants issued to soldiers by the republic of Texas for service become assets in the hands of the administrator. *Rogers v. Kennard*, 54 Tex. 30, 35; *Saye v. McCallister*, 18 Tex. 80; *Soye v. Maverick*, 18 Tex. 100; *Allen v. Clark*, 21 Tex. 404; *Goldsmith v. Herndon*, 33 Tex. 705; *Marks v. Hill*, 46 Tex. 345; *Hubbard v. Horne*, 24 Tex. 270; *Causici v. La Coste*, 20 Tex. 269, 286; *Todd v. Masterson*, 61 Tex. 618, 626; *Ames v. Hubby*, 49 Tex. 705, 710.

Such bounty warranty differs from those cases where a gift has been made by the government as a pure donation, generally by specific legislation. *Rogers v. Kennard*, 54 Tex. 30; *Eastland v. Lester*, 15 Tex. 98, 99, commented on in *Soye v. Maverick*, 18 Tex. 100, 101; *Causici v. La Coste*, 20 Tex. 269; *McKinney v. Brown*, 51 Tex. 94, 97.

Pension warrants issued to a veteran soldier during his lifetime under act of 1874 form part of his estate, and are not excepted by probate act of 1870. *Heard v. Northington*, 49 Tex. 439, 444; following *Hubbard v. Horne*, 24 Tex. 270. A case similar in principle relating to lands located under a San Jacinto bounty warrant.

b. Donation Certificates and Gratuities.

Donation certificates granted to heirs of deceased soldiers by § 12, act of February 7, 1860, are property of such heirs and not of the estate of such deceased soldier. *Summerlin v. Rabb*, 11 Tex. Civ. App. 53, 56, 31 S. W. 711; *Todd v. Masterson*, 61 Tex. 618.

The object of Pasch. Dig., arts. 4059-4065, donating a square mile of land to each volunteer who fell at the Alamo, or to his heirs, was to confer an additional right on some one after

the soldier's death, without reference to what came to him under laws existing at the time of his death; and a certificate therefor, granted under § 4068 "to the legal representatives in the name of the heirs," etc., was a mere gratuity, evidencing the republic's gratitude for his sacrifice, and was no part of his estate subject to sale by his administrator to pay debts. *Todd v. Masterson*, 61 Tex. 618. See *Fields v. Burnett*, 49 Tex. Civ. App. 446, 108 S. W. 1048, 1050, affirmed, no op.

In *Causci v. La Coste*, 20 Tex. 269, Castro under a contract with the government had introduced colonists into Texas. The latter, for a consideration, had undertaken to convey to Castro a portion of the land they might receive as colonists under his contract with the government. On account of his failure to comply with its terms Castro's contract was declared by the state to be inoperative and void. Afterwards the legislature passed an act conceding to the colonists the land they would have been entitled to had they and Castro complied with their forfeited contracts. It was held that the grant to the colonists was a donation. *Fields v. Burnett*, 49 Tex. Civ. App. 446, 108 S. W. 1048, 1051, affirmed, no op.

A grant bestowed upon grantee as a gratuity by the state does not become assets in the hands of the administrator. *Soye v. Maverick*, 18 Tex. 100, 102; *Roan v. Raymond*, 15 Tex. 78, 86; *Eastland v. Lester*, 15 Tex. 98; *Fields v. Burnett*, 49 Tex. Civ. App. 446, 108 S. W. 1048, 1050, affirmed, no op.; *Causici v. La Coste*, 20 Tex. 269.

Gratuities under Act of 1850 to Prisoners in War with Mexico.—Under Hart. Dig., art. 2712, declaring that all volunteers captured by the Mexican forces should be entitled to pay from the day of their mustering into service until one month after the time at which the main bodies were

released by the Mexican government, and that it should be the duty of the auditor and comptroller to issue to each of said volunteers, or heirs or representatives, a certificate for the amount to which he was entitled, where a volunteer was dead at the date of the act, the amount so allowed was not assets of his estate, subject to payment of his debts, but passed directly to his heirs and widow. *Eastland v. Lester*, 15 Tex. 98. See, also, *Roan v. Raymond*, 15 Tex. 78, 86; *Soye v. Maverick*, 18 Tex. 100, 101; *Todd v. Masterson*, 61 Tex. 618, 625.

c. Headright Certificates and Grants to Heirs.

The issue of a headright certificate to heirs does not make it their property in their individual capacity; but they hold only as heirs of the deceased, and the certificate belongs to the estate of the deceased. *Todd v. Masterson*, 61 Tex. 618, 622; *Soye v. Maverick*, 18 Tex. 100, 101; *Allen v. Clark*, 21 Tex. 404, 406; *Goldsmith v. Herndon*, 33 Tex. 705, 707; *Hornsby v. Bacon*, 20 Tex. 556, 558; *Warnell v. Finch*, 15 Tex. 163, 165; *Marks v. Hill*, 46 Tex. 345.

Certificate for headright issued to administrator of deceased parent for benefit of heirs, became assets in his hands, subject to the payment of debts. *Soye v. Maverick*, 18 Tex. 100, 101. See, also, *Fishback v. Young*, 19 Tex. 515.

Act Feb. 9, 1850, providing that the adjutant general shall issue to the heirs of those who fell with "Fannin, Ward, Travis, Grant, or Johnson, their heirs of legal representatives, attorneys or assigns, certificates for headrights," was recognized as pre-existing rights, and certificates issued thereunder became assets in the hands of administrators. *State v. Zanco's Heirs*, 44 S. W. 527, 18 Tex. Civ. App. 127; *Ames v. Hubby*, 49 Tex. 705, 710; *Rogers v. Kennard*, 54 Tex. 30, 35; *Todd v. Masterson*, 61 Tex. 618, 619.

Not a Donation to Heirs.—See ante, "Donation Certificates and Gratuities," VII, C, 8, b.

Under the joint resolution of the congress of the republic of Texas in 1838 (Hart. Dig. art. 595), directing that head-right certificates might be granted to the "heirs or legal representatives" of those who fell with Fannin and other soldiers at Goliad, in March, 1836, a certificate to such heirs or legal representatives was not a donation to such heirs, but was assets of the estate of the deceased soldier, and subject to sale by the administrator for the payment of debts. *Goldsmith v. Herndon*, 33 Tex. 705.

Sp. Act Feb. 11, 1850, provided that the commissioner of the general land office "issue a certificate for a league and labor of land to the heirs or legal representatives of Willis A. Forris, deceased: * * * provided, however, this act shall only be in force and effect if the party has not heretofore received his headright." Held, that the terms of the act show that the grant was in pursuance of a right existing in the grantee by his compliance with the laws under which a certificate was earned, and the grant was therefore not a gratuity to the heirs, but assets of the estate. *Lyne v. Sanford*, 82 Tex. 58, 19 S. W. 847, citing *Hill v. Kerr*, 78 Tex. 213, 218, 14 S. W. 566; *Rogers v. Kennard*, 54 Tex. 30, 34.

Section 10 of the general provisions of the constitution of the republic of Texas declared who should be considered citizens of the republic, and that all citizens then living in Texas, who had not received their portion of land in like manner as colonists, should be entitled to land as follows: Every member of a family to one league and labor of land; orphan children residing in the republic, and whose parents were entitled to land under the colonization laws of Mexico, to their parent's rights at the time of their death. In 1838 the board of land commission-

ers issued a certificate reciting that a certain woman emigrating to Texas in 1827 had a family, died in 1832, has heirs living, and that she was entitled under the colonization laws to one league and labor of land. It did not appear that she ever took any steps towards complying with such laws. Thereafter the land was surveyed, and in 1842 a patent thereto issued to the heirs. Held, that the certificate granted was a part of the woman's estate, and as such subject to administration, and was not the property of her heirs as a donation to them. *Fields v. Burnett*, 49 Tex. Civ. App. 446, 108 S. W. 1048. See, in support of the proposition that such certificate was assets, *Pendleton v. Shaw*, 18 Tex. Civ. App. 439, 44 S. W. 1002, affirmed in 93 Tex. 693, no op.; *Soye v. Maverick*, 18 Tex. 100; *Lyne v. Sanford*, 82 Tex. 58, 61, 19 S. W. 847; *Marks v. Hill*, 46 Tex. 345, 349; *Hill v. Kerr*, 78 Tex. 213, 218, 14 S. W. 566; *Rogers v. Kennard*, 54 Tex. 30, 35; *State v. Zanco*, 18 Tex. Civ. App. 127, 44 S. W. 527, affirmed in 93 Tex. 720, no op.; *Leonard v. Rives* (Civ. App.), 33 S. W. 291; *McKinney v. Brown*, 51 Tex. 94, and *Grant v. Wallis*, 60 Tex. 350.

Commissioner Can Not Invest Title in Heirs as against Administrator.—The commissioner of the general land office had no power under Sp. Act Feb. 11, 1850, to issue a certificate for a league and labor of land to the heirs of one F., so as to vest title in them as against the administrator, the act providing for such issue to his heirs or legal representatives, his duty being simply ministerial. *Lyne v. Sanford*, 82 Tex. 58, 19 S. W. 847.

Certificate Not Issued and Inventoried When Order of Sale Made.—That the certificate was not in existence when the order of sale was made, and was not inventoried as assets, was not material, the certificate having been issued before administrator's sale thereof. *Lyne v. Sanford*, 82 Tex. 58, 19 S. W. 847.

Patent of Land to Heirs of Deceased Person.—Where a patent to land is issued to the heirs of a deceased person, such land becomes a part of the estate of the deceased, and can be sold under an order of the probate court to pay the debts of the decedent. *Soye v. Maverick*, 18 Tex. 100; *Pendleton v. Shaw*, 18 Tex. Civ. App. 439, 44 S. W. 1002, affirmed in 93 Tex. 693, no op.; *Eastland v. Lester*, 15 Tex. 98; *Todd v. Masterson*, 61 Tex. 618; *Fields v. Burnett*, 49 Tex. Civ. App. 446, 108 S. W. 1048, 1050, affirmed, no op.; *Fishback v. Young*, 19 Tex. 515. See, also, *Lyne v. Sanford*, 82 Tex. 58, 61, 19 S. W. 847; *Marks v. Hill*, 46 Tex. 345, 349; *Hill v. Kerr*, 78 Tex. 213, 218, 14 S. W. 566; *Rogers v. Kennard*, 54 Tex. 30; *State v. Zanco*, 18 Tex. Civ. App. 127, 44 S. W. 527, affirmed in 93 Tex. 720, no op.; *Hill v. Moore*, 85 Tex. 335, 19 S. W. 162; *Babb v. Carroll*, 21 Tex. 765.

Land granted by the state to a person and his heirs inures to the grantee's estate, as assets subject to administration. *Pendleton v. Shaw*, 44 S. W. 1002, 18 Tex. Civ. App. 439.

A judgment was recovered against an administrator, who had in his hands a land certificate. Subsequently a patent was issued to the heirs of the grantee under the certificate. Held, that the heirs held the legal title as trustees for the judgment creditor until the debt was paid. *Peevy v. Hurt*, 32 Tex. 143.

Where No Constituent of Family Survives.—Administration was had upon exempt property upon the death of the widow who had survived her husband about six months. The estate was insolvent. The administrator allowed claims against the deceased husband. These were approved. Claims against the widow were also allowed and approved. No constituent of the family survived the widow. Heirs brought suit against the administrator for conversion of the property, which had been sold under orders of the probate court. Held, the property

was liable for the debts of the widow after the husband's death. *Cameron v. Morris*, 83 Tex. 14, 18 S. W. 422.

9. Homestead and Exempt Property.

The homestead, which is exempt from the payment of debts, if a constituent of the family remains, descends and becomes vested absolutely in the heirs, and is not assets in the hands of the administrator subject to the payment of debts. Aliter where no constituent of the family survives. *Zwernemann v. Von Rosenberg*, 76 Tex. 522, 13 S. W. 485; *Stephenson v. Marsallis*, 11 Tex. Civ. App. 162, 168, 33 S. W. 383; *Cameron v. Morris*, 83 Tex. 14, 18 S. W. 422; *Givens v. Hudson*, 64 Tex. 471; *Childers v. Henderson & Co.*, 76 Tex. 664, 667, 13 S. W. 481; *Bell v. Read*, 23 Tex. Civ. App. 95, 97, 56 S. W. 584; *Lacy v. Locett*, 82 Tex. 190, 17 S. W. 916; *McAllister v. Godbold* (Civ. App.), 29 S. W. 417; *Telschow v. House*, 10 Tex. Civ. App. 671, 32 S. W. 153, affirmed in 93 Tex. 650, no op.; *Willard v. Cleveland*, 14 Tex. Civ. App. 557, 560, 38 S. W. 222; *Blair & Co. v. Thorp*, 33 Tex. 38; *Wood v. Wheeler*, 7 Tex. 13; *In re Estate of Horn*, 2 Posey 297; *Hoffman v. Hoffman*, 79 Tex. 189, 14 S. W. 915, 15 S. W. 471; *Scott v. Cunningham*, 60 Tex. 566, 567; *Mullins v. Yarborough*, 44 Tex. 14, 16; *O'Docherty v. McGloin*, 25 Tex. 67; *Duke v. Reed*, 64 Tex. 705, 714. See the title HOMESTEAD EXEMPTIONS.

On the death of a husband the legal title to the homestead vested in the wife and children and the administrator had no right or control over it as part of the assets held by him for the purpose of administration. *Hanks v. Crosby*, 64 Tex. 483. *Sossaman v. Powell*, 21 Tex. 664; *O'Docherty v. McGloin*, 25 Tex. 67, 72.

Such property as would have been set aside to the widow and child, as exempt, or as the year's allowance by the probate court, had the administration been under some other provision

of the statute than that regulating the administration of community property by a survivor should not be considered assets of the estate. *Nichols v. Oliver*, 64 Tex. 647.

Though a homestead may be subject to final partition and distribution, it is not assets in the hands of the administrator; but the use of it as a homestead is reserved to the family during the period of administration. *O'Docherty v. McGloin*, 25 Tex. 67.

Under act of August, 1870, deceased's exempted property is withdrawn from administration when any family constituent survives. The value of such exempt property may be withdrawn though not existing in kind. *Scott v. Cunningham*, 60 Tex. 566, 567; *Zwernemann v. Von Rosenberg*, 76 Tex. 522, 13 S. W. 485; *Childers v. Henderson & Co.*, 76 Tex. 664, 13 S. W. 481; *Bell v. Read*, 23 Tex. Civ. App. 95, 97, 56 S. W. 584.

Prior to act of August, 1870, exempted property on death of owner vested absolutely in the beneficiaries pointed out by law. *Scott v. Cunningham*, 60 Tex. 566, 567; *Green v. Crow*, 17 Tex. 180. See, also, *Wood v. Wheeler*, 7 Tex. 13; *Blair & Co. v. Thorp*, 33 Tex. 38; *Mullins v. Yarborough*, 44 Tex. 15; *In re Estate of Horn*, 2 Posey 297, 298.

Paschal's Digest, art. 5487, does not prevent exempt property from being finally distributed or taken into account under the laws of descent and distribution. *Akin v. Jefferson*, 65 Tex. 137.

Though the statute in force in 1872 (*Pasch. Dig.* 5487) provided that the property reserved from forced sale by the constitution and laws of the state or its value should form no part of the estate of a deceased person when a constituent of the family survived, yet this was so only in the sense that such property constituted no part of the estate subject to the payment of debts; in some other respects it stood in the

same relation to the estate as other property. *Helham v. Murray*, 64 Tex. 477.

Pasch. Dig. art. 5487, providing that property reserved from forced sale, or its value if there be no such property, does not form any part of the estate of a deceased person, if a constituent of the family survives, was repealed by act August 9, 1876 (Laws 16th Leg. p. 93). *McGowen v. Zimpelman*, 53 Tex. 479.

The books of a professional man, i. e., a law library, is exempted from assets liable for payment of debts of deceased. *Fowler v. Gilmore*, 30 Tex. 432, 434.

But the exemption from execution, of lands granted to those who were in the "battle of San Jacinto, and other battles," under the act of the 21st of December, 1837, is limited to the lifetime of the grantee, and upon his death it ceases and the property becomes assets in the hands of his administrator. *Hubbard v. Horne*, 24 Tex. 270.

Where homestead loses its exemption on death of husband, it becomes an asset in the hands of his representatives. *Duke v. Read*, 64 Tex. 705, 714.

10. Crops and Products of Land.

Where a vendee had established his homestead on land, on which he had given notes for the purchase price, secured by a vendor's lien, and died without having paid all the notes, the vendee's administrator was not entitled to treat the proceeds of crops raised on the homestead subsequent to the vendee's death, and turned over to him by the widow, as assets of the estate, instead of applying them on the lien notes, of which he was the holder; and, as against a donee of the notes after maturity, the widow was entitled to a credit on the notes for the amount realized by the administrator from the sale of crops turned over to him by the widow. *McCord v. Hames*, 85 S. W. 504, 38 Tex. Civ. App. 239.

11. Rents and Revenues Reserved to Decedent in Fraudulent Conveyance.

Where a widow as a creditor of her husband's estate claimed a bank deposit standing in plaintiff's name, representing the income of certain land deeded by her husband to his children, with a reservation of the rents and revenues for life, which were deposited in plaintiff's name to defraud the husband's creditors, plaintiff's right to such deposit did not depend on whether the conveyances of the property and the surrender of possession thereof to plaintiff were or were not made to defraud the husband's creditors, but on whether the husband reserved to himself, at the time he deeded the land to his children, the rents and revenues from the land after the execution of the deeds. *McCormick v. National Bank of Commerce (Civ. App.)*, 106 S. W. 747.

12. Interest of Mortgagor.

See post, "Equity of Redemption," VII, C, 13.

13. Equity of Redemption.

"The equity of redemption, is a subsisting estate and interest in the land, in the hands of the heirs, devisees, assignees, and representatives (strictly so called) of the mortgagor. 2 Story, Eq. Jur., § 1023. It is liable to sale on execution, in this country, as the real estate of the mortgagor, or his alienee, in his lifetime; and upon his death descends to his heirs, charged in the administration of his estate, with subsisting liens, and his debts in the same manner as his other real estate; whereas, the estate of the mortgagee is but a chattle interest, is not liable to execution, and upon his death, the mortgage debt is part of the personal estate of the mortgagee." *Buchanan v. Monroe*, 22 Tex. 537, 541.

Where Sold under Execution.—An interest in land in the nature of an equity of redemption, sold under execution in the lifetime of the decedent, is wholly

vested in the purchaser by the sheriff's sale and there is at his death no title or estate in the land remaining in him which can descend to the heir or vest in the estate for purpose of administration. *Dibrell v. Smith*, 49 Tex. 474, 480.

14. Interest of Vendee.

See ante, "Contract of Purchase of Land," V, K, 1, b, (6), (d), bb.

15. Debts Payable to Decedent.

Where an owner of a negotiable note dies, only her legal representative or his assignee has a right of action thereon. *Whithed v. McAdams*, 18 Tex. 551.

An executor may recover upon a note indorsed to his testator, by virtue of the latter's legal title, irrespective of the true ownership. *Schauer & Co. v. Beitel*, 92 Tex. 601, 50 S. W. 931, affirming 49 S. W. 145.

Notes Secured by Deed of Trust.—

Upon the death of the payee of notes, to secure which a deed of trust is given, the legal title descends to his executors, who, upon the death of the trustee, may prosecute an action for the appointment of another trustee, notwithstanding the testator was not the real party in interest. *Davis v. Converse* (Civ. App.), 46 S. W. 910; *Jones v. Butler* (Civ. App.), 42 S. W. 367.

16. Damages Recovered for Injury to Estate.

So long as there are unpaid debts, the recovery for an injury to the estate should be assets in the hands of the administrator and recovery should be in his name. *Peveler v. Peveler*, 54 Tex. 53, 57.

17. Claims for Death by Wrongful Act.

Money recovered by a parent for death of son is no part of son's estate to be disbursed to creditors or distributed among heirs under the general statute of descent and distribution. *H. & T. C. R. Co. v. Hook*, 60 Tex. 403, 407; *Cooper v. Gulf, etc., R. Co.*, 41 Tex. Civ. App. 596, 93 S. W. 201, affirmed in 101 Tex. 632, no op.

18. Insurance Moneys.

See the title INSURANCE.

19. Legacies and Devises.

If in the settlement of an estate there is a deficiency of assets, it must be supplied, first, from the general legacies, and the special legacies will not abate in favor of creditors until the general legacies are exhausted. But if special legacies can not be supplied from the particular fund designated, the legatee can not be compensated out of other effects of the estate. *Moss v. Helsley*, 60 Tex. 426.

The fact that testator's land was devised to a certain person, did not prevent it from being administered as part of the estate, unless it was exempt from distribution. *Hamm v. Hutchins*, 19 Tex. Civ. App. 209, 211, 46 S. W. 873.

Testatrix directed her executors to procure a partition of her property into six portions, one of which she devised to the minor children of a son, and authorized the executors, after partition, to manage the share so devised till the devisees attained their majority. Held, that such portion was chargeable with the payment of debts. *Shiner v. Shiner*, 15 Tex. Civ. App. 666, 40 S. W. 439.

Bequest of Insurance Policy.—See the title INSURANCE.

20. Partnership Assets.

See the title PARTNERSHIP.

The interest of a deceased partner in the firm assets is not a part of the estate to be inventoried and administered. *Altgelt v. Alamo Nat. Bank*, 98 Tex. 252, 269, 83 S. W. 6, reversing 79 S. W. 582.

If one partner sells out to his co-partner, and the latter dies, property belongs to his estate, subject to administration, and administrator of his estate is entitled to its possession. *Texas Produce Co. v. Turner*, 7 Tex. Civ. App. 208, 213, 26 S. W. 917, affirmed in 93 Tex. 741, no op.

If one partner sells out to his co-partner and the latter dies, a resale by the living partner confers no title, and

the estate of the deceased partner is not estopped to assert title. *Texas Produce Co. v. Turner*, 7 Tex. Civ. App. 208, 213, 26 S. W. 917, affirmed in 93 Tex. 741, no op.

Where a surviving partner sells the firm's personal property, which is situated in a foreign state, pays the firm's debts, and brings the balance of the proceeds into the state where deceased resided, and where he died, such proceeds are subject to administration in the latter state, and to be applied to payment of debts as if the firm's property had been situated therein. *Minter v. Burnett*, 38 S. W. 350, 90 Tex. 245.

31. Slaves and Their Hire.

Proceeds of the hire of negroes subsequent to the death of the testator, and prior to their establishing their freedom, are assets in the hands of his administrator. *Boulware v. Hendricks*, 23 Tex. 667.

32. Ownership at Time of Death.

a. Property Disposed of by Decedent.

(1) In General.

While a conveyance by a husband is inoperative to divest the wife of her homestead right, it is otherwise with the interest of the husband, or those claiming under him; and his conveyance estopped his administrator from a recovery of the wife's interest which had vested in the husband after his death. *Irion v. Mills*, 41 Tex. 310, 318. See, also, *Gould v. West*, 32 Tex. 338, 352.

Where mortgagor before his death sold land mortgaged, and deed was recorded, the same constitutes no part of his estate, and the court can not order the same sold as property of the estate. *Bradford v. Knowles*, 86 Tex. 505, 508, 25 S. W. 1117.

Notes Transferred by Decedent.—Administrator can not bring suit to recover notes which decedent had absolutely transferred. *Donley v. Cundiff*, 35 Tex. 741, 749.

(2) Gifts by Decedent in Lifetime.

In the absence of allegations or proof of the insolvency of a donor's estate, his administrator was not entitled to a savings bank deposit standing in the name of his intestate, which had been transferred by the intestate in his lifetime by a valid gift. *Hill v. Escort*, 86 S. W. 367, 38 Tex. Civ. App. 487.

Where a testator had boarded a person free of charge, which was intended as a gratuity, the executors can not revoke the gift, and recover the amount of such board for the estate. *Stevens' Ex'rs v. Lee*, 70 Tex. 279, 8 S. W. 40.

(3) Property Assigned for Benefit of Creditors.

Where the trustee in an assignment for the benefit of creditors was summoned as garnishee, and, the defendant dying, was appointed administrator, and answered in both capacities, but, judgment being rendered against him, prayed a writ of error in his capacity of administrator only, the court said: "And if, as he (the plaintiff in error) now insists, the assignment was a legal and valid conveyance, divesting the title of his intestate and vesting it in the assignee for the benefit of creditors, the property so conveyed can not be assets in his hands, and he had no right to the possession of it as administrator." *Seawell v. Lowery*, 16 Tex. 47.

(4) Property Fraudulently or Voluntarily Conveyed by Decedent.

A personal representative can not impeach for benefit of creditors a transfer or conveyance made by his decedent, though it is fraudulent as to creditors. *Cobb v. Norwood*, 11 Tex. 556, 561, overruling *Danzey v. Smith*, 4 Tex. 411; *Wilson v. Trawick*, 10 Tex. 428, 435; *Avery v. Avery*, 12 Tex. 54, 57; *Connell v. Chandler*, 13 Tex. 5; *Hart v. Rust*, 46 Tex. 556, 573; *Wilson v. Demander*, 71 Tex. 603, 605, 9 S. W. 678; *Burges v. New York Ins. Co.* (Civ. App.), 53 S. W. 602, 604; *Willis*

& Bro. *v. Smith*, 65 Tex. 656, 658; *Blackman v. Schierman*, 21 Tex. Civ. App. 517, 520, 51 S. W. 886; *Heard v. McKinney*, 1 Posey 83, 88; *Seawell v. Lowery*, 16 Tex. 47, 50; *Love v. Wyatt*, 19 Tex. 312. But see obiter in *Hunt v. Butterworth*, 21 Tex. 133, 140; *Lemp Brewing Co. v. La Rose*, 20 Tex. Civ. App. 575, 50 S. W. 460.

Property conveyed by a decedent, in fraud of his creditors, constitutes no part of his estate; it passes to his grantee, subject only to the right of his prior creditors, and no title descends to his heirs or vest in his executor or administrator. *Willis & Bro. v. Smith*, 65 Tex. 656, 658. See the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

An administrator with the will annexed can not impeach a deed of manumission made by his testator, on the ground that it was executed to defraud his creditors. *Moore's Adm'r v. Minerva*, 17 Tex. 20.

An administrator can not sue to set aside a conveyance made by his intestate with intent to defraud creditors, though the estate is involved, as the fraudulent grantor could not have done so, and under Rev. St. art. 1201, the administrator can sue only in those cases in which his intestate could have so done. *Wilson v. Demander*, 71 Tex. 603, 9 S. W. 678.

Where land was conveyed in fraud of creditors, the administrator of the grantor would not be a proper plaintiff in an action to set the conveyance aside, since only those creditors who were such at the time of the conveyance had a right to subject the land to their claims, and no title remained in the estate to support such an action. *Willis v. Smith*, 65 Tex. 656.

Exception to Rule.—Where a fraudulent deed has not been delivered, and the grantor dies in possession, and there is probate before the grantee takes possession, such property is assets in the hands of an administrator.

Hunt v. Butterworth, 21 Tex. 133. See to the same effect *Blackman v. Schierman*, 21 Tex. Civ. App. 517, 51 S. W. 886; *Burges v. New York Life Ins. Co.* (Civ. App.), 53 S. W. 602, 604. But see *Lemp Brewing Co. v. La Rose*, 20 Tex. Civ. App. 575, 579, 50 S. W. 460. It is said: "It was indeed held in *Hunt v. Butterworth*, 21 Tex. 133, that if the fraudulent grantor remains in possession of the property at his death, the legal representative may assert title to it, as assets, as against the grantee. But if the conveyance executed were sufficient to pass legal title, later decisions necessitate the conclusion that the fact that the grantor has remained in possession will not enable him to defeat a recovery by the grantee; and if the grantor can not do so, it logically follows under the decisions that his legal representative can not. *Hoeser v. Kraeka*, 29 Tex. 450; *Miller v. Koertge*, 70 Tex. 162, 7 S. W. 691; *Kerr v. Hutchins*, 46 Tex. 384, 389; *Wilson v. Demander*, 71 Tex. 603, 606, 9 S. W. 678."

An executor may maintain an action to cancel his testator's deed as a cloud upon title on the ground that the conveyance of the land was never consummated because there was no delivery of the deed, and the pretended grantee never accepted the conveyance or acquired possession of the land, although the deed was intended for the purpose of defrauding the grantor's creditors. *Blackman v. Schierman*, 21 Tex. Civ. App. 517, 51 S. W. 886.

Judgment creditors of insolvent estate are entitled to subject property conveyed by decedent in fraud of their debt, to payment of their judgment. *Willis & Bro. v. Smith*, 65 Tex. 656, 659.

Property fraudulently conveyed by decedent formed no part of his estate and the county court had no control over it but creditors could maintain their suit in the district court except

so far as they claimed to have property descended to the heirs subjected to their demand. *P. J. Willis & Bro. v. Smith*, 65 Tex. 656.

b. Evidence of Ownership.

While plaintiff's intestate was unconscious from the effects of poison, defendants went to his store, which was run under the name of the L. Co., which was not the intestate's name, and persuaded a clerk who worked in the store, but who had no authority to sell at wholesale, to deliver to them certain goods in settlement of a debt due them from the L. Co. The evidence showed that the intestate had run the business as the L. Co. for several years, and had always had complete possession and control thereof as if it were his own. The only evidence tending to show that the business was not his own were two letters introduced by defendants, found on his desk, one of which stated that the business did not belong to intestate, and the other that his total resources consisted of a small sum of money in the safe. Plaintiff's intestate never recovered consciousness, and never ratified the sale made by his clerk. Held, that the evidence was sufficient to show the property to have been assets of the estate, so as to support a verdict for plaintiff for possession or value of the goods. *Bridges v. Williams*, 66 S. W. 120, 28 Tex. Civ. App. 38, rehearing denied, 66 S. W. 484, 28 Tex. Civ. App. 38.

23. Foreign Assets.

See post, "Foreign Executors and Administrators," XVII.

D. PERSONS LIABLE FOR DEBTS OF INTESTATE AND INCUMBRANCES ON PROPERTY.

1. Nature and Grounds of Liability of Heirs and Distributees.

a. In General.

An heir who does not inherit assets is not liable for the debts of the ancestor. *Schmidtke v. Miller*, 71 Tex. 103,

107, 8 S. W. 638; *Mayes v. Jones*, 62 Tex. 365; *Webster v. Willis*, 56 Tex. 468; *Pierce v. Logan*, 2 Posey 354; *Roots v. Robertson*, 93 Tex. 365, 55 S. W. 308. See ante, "General Rule," III, C, 1.

Possession of estate before administration does not subject heir to liability for its debts, though he holds it subject to them. *Ansley v. Baker*, 14 Tex. 607, 613. See *Wyatt v. McLane*, 37 Tex. 311; *Blinn v. McDonald* (Civ. App.), 38 S. W. 384.

b. By Accepting Succession under Civil Law.

Under the laws in force in 1837 the heirs had a right to accept the estate of a person deceased, becoming responsible for his debts, without the necessity of having an administrator appointed. *Francis v. Hall*, 13 Tex. 189.

Under the civil law the acceptance of the succession by the heirs rendered them liable for the ancestor's debts, and in Louisiana the heir has the right to so qualify his acceptance that he may avoid personal liability by abandoning the effects so received to the ancestor's creditors. *Blinn v. McDonald*, 92 Tex. 604, 606, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931, reversing 38 S. W. 384; *Montgomery v. Culton*, 18 Tex. 736, 749.

It is doubtful whether, within the scope and meaning of the terms in Spanish law, there was any such thing as the vacant estate of the civil law known to our jurisprudence after December, 1836. *Duncan v. Rawls*, 16 Tex. 478.

But whatever may have been the law in relation to vacant estates, and the prescription for and against them, this has been abrogated on the introduction of the common law, in 1840, and other laws passed during that session. *Dunvan v. Rawls*, 16 Tex. 478.

"A succession is called vacant when no one claims it, or when all the heirs are unknown, or when all the heirs to

it have renounced it." *Duncan v. Rawls*, 16 Tex. 478, 502.

c. Where No Administration Necessary.

When four years had not elapsed and there was but one debt against estate, and no necessity for administration, and heirs had divided property among themselves, creditor could sue heirs directly, and each heir was liable for amount of estate he received. *Buchanan v. Thompson*, 4 Tex. Civ. App. 236, 238, 23 S. W. 328; *Patterson v. Allen*, 50 Tex. 23, 26; *Low v. Felton*, 84 Tex. 378, 19 S. W. 693; *Webster v. Willis*, 56 Tex. 468; *Schmidtke v. Miller*, 71 Tex. 103, 8 S. W. 638; *McCampbell v. Henderson*, 50 Tex. 601; *Mayes v. Jones*, 62 Tex. 365; *Heard v. McKinney*, 1 Posey 83, 88; *Turman v. Robertson*, 3 App. Civ. Cases, §§ 215, 216; *Blinn v. McDonald* (Civ. App.), 38 S. W. 384, 386, reversed on another point in 92 Tex. 604; *Floyd v. Watkins*, 34 Tex. Civ. App. 3, 6, 79 S. W. 612, affirmed in 98 Tex. 616, no op.; *Byrd v. Ellis* (Civ. App.), 35 S. W. 1070. See post, "In Absence of Administration," VII, D, 3, b.

Where there is no administration on the estate of a deceased person, and but one debt against the estate, and the heirs of such deceased person, by an agreement among themselves, distribute the estate without satisfying the debt, the creditor may sue for the debt, making the heirs defendants, without administration on the estate. *Peters v. Hood*, 2 Willson, Civ. Cas. Ct. App. § 376.

Where Debt a Lien.—Where an estate is partitioned, and distributed by agreement among the heirs, without administration, one who is the sole creditor of the estate, and whose debt it a lien thereon, may enforce the lien against the heirs, without procuring administration. *Patterson v. Allen*, 50 Tex. 23.

Presumption That Administration Necessary.—General rule is that there

must be executor or administrator representing estate to enable creditor to bring suit to subject property of deceased debtor to payment of his debt and necessity for administration will be presumed in absence of showing that it is necessary. *Turman v. Robertson*, 3 App. Civ. Cases, § 216; *Green v. Rugely*, 23 Tex. 539; *Ansley v. Baker*, 14 Tex. 607; *Webster v. Willis*, 56 Tex. 468.

d. Estate Withdrawn from Administration.

It is only where administration has been taken, and the estate is afterwards withdrawn from administration by the heirs or distributees, that the present statute provides that "any creditor may sue distributee, or he may sue all the distributees together, who have received any of the estate, but no one of such distributees shall be liable beyond his just proportion according to the estate he may have received in the distribution." *Green v. Rugely*, 23 Tex. 539; *Webster v. Willis*, 56 Tex. 468; *Peters v. Hood*, 2 App. Civ. Cases, § 376; *Turman v. Robertson*, 3 App. Civ. Cases, §§ 215, 216; *Blinn v. McDonald* (Civ. App.), 38 S. W. 384, 386, reversed in 92 Tex. 604; *Montgomery v. Culton*, 18 Tex. 736, 748.

Where the heir takes the estate, after partial administration by order of court, under Hart. Dig. art. 1197, he assumes all liabilities of the estate not presented to the administrator, and those only, and the administrator should retain in his hands sufficient to pay those debts previously presented; but when the heir takes the whole estate, he assumes all debts, as well those which have been already allowed and approved as others. *Montgomery v. Culton*, 18 Tex. 736; *Same v. Jones*, 18 Tex. 751.

Where, after an estate is partially administered, it is delivered to the heirs under Hart's Dig. §§ 1196, 1197, the administrator should retain in his hands a sufficient amount to pay the debts

which have been established or may be established by suit, the heir being liable only under article 1197 for demands not presented to the administrator, but, where the heir takes possession of the whole estate by consent of the administrator without any order of court except to discharge the administrator, the obligation of the heir is commensurate with the amount received, and extends to all debts. *Montgomery v. Culton*, 18 Tex. 736.

Agreement to Hold Administrator Harmless.—The obligation on the part of the heirs, who have taken the property out of the hands of the executor, who have elected to consider the administration as closed, would in itself be sufficient to authorize creditors of the estate to enforce their claims by suit; but when to this is added their voluntary obligation to pay these demands, or in other words, to save the executor harmless, a case is presented of obligation on the part of the heirs, as strong as could be raised against the holder of property charged with a trust in favor of third persons. *Montgomery v. Culton*, 18 Tex. 736, 748; *McMahan & Co. v. Harbert*, 35 Tex. 451, 459.

e. Where There Can Be No Administration.

See post, "In Absence of Administration," VII, D, 3, b.

f. Where Will Provides for Administration Out of Court.

Where a testator provided by his will that his estate should be administered outside of the probate court, and the executor had turned over the estate to the devisee, it was competent for a creditor of the estate to bring suit on his claim in the district court, directly against the devisee of the estate. *Reynolds v. McFadden*, 36 Tex. 129; *Carroll v. Carroll*, 20 Tex. 731, 746; *Green v. Rugely*, 23 Tex. 539, 543.

2. What Law Governs.

The liability of heirs and devisees for the debts of decedent should be gov-

erned by the law in force at the time they actually receive the property. *Judgment (Civ. App.)*, 38 S. W. 384, reversed. *Blinn v. McDonald*, 46 S. W. 787, 48 S. W. 571, 92 Tex. 604, rehearing denied 50 S. W. 931, 92 Tex. 604.

3. Liabilities on Distribution or Descent of Property.

a. In General.

Property Received under Order of Distribution.—The right of a creditor to sue a decedent's heirs who have received portions of the estate under an order of distribution, is fully conferred by Act 1876, Sayles' Civ. St. art. 2035. *Buchanan v. Thompson's Heirs*, 4 Tex. Civ. App. 236, 23 S. W. 328; *Mayes v. Jones*, 62 Tex. 365; *Blinn v. McDonald (Civ. App.)*, 38 S. W. 387, reversed in 92 Tex. 604; *Low v. Felton*, 84 Tex. 378, 19 S. W. 693; *Webster v. Willis*, 56 Tex. 468; *Schmidtke v. Miller*, 71 Tex. 103, 8 S. W. 638; *McC Campbell v. Henderson*, 50 Tex. 601; *Moore v. Moore*, 89 Tex. 29, 33, 33 S. W. 217, affirming 31 S. W. 532.

Upon the death of a person, his debts are charged upon his estate and a creditor of a decedent may assert a lien on his land after it has passed into the hands of distributees. *Devine v. United States Mtg. Co. (Civ. App.)*, 48 S. W. 585; *Blinn v. McDonald*, 92 Tex. 604, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931.

After Administration and Partition.

—After administration and partition, heir, who takes estate into possession, is liable for its debts, not barred by statute. *Anslay v. Baker*, 14 Tex. 607, 610.

Property passing from the hands of administrator to guardian may still be subjected to payment of an approved debt against the estate. *Debrell v. Ponton*, 22 Tex. 686, 688.

Receipt of Property Subsequent to Incurring of Indebtedness.—In order to recover from the heirs, who took an estate for a debt of the estate, it must be shown that they received the

estate subsequent to the execution of the instruments of indebtedness. *Gresham v. Steel*, 1 White & W. Civ. Cas. Ct. App. § 555.

b. In Absence of Administration.

See ante, "Where No Administration Necessary," VII, D, 1, c.

Where an heir takes possession of his ancestor's estate without administration, he is liable to the extent of the property thus received for the debts of the decedent. *Wyatt v. McLane*, 37 Tex. 311; *Pierce v. Logan*, 2 Posey 354, 356.

Heirs may take the property of their deceased ancestors and pay his debts without bringing the estate within the jurisdiction of the probate court; and if, in pursuing this course, they sell portions of the property and make proper application of the proceeds to the payment of the debts, their acts are entitled to full faith and credit, as though they acted in the capacity of administrators or executors. *Morris v. Halbert*, 36 Tex. 19.

Where there has been and can be no administration, e. g., because of running of statute, and heirs are in possession, they may be sued as ancestor's personal representatives. *McCampbell v. Henderson*, 50 Tex. 601, 612; *Peters v. Hood*, 2 App. Civ. Cases, § 376; *Turman v. Robertson*, 3 App. Civ. Cases, §§ 215, 216; *Low v. Felton*, 84 Tex. 378, 385, 19 S. W. 693.

c. On Descent at Common Law.

Under the common law the heir took the lands discharged of all debts of the ancestor except specialties in which he had been specially bound, his liability in such case being on the contract, by which the ancestor was authorized to bind him personally to the extent of the value of the lands descended, so long as they remained in his possession, but there was no lien on the lands, nor personal liability on his part after he had conveyed them, and the devisee took the lands free from all debts of the ancestor, while

the executor or administrator took the property to which he was entitled under the law subject to the payment of the decedent's debts. *Blinn v. McDonald*, 92 Tex. 604, 606, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931, reversing 38 S. W. 384; *Montgomery v. Culton*, 18 Tex. 736.

Where Alienated.—"At common law, even though estate had descended to the heir, if the heir had alienated it before suit against him, he was not liable for the ancestor's debt. This was changed by the statute of 3d and 4th William and Mary, and the heir was made liable for such estate as had descended, though the same had been alienated before suit brought." *State v. Lewellyn*, 25 Tex. 797, 799.

d. Debts Enforcible.

Debts of deceased and expenses of administration are charges against estate in hands of heir. *Walker v. Lawler*, 45 Tex. 532, 537; *Ansley v. Baker*, 14 Tex. 607.

Debt Incurred by Administrator.

—Heirs are equally liable for a debt properly incurred by administrator, as for a debt due by decedent at his death. *Blinn v. McDonald* (Civ. App.), 38 S. W. 381, reversed on another point in 92 Tex. 604.

Heirs can be bound if they accept the benefits of a debt created by an administrator. *McMahan & Co. v. Harbert*, 35 Tex. 451, 460.

Claim Allowed before Distribution.

—After an administration is formally closed, the heirs and legatees, to whom the property is delivered without any order of the probate court, are liable to the extent of the property so received to the estate's sole creditor, whose claim was duly allowed, but not paid. (Civ. App.), *Blinn v. McDonald*, 38 S. W. 384, reversed, 46 S. W. 787, 48 S. W. 571, 92 Tex. 604, on rehearing denied 50 S. W. 931, 92 Tex. 604.

Breach of Warranty.—Where a warrantor of the title to land died intestate, and his estate worth over

\$100,000 unincumbered by debts passed into the possession of certain distributees, they were liable for the payment of a judgment for breach of his warranty less than the amount so distributed. *Young v. Moore* (Civ. App.), 110 S. W. 548; *Mayes v. Jones*, 62 Tex. 365; *Byrd v. Ellis* (Civ. App.), 35 S. W. 1070.

Incumbrance on Land.—An incumbrance descending with land to the heir may be made available as a defense against his right to partition, and to participation as joint owner, until it is removed, or the interest may be sold to adjust the rights of the parties in an equitable partition. *Kerr v. Paschal*, 1 Posey Unrep. Cas. 692.

e. Extent of Liability.

Heirs are not bound for the debts of the ancestor beyond the amount of assets descended to them. *Green v. Rugely*, 23 Tex. 539; *Mayes v. Jones*, 62 Tex. 365, 366; *Webster v. Willis*, 56 Tex. 468, 475; *Low v. Felton*, 84 Tex. 378, 19 S. W. 693; *Frost v. Smith* (Civ. App.), 24 S. W. 40, 41; *McC Campbell v. Henderson*, 50 Tex. 601; *Blinn v. McDonald* (Civ. App.), 38 S. W. 386.

The distributees can only be liable for their just proportion of the debt, according to the estate received by them in the distribution. *Headley v. Good*, 24 Tex. 232.

Heir receiving estate and releasing administrator is liable for debts of estate only in proportion to the amount he received. *Montgomery v. Culton*, 18 Tex. 736, 749.

Measured by Amount Actually Received.—The responsibility of an heir for the debt or covenant of his ancestor is to be measured, not by the amount of the ancestor's estate which vested in him, but by the amount received. *Yancey v. Batte*, 48 Tex. 46.

At Common Law.—At common law the liability of the heir did not exceed the lands inherited. *Yancey v. Batte*, 48 Tex. 46; *State v. Lewellyn*, 25 Tex. 797, 799.

Value of Property Received by Heir Subject of Inquiry.

—Where the maker of a note which by the acknowledgment of the administrator and the approval of the chief justice became a recognized claim against the estate of the deceased maker, which was closed without payment thereof, and her children were the distributees of the estate of her deceased husband, and one of the children died without issue, before the final settlement of his father's estate, and the portion of such child had not been set apart and separated from the balance of the estate, either before or at the time of its final settlement, the creditor seeking to subject the interest of the wife in the estate of her deceased child, and as one of the distributees of her deceased husband, alleging that it had passed into the hands of the guardian of the other children, may, for this purpose, prove the value of the property in the hands of the guardian, which is the same mentioned in the final settlement of the estate of their deceased father, but has not been partitioned. *Debrell v. Ponton*, 22 Tex. 686.

f. Right to Assume Debts upon Descent of Homestead.

Heirs to whom a homestead descends on the death of their ancestor may undertake to pay the debts of the ancestor and give a lien on the property to secure them. *Adams v. Bartell*, 46 Tex. Civ. App. 349, 102 S. W. 779, affirmed in 101 Tex. 577, no op.

4. Liability on Ancestor's Warranty.

A husband and wife owned community property which after the death of the wife was sold by the husband by warranty deed. In a suit against the vendee brought by the heirs of the wife to establish title and for partition, defendants pleaded that the vendee was a purchaser in good faith and that plaintiffs had inherited from their father, after the sale of the property by him assets in excess of their interest in the land. Held, it was

proper on submission of the special issues to the jury to instruct them to find not only what estate of their father the plaintiffs had inherited, but what portion of it had been received by them. *Yancy v. Batte*, 48 Tex. 46.

5. Allowance for Debts Paid by Heirs before Administration.

Debts fairly paid by heir before administration should be allowed to him. *Ansley v. Baker*, 14 Tex. 607, 613.

6. Contribution from Coheirs.

Where one of the heirs in possession of lands of the estate paid off a just and legal claim which was a charge thereon, the other heirs could not recover their portion of the lands until they paid their portion of the debt, with interest thereon. *Duke v. Reed*, 64 Tex. 705. See, generally, the title CONTRIBUTION AND EXONERATION, vol. 4, p. 662.

E. PRESENTATION AND AUTHENTICATION OF CLAIMS.

1. Presentation.

a. Object.

The object of the presentation of the claim to the administrator is to afford him an opportunity to admit it, if he conceives it just, and to settle it in the due course of administration. *Trigg v. Moore*, 10 Tex. 197, 199.

The object of the statute requiring presentation manifestly was to prevent litigation and unnecessary expense to estates, and promote their settlement with as little delay as practicable. *Coles v. Portis*, 18 Tex. 155, 157; *Garrett v. Gaines*, 6 Tex. 435, 443; *Graham v. Vining*, 1 Tex. 639, 644; *Boone v. Roberts*, 1 Tex. 147, 160.

Its object was, however, to prevent suits from being capriciously commenced against an administrator, not to suspend those already in progress against the decedent. *Boone v. Roberts*, 1 Tex. 147, 160.

b. Necessity.

(1) General Rule.

Presentation of demand is condi-

tion precedent to an action against a personal representative. *Darby v. Chevallier*, Dall. Dig. 555; *Thompson v. Branch*, 35 Tex. 21; *Graham v. Vining*, 1 Tex. 639; *Danzey v. Swinney*, 7 Tex. 617, 627; *Wiley v. Pinson*, 23 Tex. 486; *Schmitt v. Jacques*, 26 Tex. Civ. App. 125, 128, 62 S. W. 956, affirmed in 94 Tex. 707, no op.; *Red River County Bank v. Higgins*, 72 Tex. 66, 9 S. W. 745; *Hall v. McCormick*, 7 Tex. 269, 278; *Millican v. Millican*, 15 Tex. 460, 462; *Ballard v. Murphy*, 4 App. Civ. Cases, § 171, 15 S. W. 42; *Hollingsworth v. Davis*, 62 Tex. 438; *Green v. Raymond*, 58 Tex. 80; *Neill v. Hodge*, 5 Tex. 487, 490; *Boone v. Roberts*, 1 Tex. 147, 158.

Not Necessary When Other Grounds for Suit.—A moneyed demand can be sued for with other demands for going into a district court, without having first presented the moneyed demand to the administrator; upon the principles of equity jurisprudence, as the petitioner had other grounds upon which he had a right to seek equitable relief, he might well connect therewith the moneyed demand. *Smith v. Smith*, 11 Tex. 102, 105. See, also, *Newson v. Chrisman*, 9 Tex. 113, 116; *Merle v. Andrews*, 4 Tex. 200. And see *National, etc., Trust Co. v. Fly*, 29 Tex. Civ. App. 533, 535, 69 S. W. 231.

Statute Imperative.—The statute requiring presentation of claims is positive and imperative, and can not be avoided. *Graham v. Vining*, 1 Tex. 639; *Converse & Co. v. Sorley*, 39 Tex. 515, 527. But see preceding paragraph.

Required in Both Pending and Subsequent Administration.—Prob. Law 1840, requiring the claims against estates of decedents to be presented to the executor or administrator for his approval, governed the procedure in the administration of the estates then in progress of administration, as well as those of which the administration was subsequently opened. *Harrison v. Knight*, 7 Tex. 47.

Error to Render Judgment on Un-presented Claim.—Where a claim had not been presented to an executor, it is error to render judgment on it where no facts were alleged to excuse the presentation. *Rogers v. Harrison*, 1 App. Civ. Cases, §§ 494, 495.

Necessity When Defendant Dies Pending Suit.—Where a defendant dies pending suit, it is not necessary to present the claim on which the suit was founded to his representative for approval. *Boone v. Roberts*, 1 Tex. 147; *Parks v. Lubbock* (Civ. App.), 50 S. W. 466; *Bennett v. Spillars*, 7 Tex. 600, 602; *Low v. Felton*, 84 Tex. 378, 384, 19 S. W. 693.

Unnecessary to Present Agreement on Which Claim Founded.—On presentation of a claim against an estate to the administrator for allowance, it is not necessary to present the agreement on which the claim is founded. *Altgelt v. Elmendorf* (Civ. App.), 86 S. W. 41.

(2) Claims Which Must Be Presented.

(a) In General.

All "Claims for Money" Must Be Presented.—Every claim for money, of whatever grade, must be presented for allowance before action can be commenced on it. *Graham v. Vining*, 1 Tex. 639, 644; *Gaston v. Boyd*, 52 Tex. 282, 287; *Schmitt v. Jacques*, 26 Tex. Civ. App. 125, 131, 62 S. W. 956, affirmed in 94 Tex. 707, no op.; *Jenkins v. Cain*, 72 Tex. 88, 91, 10 S. W. 391; *Buchanan v. Wagnon*, 62 Tex. 375, 377; *Hall v. McCormick*, 7 Tex. 269.

Rev. St. 1895, arts. 2068-2082, relating to claims against an estate, and requiring that before bringing suit such claims must have been presented to the administrator, and been rejected, contemplate only claims for money. *Barlow v. Anglin* (Civ. App.), 45 S. W. 857.

Meaning of "Claim for Money."—"Claim for money" means, literally, and does not include claim for lien.

Western Mortg., etc., Co. v. Jackman, 77 Tex. 622, 625, 14 S. W. 305.

(b) Claims Incurred by Administrator.

An administrator need not file his claims for expenses of administration in court for allowance, but may include them as items in his account to be filed with the court. *Hanlon v. Wheeler* (Civ. App.), 45 S. W. 821.

Claim against estate for debt incurred by administrator must be presented to him for allowance. *Price v. McIver*, 25 Tex. 769, 771. And see *Richardson v. Kennedy*, 74 Tex. 507, 509, 12 S. W. 219.

(c) Claims Enforced against Independent Executor.

It is not necessary before suing an executor administering an estate independently of the county court on a claim against his testator to present to him the claim for allowance. *Smyth v. Caswell*, 65 Tex. 379. *Wood v. McMeans*, 23 Tex. 481, 486; *Pleasant v. Davidson*, 34 Tex. 459, 460; *Roy v. Whitaker* (Civ. App.), 50 S. W. 491, 493, affirmed in 93 Tex. 649, no op.; *Howard v. Johnson*, 69 Tex. 655, 658, 7 S. W. 522; *Parks v. Lubbock* (Civ. App.), 50 S. W. 466; *Fulton v. Black*, 21 Tex. 424, 425; *Walters v. Prestidge*, 30 Tex. 65, 66; *Moore v. Bryant*, 10 Tex. Civ. App. 131, 31 S. W. 223; *Daniel v. Harvin*, 10 Tex. Civ. App. 439, 31 S. W. 421; *Kendall v. Calder*, 2 Posey 732.

Where an estate is administered under a will, independent of the provisions of the statute, property of the estate may be charged in the hands of the executor with the payment of the debts of the decedent, and is liable to execution in the same manner as any other property which may be administered under a power, without the necessity of presentation of the claim to the executor of the decedent's estate. *Rogers v. Harrison*, 44 Tex. 169.

Where a claim against an estate arose under a contract between the

claimant and the widow while she was acting as independent executrix, and consisted of indebtedness for funeral and other expenses legally chargeable to the estate, paid by the claimant, it was not necessary that such claim should be presented to the administratrix with the will annexed for allowance. *King v. Battaglia*, 84 S. W. 839, 38 Tex. Civ. App. 28.

Rev. St. 1895, art. 2068, requires money claims against decedents to be presented to the executor or administrator within 12 months after the grant of letters testamentary or of administration, failing which they shall be postponed to the claims presented within that time. Article 2078 provides that, if a claim be allowed by an executor or administrator, it shall be presented within 12 months after the issuance of such letters to the clerk of the county court, failing which it shall be postponed to claims allowed and approved within the time prescribed. Held, that these sections have no application to the case of the administration of a decedent's estate by an independent executrix, during which a final judgment was rendered against her establishing a claim secured by a mortgage lien, which, on her resignation, was exhibited in her report. *Bell's Estate v. Farmers' & Merchants' Nat. Bank*, 76 S. W. 798, 33 Tex. Civ. App. 408.

(d) Judgments.

Judgments rendered during the life of the decedent must be presented against estates as other money claims. *Converse & Co. v. Sorley*, 39 Tex. 515, 529; *Birdwell v. Kauffman*, 25 Tex. 189, 192; *Robertson v. Paul*, 16 Tex. 470, 472; *Cunningham v. Taylor*, 20 Tex. 126, 129; *Hall v. McCormick*, 7 Tex. 269. But see *Cole v. Robertson*, 6 Tex. 356, 368, and *Garrett v. Gaines*, 6 Tex. 435, in which it was held under the 131st section of the district court act that a judgment, unless its lien be lost, need not be presented. This section

has been repealed. See, also, *Hall v. McCormick*, 7 Tex. 269.

"A money judgment against a deceased defendant is a claim to be proved up and paid in due course of administration." *Jenkins v. Cain*, 72 Tex. 88, 91, 10 S. W. 391.

Certified copy of judgment need not be presented to administrator for allowance. *Gaston v. McKnight*, 43 Tex. 619, 624.

Dormant Judgment.—A judgment which has become dormant, so that execution can not issue thereon without judicial action, must be presented to an administrator like any other claim. *Hall v. McCormick*, 7 Tex. 269.

Judgment Enforcing Vendor's Lien.—A judgment enforcing vendor's lien, rendered during intestate's lifetime must be presented, duly authenticated to the executor for allowance. *Converse & Co. v. Sorley*, 39 Tex. 515, 537.

The assignees of a judgment for money, and foreclosing a vendor's lien therefor, after defendant had died, in ignorance that the judgment had become dormant, filed an affidavit of the death, and obtained an order of sale against the administrator, as allowed by Rev. St. art. 2276, and the land was sold, and they became purchasers. Article 2036 provides that no judgment shall be rendered on a claim for money against an estate which has not been legally presented to the administrator, and rejected; and article 2275 that, where a sole defendant dies after judgment, execution shall not issue, but the judgment shall be proved up and paid in due course of administration. Held, that the assignees could not petition the district court to revive the judgment, set aside the sale, and enforce the lien, without having first presented the judgment as a claim. *Jenkins v. Cain*, 72 Tex. 88, 10 S. W. 391.

Judgment for Costs.—A judgment for costs against an administrator does

not lose its priority, though not presented in the county court within 30 days after it was rendered, as required by Rev. St. art. 2029, since said article applies only to judgments obtained on claims which have been rejected by the administrator. *Manning v. Mayes*, 79 Tex. 653, 15 S. W. 638.

Judgment against Foreign Administrator.—A judgment against an administrator in a court of another state is not a claim to be accepted and approved here. *Jones v. Boulware*, 39 Tex. 367, 372.

Where amount realized from sheriff's sale is insufficient to pay judgment, judgment creditor should file claim against estate for balance. *Dibrell v. Smith*, 49 Tex. 474, 481.

(c) Mortgages and Other Secured Claims.

Mortgage claim against estate must be presented. *Danzey v. Swinney*, 7 Tex. 617, 627; *Robertson v. Paul*, 16 Tex. 470, 475; *Wright v. Henderson*, 12 Tex. 43; *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815; *Duty v. Graham*, 12 Tex. 427; *Crosby v. McWillie*, 11 Tex. 94; *Convers & Co. v. Sorley*, 39 Tex. 515, 527. And see *Cole v. Robertson*, 6 Tex. 356, 366.

Where a creditor failed to present his claim for allowance against the estate of his deceased debtor, his claim was barred, and, though it was secured by trust deed of real estate, a subsequent sale under the power therein was void. *Harris v. Wilson* (Civ. App.), 40 S. W. 868.

The owner of a mortgage made by a person since deceased must present the same to the executor or administrator of such deceased before an action can be legally commenced thereon, and the fact of such presentation must be averred in the petition. *Graham v. Vining*, 1 Tex. 639.

Under the probate law of 1840, providing that realty and personalty alike should go to the administrator, a mortgage is a moneyed claim, which must

be presented within the time limited by statute, to prevent its being barred. *Graham v. Vining*, 2 Tex. 433.

Mortgage of Homestead with Power of Sale.—A mortgage of a homestead with power of sale is, on the death of the mortgagor leaving a widow, who had joined in the execution of the mortgage, and children, but an incident to the claim against the estate of the deceased mortgagor and the claim comes within the policy of the law requiring the presentation of the claim and postponing its payment to other preferred claims. *Abney v. Pope*, 52 Tex. 288; *Robertson v. Paul*, 16 Tex. 470, 476; *Black v. Rockmore*, 50 Tex. 88, in which the rule was enforced although there was no administration, the estate being managed by the survivor of the community under the statute.

Mortgage with Claim or Note Secured Thereby.—It is not necessary to present mortgage with claim in order to give county court jurisdiction to enforce it. *Western Mortg., etc., Co. v. Jackman*, 77 Tex. 625, 14 S. W. 305. See, also, *Cannon v. McDaniel*, 46 Tex. 303, 306.

Where the evidence of a claim consists of a mortgage alone, it must be presented for allowance and approval; but, where a note or bond has been executed, it would seem that the allowance and approval of such note or bond would be sufficient under the law. *Danzey v. Swinney*, 7 Tex. 617.

Under the laws, the owner and holder of a note due from the estate of a deceased person, to secure the payment of which a mortgage is also held by the payee and owner of the note, need not present both note and mortgage to the administrator of the succession for approval. The presentation of the note is sufficient. *Cundiff v. Simpson*, 32 Tex. 144.

Where claim secured by mortgage is allowed against an estate, the court may allow a lien, though the mort-

gage is not presented. *Simpson v. Reily*, 31 Tex. 298, 302.

Foreclosure of Deed of Trust.—

Where, after the death of the grantor in a deed of trust, the county court, in administration proceedings, set apart the land described therein to defendants, who were the grantor's minor children, as their homestead, and the holder of the debt secured did not file his claim therefor as a claim against the estate, and did not appear in any manner in the administration proceedings, he could not thereafter enforce his lien against the land. *Tiboldi v. Palms*, 78 S. W. 726, 34 Tex. Civ. App. 318, judgment affirmed, 79 S. W. 23, 97 Tex. 414.

But where the grantor in a deed of trust subsequently conveyed the land to a third person, and thereafter died insolvent, and less than four years from his death and after administration on the grantor's estate had closed, the land was sold under foreclosure, the sale was valid, though the claim secured by the deed had not been presented to the estate of the grantor. *Miles v. Coleman Nat. Bank*, 84 S. W. 284, 37 Tex. Civ. App. 73.

Pledge or Collateral Security.—

Pledge of note given as security should, on pledgor's death, present claim against estate, not sue on note. *Gurley v. Ward*, 37 Tex. 20, 22.

Plaintiff's intestate executed his note to defendant H., and deposited with him the note of defendant L. as collateral security; and H. sold the former note and assigned the latter, as collateral, to defendant S. Plaintiff sued for the amount of L., note. Held, that defendant S. held L.'s note in trust for the estate of plaintiff's intestate, subject to the payment to S. of the note of plaintiff's intestate to H., and was entitled to judgment against L., for the amount of the note, without first establishing his claim against intestate's estate. *Williams' Adm'r v. Lumpkin*, 12 S. W. 488, 74 Tex. 601.

Notwithstanding death of debtor, a creditor holding negotiables as collateral security may collect them, if he can do so in the ordinary course of business and without necessity of legal proceedings, and apply proceeds to his demand, and is not confined to proving his demand against the estate in the probate court. *Huyler v. Dahoney*, 48 Tex. 234.

Where negotiable notes payable to bearer deposited as collateral security for a debt, are uncollectible and the creditor is driven to treat them as mere personal property pledged to secure the debt and to invoke the aid of the courts to realize on the security, if the debtor has died the matter might come within the reach of the probate laws, and the creditor be compelled to prove his claim and the securities be administered under the probate law. *Huyler v. Dahoney*, 48 Tex. 234.

Vendor's Lien.—Where the vendee has died, it is not necessary that the vendor present his claim for interest falling due on the purchase money notes for allowance against the estate in order to entitle him to rescind the sale and recover the land for default in the payment of such interest. *Curran v. Texas Land, etc., Co.*, 24 Tex. Civ. App. 499, 60 S. W. 466, affirmed in 94 Tex. 709, no op.

Where party contracting to pay encumbrances on property within two years in consideration of a conveyance of the property, died within the two years, without paying encumbrances, held vendor need not present encumbrances to vendee's administrator. *King v. Cassidy*, 36 Tex. 531, 537.

Note Secured by Vendor's Lien.—

Holder of note secured by vendor's lien and indorsed by payee, since deceased, need not present claim to administrator of estate of indorser before enforcing vendor's lien against estate of maker. *Watt v. White*, 46 Tex. 338, 343.

Guaranty of Note.—An indorsement on a note that, "for value received, I

hereby guaranty * * * the payment of the principal and interest of the within note," is an absolute guaranty of payment, and should be presented to the guarantor's administrator for allowance before suit thereon. *National Guaranty Loan & Trust Co. v. Fly*, 69 S. W. 231, 29 Tex. Civ. App. 533.

But in an action on a note it was sought to enforce certain liens given to secure the same, and to establish a claim against the estate of a deceased guarantor of the note for the balance remaining unpaid after foreclosure of the liens. Held that, as the relief sought was beyond the power of the county court, it was not necessary for the claim against the estate to be presented to the administrator for allowance, and failure to sue thereon, in compliance with Rev. St. art. 2082, within 90 days after the rejection of the same by the administrator, did not preclude recovery. *National Guaranty Loan & Trust Co. v. Fly*, 69 S. W. 231, 29 Tex. Civ. App. 533.

(f) Claims Uncertain, Unliquidated and Not Yet Due.

Under Rev. St. art. 2068, requiring the presentation to an executor or administrator of every claim for money against a testator or intestate, and other provisions directing that all claims allowed by an administrator be accompanied by affidavit that the claim is just, and that all legal assets, payments, and credits known to affiant have been allowed thereon, it is not necessary that contingent claims, or those for an uncertain amount, should be presented for allowance. *National Guaranty Loan & Trust Co. v. Fly*, 69 S. W. 231, 29 Tex. Civ. App. 533.

Pasch. Dig. art. 1310, prohibiting suit against an administrator on a claim for money unless it has been presented, properly authenticated for allowance, applies only to such money demands as can be reduced to reasonable certainty; and, if a claim is of such a nature that it can not be verified

with a reasonable degree of certainty, the holder may sue and ask an accounting. *King v. Cassidy*, 36 Tex. 531. See, also, *Dunn v. Sublett*, 14 Tex. 521, 529.

Unliquidated Claims.—A claim which is not liquidated and which can not be reduced to a specific and definite sum without the intervention of a jury may be sued without previous presentation to the administrator for allowance. *Garrett v. Gains*, 6 Tex. 435; *Sutton v. Page*, 4 Tex. 142; *Evans v. Harde-man*, 15 Tex. 480, 484.

The words "claim for money" in Paschal's Dig. art. 130, providing that no holder of a claim for money against the estate of a decedent shall bring a suit thereon unless the claim, properly authenticated, has been presented to the administrator, mean liquidated claim, and not a demand for unliquidated damages, and it is not necessary that a demand of the latter character against an estate shall be probated before suit is brought on it. *Ferrill's Adm'x v. Mooney's Executors*, 33 Tex. 219; *Hall v. McCormick*, 7 Tex. 269; *Blum v. Wellborne*, 58 Tex. 157, 160; *Low v. Felton*, 84 Tex. 378, 384, 19 S. W. 693; *National, etc., Trust Co. v. Fly*, 29 Tex. Civ. App. 533, 534, 69 S. W. 231.

The terms "claim for money" in the probate laws are not restricted to claims which are liquidated in the legal acceptance of that term, but include such claims as are susceptible, on well-established principles of law, of being reduced to a specific and definite sum without the intervention of a jury, and which therefore, beyond all question, the administrator would be justified in allowing. *Garrett v. Gains*, 6 Tex. 435.

A guaranty by a locator, to the obligee, of a dollar per acre for land, if he will accept of a certain selection, is a claim for unliquidated damages, being the amount which the value of the land falls short of that price; and

such claim need not be presented to an administrator before suit. *Evans v. Hardeman*, 15 Tex. 480.

Claims Not Due.—Claims not yet due must be presented to executor as other claims. *Dunn v. Sublett*, 14 Tex. 521, 528.

(g) Miscellaneous Claims.

Claim of Attorney for Services.—The claim of an attorney against the estate of a decedent for services rendered in its settlement must be authenticated by affidavit, and presented for approval, as any other debt of the estate. *Gammage v. Rather*, 46 Tex. 105; *Wicks-Nease v. James*, 31 Tex. Civ. App. 151, 72 S. W. 87, affirmed in 97 Tex. 642, no op.

Claim Payable from Particular Fund.—Claim payable from particular fund must be presented as any other. *Dunn v. Sublett*, 14 Tex. 521, 530.

Ownership of Specific Fund.—A creditor who is entitled by reason of absolute ownership to a specific fund in the custody of an administrator, which is claimed by the administrator as estate assets, may maintain an action for its recovery without first presenting it for allowance in due course of administration when the fund is claimed not through the estate of the decedent but adversely to it. *Red River County Bank v. Higgins*, 72 Tex. 66, 9 S. W. 745.

Claim for Credit Paid to Decedent.—Defendant, as administrator, introduced in the probate court his application to be released from the collection of part of a sum due his intestate on a note, and offered evidence that such part had been paid to decedent. Held, that such proof was not objectionable on the ground that the credit should be established by the statutory method of establishing claims against a decedent's estate. *Stonebraker v. Friar*, 70 Tex. 202, 7 S. W. 799.

Claims Accruing after Death of Testator.—Demands against an estate, which accrue after the decease of the

testator or intestate, must be presented to the administrator for allowance, and to the chief justice for approval. *Jones v. Lewis*, 11 Tex. 359.

If the holder of a claim which has accrued against an estate after the death of the testator elects to enforce the liability of the estate, instead of that of the executor personally, he must bring his case within the provisions of law for the establishment of claims against estates. *Price v. McIver*, 25 Tex. 769.

Claims against Community Property.—Community property in hands of administrator can only be reached for debts by presentation and collection of claim according to statute. *Hollingsworth v. Davis*, 62 Tex. 438, 441; *Moke & Bro. v. Brackett*, 28 Tex. 443; *Tucker v. Brackett*, 28 Tex. 336, 337.

Claims of Heirs to Proceeds of Property.—Claims of heirs for half the rents of community property appropriated by their father after their mother's death, and for half the proceeds of community property sold by him and also appropriated after the mother's death, after the decease of their father, must be presented against his estate, and authenticated and established, like other claims, in the manner prescribed by statute. *Rose v. England*, 51 Tex. 617.

Demands for Delivery of Property.—Act 1846, declaring that no action shall lie on a claim against a decedent's estate before its presentation and acknowledgment by decedent's personal representative, applies not only to claims on money demands, but to all demands for the delivery of personal or real property sold. *Hall v. McCormack*, 7 Tex. 269.

Under the probate laws, claims for money and demands for personal property and for land must be presented to the administrator before the institution of a suit. *Hall v. McCormick*, 7 Tex. 269.

But in replevin against an administrator, the assertion of a money demand for failure to deliver the property is secondary, and does not constitute a claim for money, within Rev. St. 1895, arts. 2068-2082, relating to claims against estates, and requiring that they shall be presented to the administrator, and be rejected, before suit can be maintained. *Barlow v. Anglin* (Civ. App.), 45 S. W. 857.

Rent Accrued at Lessee's Death.—Rents accrued at the time of the lessee's death can not be recovered in an action against his administrator, where a claim for them has not been presented to the administrator and rejected by him. *Roddy v. Harrell* (Civ. App.), 40 S. W. 1064.

Rent Claimed by Vendor under Rescinded Executory Contract.—Where, after a vendor in an executory contract of sale had rescinded the sale and had brought trespass to try title against the purchaser's widow individually and as administratrix and had sequestered the property, the administratrix continued in possession on her executing a replevin bond, as the claim by the vendor for rents of the land during the pendency of his action was not a claim against the estate of the deceased purchaser, it was not necessary to present it to the administratrix for allowance. *Fidelity & Deposit Co. of Maryland v. Texas Land & Mortgage Co.*, 90 S. W. 197, 40 Tex. Civ. App. 489.

Contract to Pay Money upon Consummation of Sale of Land.—Instance of contract to pay money upon consummation of sale of land held to be such claim for money as is required to be authenticated and presented to estate. *Dunn v. Sublett*, 14 Tex. 521, 529.

Bond for Title.—A claim against a decedent's estate on a bond for title to real estate, which the deceased contracted to convey, is a "claim for money," within Act March 20, 1848, §

15, requiring claims for money to be presented to an administrator for allowance before institution of suit thereon. *Sutton v.* Page, 4 Tex. 142.

Contract for Conveyance of Land.—The statute requiring the presentation of claims against the estates of deceased persons to the administrator before suits can be brought upon them is not applicable to a contract to convey land, or for the recovery of damages on the breach of such contract. *Bullion v. Campbell*, 27 Tex. 653; *Robinson v. McDonald*, 11 Tex. 385; *Evans v. Hardeman*, 15 Tex. 480; *Peters v. Phillips*, 19 Tex. 70. And see *Hemming v. Zimmerschitte*, 4 Tex. 159.

Where one makes an executory contract to convey land, and dies without executing it, the claim of the purchaser, who becomes his administrator, is not wholly in the nature of a money demand, and hence is not included in that class of claims which must be presented to the administrator for allowance, or which, as the purchaser is himself the administrator, must be filed in the county court pursuant to Hart. Dig. art. 1242. *Robinson v. McDonald's Widow and Heirs*, 11 Tex. 385.

Claim for Chattel Recovered by Paramount Owner.—The vendor of a slave, on being notified by the vendee that he had been sued for the slave by a third person claiming him, employed counsel, and aided in defending the suit. On his death, his administrator did the same. The claimant recovered in the action. The vendee then gave the claimant an order on the administrator for the amount, which he refused to accept. The vendee sued the administrator on the warranty. Held, that it was not necessary that the vendee should have presented his claim to the administrator, before suit, for allowance. *Garrett v. Gaines*, 6 Tex. 435.

Promise Taking Debt Out of Statute of Limitations.—Where subsequent

promise is relied on to take case out of statute of limitations, subsequent promise is foundation of subsisting debt and should be presented with original claim to administrator. *Jones v. Underwood*, 11 Tex. 116, 118.

Claim for Damages for Killing Stock.—A claim for damages against the estate of one who killed stock belonging to the plaintiff, while trespassing on the latter's ground, is not such a claim as must be presented to the executor for allowance before an action can be brought thereon. *Ferrill's Adm'x v. Mooney's Ex'rs*, 33 Tex. 219.

Documentary Claims in Hands of Administrator.—Where decedent had been plaintiff's agent, and the accounts between plaintiff and deceased involved lands, claims against third persons, and an indebtedness from deceased to plaintiff, and plaintiff had no way of knowing how much money, if any, had been collected by the deceased, depending mainly on evidence furnished by decedent's books and papers in the hands of his administrator for such information, plaintiff was not required to present a direct claim for money to such administrator for allowance before bringing suit for the settlement of the account. *Merle v. Andrews*, 4 Tex. 200.

Assignment for Benefit of Creditors.—An assignment for the benefit of creditors, conveying property to trustees, with power to sell and to apply the proceeds in payment of the secured debts, is not to be regarded as a mere mortgage security, necessitating the presentation of the creditors' claims to the grantor's administrator for allowance nor are the powers by it conferred upon the trustees revoked or defeated by the death of the grantor. It is an absolute conveyance, by which both the legal and equitable estate is divested out of the grantor, and vested in the trustees, subject to the uses and trusts in favor of the creditors. *Dwight v. Overton*, 35 Tex. 390.

Claims of Cestui Que Trust.—Land held by the intestate in trust was sold by his administrators to bona fide purchasers. A suit brought in such a case by the cestuis que trustent against the administrator and purchaser, in which it is claimed to have the money due from such purchaser paid to the plaintiff, can be maintained without any previous presentation of the claim to the administrator. *Vandever's Adm'r's v. Freeman*, 20 Tex. 333.

But where a purchaser of land assumed in part consideration therefor a note given by a former owner, and executed a deed of trust to secure it. The deed provided that the power of sale should not be revoked by the grantor's death, and that the holder of the note should not be obliged to resort to probate proceedings to enforce his claim. The grantor died, and pending probate proceedings the trustee sold the property. Held that, the cestui que trust under the deed having failed to present its claim to the administratrix of the grantor's estate for allowance, and the administratrix having subsequently sold the property, and the administration being closed, the cestui que trust had waived its rights and lost its debt and lien. *Texas Loan Agency v. Dingee*, 75 S. W. 866, 33 Tex. Civ. App. 118.

Claim for Damages by Assignee in Insolvency.—An action by an assignee in insolvency against an attaching creditor and the administrator of the sheriff who executed the writ may be maintained without showing that the claim for damages was presented to the administrator for allowance. *Blum v. Welborne*, 58 Tex. 157.

Presentation to Guardian for Allowance.—Where four years had not elapsed, and there was but one debt against estate and no necessity of administration, and heirs had divided property among themselves, guardian of heirs could be sued by creditor without first presenting his verified claim for allowance. *Buchanan v. Thomp-*

son, 4 Tex. Civ. App. 236, 238, 23 S. W. 328; *Low v. Felton*, 84 Tex. 378, 19 S. W. 693.

c. Form and Requisites.

Although the law does not prescribe the form in which a claim shall be presented to the administrator, it requires that when a claim is presented to him it shall be in a shape so as to apprise the trustee of the nature and character of the claim—that is, whether an account, note, bond, bill of exchange, covenant broken, etc.—and when this is done the requirements of the law will be complied with. *Trigg v. Moore*, 10 Tex. 197, 199; *Dunn v. Sublett*, 14 Tex. 521, 531; *Gaston v. McKnight*, 43 Tex. 619, 624.

All the specialty and certainty of a pleading in judicial proceedings is not required in the presentation of claims. *Trigg v. Moore*, 10 Tex. 197.

Continuation of Suit by Administrator Sufficient.—Where a suit was pending against an intestate at the time of his death, and was continued by his administrator, such proceedings constitute a sufficient exhibition of the claim to the administrator to warrant the grading of the claim, after judgment has been rendered thereon, according to its proper statutory classification. *Simpson v. Knox*, 1 Posey Unrep. Cas. 569.

Presentation of Abstract of Judgment Sufficient.—The presentation of an abstract of a judgment, showing its date, amount, rate of interest, names of parties, and authenticated by the proper oath of the holder, to the administrator of the estate of the defendant, is a sufficient presentation to put in operation the limitation of 90 days within which suit is required to be brought after its rejection. *Gaston v. McKnight*, 43 Tex. 619.

Presentation Held Sufficiently Specific.—A claim against an estate, as presented to an administrator, and as declared on in a suit against him:

7 Tex.—37

“L. V. to W. T. M.

“Dr.

Nov. 25th, 1854. To money paid	
J. R. S. & Co.....	\$1,000
One-third interest in Sutler's	
store (on settlement)	860
	<hr/>
	\$1,860

“Cr.

By draft in favor of G. M.	\$1,000
By my indebtedness to	
the firm (not over the	
amount)	250
	<hr/>
	1,250

Amount due me, W. T. M..\$ 610”

—was held to be sufficiently specific. *Chandler v. Meckling*, 22 Tex. 36.

d. Who May Present Claims.

A foreign administrator has no authority to present and collect debt from domestic administrator. *Cobb v. Norwood*, 11 Tex. 556, 560.

e. Time of Presentation.

(1) In General.

Ordinary diligence in asserting claims against an estate is required of one holding such claims as collateral security. *White v. Downs*, 40 Tex. 225, 236.

A claim may be presented to the administrator up to the time an order for partition or distribution has been made. *Bledsoe v. Beiler*, 66 Tex. 437, 439, 1 S. W. 164.

Claims may be exhibited to the administrator, subject to the conditions imposed by law, at any time before the estate is closed, if not barred by the general law of limitation. *Gaston v. Boyd*, 52 Tex. 282.

Governed By Probate Law Rather than Statute of Limitations.—Where the statute regulating the settlement of a decedent's estate prescribes the time within which claims against the estate must be presented, such statute governs such claims, rather than the general law of limitations. *Gaston v. Boyd*, 52 Tex. 282.

(2) Effect of Not Presenting within Statutory Time.

(a) Under Law of 1840.

Under the probate law of February 7, 1840, all claims against a succession which were not presented to the executor or administrator within 12 months from the date of letters testamentary or of administration are barred. *Graham v. Vining*, 1 Tex. 639.

Where claims against the estate of a deceased person are not presented to the administrator within 12 months after the issuance of letters, and due notice to present, as required by Act 1840, the claims are barred, and no action can be subsequently maintained thereon, either against the estate or against the heirs, to whom distribution was subsequently made. *Graham v. Vining*, 2 Tex. 433; *McDougald v. Hadley*, 1 Tex. 490; and see, *Harrison v. Knight*, 7 Tex. 48; *Buchanan v. Wagnon*, 62 Tex. 375.

Failure to present claim to estate within statutory period bars recovery thereon though period for presentation expires before bar of general statute of limitation. *Gaston v. Boyd*, 52 Tex. 282, 286; *Graham v. Vining*, 2 Tex. 433, 443.

Secured Claims.—By the law of 1840, a secured claim, if not thus presented, was barred, not only as to its right to be satisfied out of the estate generally, but as to its right of satisfaction out of the specific property upon which it held a lien. *Buchanan v. Wagnon*, 62 Tex. 375, 377. See, also, *Wilson v. Harris*, 91 Tex. 427, 429, 4 S. W. 65, affirming 40 S. W. 868; *Graham v. Vining*, 1 Tex. 639, 669; *Graham v. Vining*, 2 Tex. 433; *Danzey v. Swinney*, 7 Tex. 617, 623; *Robertson v. Paul*, 16 Tex. 470, 472.

Under the probate law of 1840, a mortgage, being a claim which, like others, must be presented, to prevent its being barred, a failure to present it in time will bar it, like other claims, not only against the administrator, but

against the heirs and all other creditors of decedent's estate. *Graham v. Vining*, 2 Tex. 433.

The failure of the trustee to present a trust deed executed in 1841, and the debts secured thereby, to the administrator of grantor (who died in 1843) for allowance, within one year after letters of administration were granted, as provided by Act 1840, extinguished the deed and the debt, so that a purchaser at a trustee's sale subsequently made took no title, as against the heirs of the grantor, and the heirs could not be compelled to pay the debt. Judgment (Civ. App.), 40 S. W. 868, affirmed. *Wilson v. Harris*, 44 S. W. 65, 91 Tex. 427.

Where Claim Barred by Limitation within Twelve Months.—The probate law of 1840, provided that claimants should be allowed twelve months from the date of letters testamentary or of administration to present their demands, and that claims which are not presented within that time shall be barred. The claimant argued that the above provision allowed twelve months after date of the letters testamentary, etc., for presenting a claim which was subsisting at the date of the letters, but would otherwise be barred by the general law of limitations before the expiration of the twelve months; and it was held that the uniform exposition of that law had been the contrary, although the construction contended for, had it been adopted at an earlier period, might have commended itself at least by its apparent justice. *Perry v. Munger*, 7 Tex. 589.

Affect of Section Requiring Deposit of Funds.—Act February 5, 1840, § 16, requiring all persons having claims against an estate to present their demands within twelve months from the date of administration, was not limited by sections 65 and 66, providing that funds of an estate, when paid over to the treasurer, shall remain in deposit until claimed by the heirs or those

having a right to them, and that the heir making claim must have his quality recognized before the probate court, and such creditor must cause his claim to be established in the county where the succession is opened, but that such heirs and creditors must make their demands within the time limited. *McDougald v. Hadley*, 1 Tex. 490.

(b) Under Present Law.

Under laws of 1840, Hart. Dig. 1010, a claim against an estate was wholly barred if not presented within the time provided, but the present statute, Rev. St., art. 2074 as a statute of limitations prescribes a less severe penalty for failure to present a claim and instead of barring it forever permits it to come in for payment out of the general assets after the other debts presented within the year have been fully paid. *Buchanan v. Wagnon*, 62 Tex. 375; *Ryan v. Flint*, 30 Tex. 382.

The object of the law relating to the time for filing claims was to bring about an early settlement of the estates and for that reason offered inducements to persons producing their claims within the year, and inflicted penalties upon those failing to do so, and as the estate stands pledged to pay all claims entitled to payment according to the exhibit to be filed within one month after the expiration of the year, the estate can not be left open for an indefinite time to accommodate other creditors who are negligent. *Buchanan v. Wagnon*, 62 Tex. 375.

Where administration was obtained in December, 1845, being less than twelve months before the probate law of 1846, and a claim was not presented for allowance till more than twelve months after the grant of administration, the claim was not barred, but only postponed. *Hall v. McCormick*, 7 Tex. 269.

Where one of two creditors holding liens of equal dignity presents his claim against the estate of a decedent

within one year, and the other creditor does not, the creditor filing his lien has priority over the other. *Converse v. Sorley*, 39 Tex. 515.

A judgment rendered against an estate, and not authenticated and presented for allowance as required by the statute, is postponed in favor of a judgment rendered in a suit pending at the time of the death of the intestate, and prosecuted against the administrator to judgment. *Converse v. Sorley*, 39 Tex. 515.

Claims not presented until five years after qualification of administratrix are postponed in favor of claims of the same class presented within one year after qualification. *Standifer v. Hubbard*, 39 Tex. 417, 419.

Where a claim had been allowed by an administrator after the expiration of twelve months, and the county court ordered the administrator to pay the claim pro rata, as if allowed within twelve months, from which order the administrator appealed to the district court, which affirmed the order, and the administrator appealed to the supreme court; held, that the judgment would be reversed and reformed, so as to put it on the schedule of postponed claims. Pas. Dig., art. 1562, note 604. *Ryan v. Flint*, 30 Tex. 382.

Both Secured and Unsecured Claims

Postponed.—The statute requires that every claim for money not presented within twelve months after the grant of letters of administration shall be postponed until those presented within that time have been paid. Held, that secured as well as unsecured claims are meant. *Buchanan v. Wagnon*, 62 Tex. 375; *Ryan v. Flint*, 30 Tex. 382, 385; *Gaston v. Boyd*, 52 Tex. 282, 286.

Where a claim, evidenced by a note secured on real estate, is not presented to the administrator, within a year after the issuance of letters of administration, it is not entitled to satisfaction out of the property incumbered or other property of the decedent until

all claims properly presented within the year have been fully paid. *Buchanan v. Wagnon*, 62 Tex. 375.

Acts 1846, § 131 (Hart. Dig., art. 785), provides that judgments against a decedent's estate shall be revived by sci. fa. Act February 5, 1853 (Oldh. & W. Dig., art. 541), amending the former act, omits section 131, above recited, and prescribes that certified copies of judgments against a decedent shall be presented to his personal representatives, "as directed by law for the settlement of estates." Held, that a judgment against a decedent, not presented to his administrator, according to the latter act, was not entitled to be paid pro rata with other claims of the same class, though revived by sci. fa., since the latter mode of establishing it as a claim against the estate was expressly repealed. *Birdwell v. Kauffman*, 25 Tex. 159.

Presentation Mailed before but Received after Expiration of Year.—Under Rev. St., art. 2068, providing that every claim for money against a testator shall be presented to the executor within twelve months after the granting of the letters testamentary, or the payment thereof shall be postponed to the payment of such claims as are presented within that time, the mailing of a claim against decedent's estate, to the executors, before the expiration of the twelve months, which is not received by them until after the expiration of the twelve months, is not a sufficient presentation. *Adoue v. Gonzales*, 54 S. W. 367, 22 Tex. Civ. App. 73.

Statute Not Ordinary Statute of Limitations.—The statute (Pasch. Dig. art. 1307), providing that, on the part of the creditor of the estate of a deceased person, his claim must be presented within twelve months, or it will be postponed until the claims which have thus been presented and approved shall have been first entirely paid, is not a "statute of limitation," in the

sense in which that term is used in section 6 of ordinance 11 of the convention of 1866 (Pasch. Dig. art. 4631a). The right of action survives the limitation of twelve months, and, if the estate is solvent, all just demands will be paid. *Ryan v. Flint*, 30 Tex. 382; *Chandler v. Westfall*, 30 Tex. 475.

The provision of the probate law requiring claims to be presented to the executor or administrator within twelve months after the qualification of the executor, and in default of which the claim to be postponed, is not a "statute of limitation," in the sense in which the term is used in const. art. 12, § 43. *Standifer v. Hubbard*, 39 Tex. 417.

(c) Presentation to Foreign Executor or Administrator.

It is error to charge that, if notice of valid claim was not given to representative in foreign state within statutory period of that state, it would also be barred as against the representative in Texas. *Cherry v. Speight*, 28 Tex. 503, 519.

(3) Excuse for Failure to Present in Time.

Delay Caused by Promises of Administrator.—Claim against estate can not be defeated for want of prosecution where delay was caused by promises of payment by administrator. *Howard v. Battle*, 18 Tex. 673, 676.

Absence of Executors from State.—Where a claim was not presented within the statutory twelve months to executors and such failure is sought to be excused on ground of the absence of the two executors from the state, only the joint absence of both executors may be considered in the computation of time constituting such excuse. *Adoue v. Gonzales*, 22 Tex. Civ. App. 73, 75, 54 S. W. 367, affirmed in 93 Tex. 635, no op.

Appeal Determining Propriety of Levy.—Where a mortgage foreclosure is begun against a decedent during his lifetime, and a judgment of foreclosure

and for a deficiency is rendered against his independent executrix, an abstract of which judgment is filed with the county clerk, under which a levy is made on property not covered by the mortgage, the determination of the propriety of such levy by the appellate courts in a suit begun by the executrix under a claim of insolvency of the estate will warrant a delay in presenting the claim to the administrator succeeding such executrix; and presentation within a few days after the question is settled, and before any partition or distribution of the estate is made, is within a reasonable time, which, in the absence of a statute applicable to the case, is all that is required. *Bell's Estate v. Farmers' & Merchants' Nat. Bank*, 76 S. W. 798, 33 Tex. Civ. App. 408.

f. Construction, Operation and Effect of Presentation.

Authentication and presentation of claim to executor or administrator for approval is commencement of prosecution thereof. *Cotten v. Jones*, 37 Tex. 34, 36; *Walker v. Taul*, 1 App. Civ. Cases, § 28; *Simmons v. Terrell*, 75 Tex. 275, 12 S. W. 854.

Presentation of a claim to an administrator or executor for approval, though not technically a suit, is a necessary resort to a judicial tribunal to enforce a demand. *Simmons v. Terrell*, 75 Tex. 275, 278, 12 S. W. 854.

Presentation of Note Authorizes Suit to Foreclose Mortgage Securing It.—The presentation to and allowance by an administrator of a note secured by a mortgage are sufficient to authorize a suit to foreclose, although the mortgage itself is not presented or approved. *Cannon v. McDaniel*, 46 Tex. 303; *Danzey v. Swinney*, 7 Tex. 617, 627; *Simpson v. Reily*, 31 Tex. 298, 301; *Cundiff v. Simpson*, 32 Tex. 144; *Western Mortg., etc., Co. v. Jackman*, 77 Tex. 622, 14 S. W. 305.

Construction of Attorney's Claim for Services.—Where an attorney was

retained in a suit, and after the client's death he performed legal services in the same suit for the administrator, a claim presented to the administrator for fees in the suit, without going into details, must be considered as a claim against the estate for services rendered to the deceased during his lifetime. *Stark v. Hart*, 55 S. W. 378, 22 Tex. Civ. App. 543.

The presentment of an account to an administrator in form of liability as surety does not restrict claimant to proof of a written promise by decedent nor preclude him from showing that decedent was liable as matter of fact as principal. *Nixon v. Jacobs*, 22 Tex. Civ. App. 97, 98, 53 S. W. 595.

Estopped to Deny Notice of Grant of Administration.—A claimant who presents his claim to the administrator for allowance is estopped by his own act from denying that he had notice of the grant of administration, and in such a case it is immaterial whether publication was made or not. *Danzey v. Swinney*, 7 Tex. 617.

Estoppel of Mortgagee from Asserting Title.—A mortgagee, after foreclosure, made an agreement with the mortgagor's grantee to convey to him on payment of a certain sum within a specified time. The payment was not made, and on the grantee's death the mortgagee, by agreement with his executor, put in a claim against his estate for such amount, without specifying a lien, on the representation that the estate was solvent, and it was allowed as a fourth-class claim. Held, that the filing and allowance of such claim did not estop the mortgagee from asserting his lien or title to such lands when such claim was not paid, and hence the sheriff's deed to him will not be set aside for that reason. *Sutherland v. Elmendorf*, 57 S. W. 890, 24 Tex. Civ. App. 137.

Presentation of Note as Affecting Attorney's Fees.—Attorney's fees can not be allowed on a note presented

against an estate, the note not providing therefor. *Miers v. Betterton*, 45 S. W. 430, 18 Tex. Civ. App. 430.

g. Proof of Presentation.

When put in issue, plaintiff must prove that account sued on was presented to administrator prior to institution of suit. *Tompkins & Co. v. Bennett*, 3 Tex. 36, 49; *Cummings v. Jones*, Dallam 531; *Darby v. Chevallier*, Dallam 555.

In a suit upon a claim against an estate, the plaintiff must prove that it was duly sworn to and presented. *Coles v. Portis*, 18 Tex. 155, 157.

Proof That Order for Payment Refused.—In a suit against an administrator, the petition alleged that the deceased in his lifetime, and the defendant since his death, though often requested, have failed to pay, etc.; and proof was adduced that an order for the payment of the amount was presented to the administrator, and not accepted by him. Held, that the averment and proof of the presentation and refusal were sufficient. *Garrett v. Gaines*, 6 Tex. 435.

h. Objections to Presentation.

A joint maker of a note can not complain of a judgment against himself and the administrator of his deceased comaker, on the ground that the note had not been presented to the administrator. *Chappell v. Brooks*, 33 Tex. 275.

Objection to Form Must Be Specified.—If the rejection of a claim by an administrator is in general terms specifying no reason, then in a suit to establish it the administrator can make no objection to the form or manner of presentation. If he will reject a claim on that ground he must so specify, or he will be precluded, and in his defense he will be compelled to defend for want of merit. *Gaston v. McKnight*, 43 Tex. 619, 624.

Effect of Indorsement on Claim of Reason for Rejection.—An administrator, who indorses on a claim his

reason for rejecting it, will not be allowed to plead or urge, in abatement of the suit, any other reason which goes merely to the sufficiency of the presentation for allowance. *Hansell v. Gregg*, 7 Tex. 223.

Raising Objection for First Time in Supreme Court.—Where no objection is taken to the want of certainty in the presentation of a claim to an administrator, either in the rejection of the claim or in the answer in the court below, such objection can not be raised in the supreme court; not even in support of the judgment of the court below. *Trigg v. Moore*, 10 Tex. 197.

Objection on Appeal Where Administrator Does Not Appeal.—On appeal in suit against an estate for priority of lien, one of lienholders can not, on appeal, object that party obtaining judgment against the estate enforcing vendor's lien had not presented proper claim to administrator when administrator did not appeal. *Watt v. White*, 46 Tex. 338, 343.

i. Presentation of Part of Claim.

A creditor can not present a note to an executor or administrator for a portion of the debt evidenced by it and hold the other in reserve for a "more convenient season." So held where a note providing for attorney's fees was presented without claiming the attorney's fees. *Wicks-Nease v. James*, 31 Tex. Civ. App. 151, 72 S. W. 87, affirmed in 97 Tex. 642, no op.

Where an evidence of indebtedness and the security for its payment are contained in the same instrument, the entire contract must be presented to the administrator by a creditor of the estate. *Cundiff v. Simpson*, 32 Tex. 144.

j. Second Presentation.

Where authentication and rejection of claim is absolutely void, it may be disregarded and second presentation made. *Crosby v. McWillie*, 11 Tex.

94, 96. See, also, *Hansell v. Gregg*, 7 Tex. 223, 228.

2. Authentication.

a. Object.

The purpose of the statute requiring authentication of claims is most manifest to prohibit the representative of an estate from allowing or paying any claim until the owner thereof shall swear to the justness of the same, and also swear that no part had been settled or paid, and thereby protect estates from fraud and imposition. The objects and wisdom of this statute have been fully recognized and enforced by repeated decisions of the supreme court. *Converse & Co. v. Sorley*, 39 Tex. 515, 528. See, also, *Gregory v. Hughes*, 20 Tex. 345, 347; *Cunningham v. Taylor*, 20 Tex. 126, 129; *Hansell v. Gregg*, 7 Tex. 223, 228; *Coles v. Portis*, 18 Tex. 155, 157; *Fulton v. Black*, 21 Tex. 424.

b. Necessity.

(1) General Rule.

No claim can be allowed against an estate, unless authenticated in manner prescribed by statute. *Walters v. Prestidge*, 30 Tex. 65, 72.

Act dispensing with necessity of presentation of claim held by administrator against estate does not dispense with necessity of affidavit. *Puckett v. McCall*, 30 Tex. 457, 460.

Neither the administrator nor probate court has power to settle a claim not authenticated, presented, allowed, and approved according to statute. An attempt to do so would not be valid, and no title would pass by an order or deed made to transfer land to the holder of such claim in satisfaction thereof. *Converse v. Sorley*, 39 Tex. 515; *Jones v. Boulware*, 39 Tex. 367, 372; *Chifflet v. Willis & Bro.*, 74 Tex. 245, 251, 11 S. W. 1105.

Prerequisite to Suit upon Claim.—

A mere creditor of an estate, whether such by virtue of his ownership either of a legal or equitable claim, can not maintain an action for its enforcement

against the administrator until after its presentation duly authenticated for allowance. *Red River County Bank v. Higgins*, 72 Tex. 66, 9 S. W. 745. And see *Robertson v. Paul*, 16 Tex. 470, 472; *Garley v. Ward*, 37 Tex. 20, 22; *Schmitt v. Jacques*, 26 Tex. Civ. App. 125, 128, 62 S. W. 956, affirmed in 94 Tex. 707, no op.; *Neill v. Hodge*, 5 Tex. 487, 490; *Walters v. Prestidge*, 30 Tex. 65, 66.

(2) Claims Which Must Be Authenticated.

(a) Money Claims.

All claims for money against estates, by whomsoever held must be accompanied by affidavit of their justness before their final approval. *Puckett v. McCall*, 30 Tex. 457, 460.

The claims against estates of deceased persons required to be sworn to by Act 1848, § 49 are claims for money. *Simpson v. Reily*, 31 Tex. 298.

(b) Mortgage.

Under Act 1848 (Pasch. Dig., art. 1095), specifying the manner in which "claims for money," etc., against a testator or intestate shall be verified before presentation to the executor or administrator, a mortgage is not a "claim for money." *Simpson v. Reily*, 31 Tex. 298.

(c) Claim of Personal Representative against Estate.

The statute (Pasch. Dig., art. 1394), providing a special mode for the presentation of the claim of an executor or administrator against the estate of his testator or intestate dispenses with the necessity of the allowance of his own claim by the administrator, but not with the affidavit required by Pasch. Dig., art. 1309. *Puckett v. McCall*, 30 Tex. 457. And see *Richardson v. Kennedy*, 74 Tex. 507, 509, 12 S. W. 219.

(d) Claims Enforced against Independent Executor.

When a testator, acting under the statute of 1862 (Pas. Dig., art. 1371),

had provided by his will that the probate court should have no control of his estate, but had placed the estate in the hands and subject to the discretion of the executor, it was not necessary for a creditor of the estate to verify his claim by affidavit and present it to the executor for allowance, as required by law when an estate is being administered in the usual way; and the creditor could institute and maintain suit in the district court, on his claim, without verifying and presenting it for allowance. *Pleasant v. Davidson*, 34 Tex. 459; *Smyth v. Caswell*, 65 Tex. 379, 382; *Howard v. Johnson*, 69 Tex. 655, 658, 7 S. W. 522; *Roy v. Whitaker* (Civ. App.), 50 S. W. 491, 493, affirmed in 93 Tex. 649, no op.

(c) Uncertain Claims.

See post, "Claims Incapable of Proof by Affidavit," VII, E, 2, b, (3).

(3) Claims Incapable of Proof by Affidavit.

If claim is of such a nature that it can not be verified with a reasonable degree of certainty, the holder can sue the administrator without regard to Pas. Dig., art. 1310. *King v. Cassidy*, 36 Tex. 531, 538; *Merle v. Andrews*, 4 Tex. 200, 214.

Claims Arising from Contract for Services.—Claim growing out of contract for services and cash deposited was not such account as could be proved against estate by affidavit under art. 2266, Rev. Stat. *Ballard v. McMillan* 5 Tex. Civ. App. 679, 25 S. W. 327; *Austin, etc., R. Co. v. Daniels*, 62 Tex. 70.

Open Account.—"Where the claim is merely an aggregation of items based upon special contracts which are clear in their items, with nothing open or undetermined, it is not an 'open account' within the meaning of the statute, and can not be proved by affidavit." *Ballard v. McMillan*, 5 Tex. Civ. App. 679, 683, 25 S. W. 327. And see *McCamant v. Batsell*, 59 Tex. 363, 369.

Verified Account.—A verified account of a physician for professional services rendered an intestate is not such an account as can be proved under Sayles' Civ. Stat., art. 2323, providing that verified open accounts shall be prima facie evidence of the existence of the debt. *Garwood v. Schlichenmaier*, 25 Tex. Civ. App. 176, 60 S. W. 573.

c. Form, Requisites and Sufficiency of Affidavit.

(1) Form.

Governed by Statute.—Manner of authentication of claims against estates is governed by statute. *Walters v. Prestidge*, 30 Tex. 65, 71.

(2) Requisites and Sufficiency.

(a) In General.

Affidavit of claim against estate required by Rev. Stat., arts. 2072, 2074, must follow provision of art. 6, Rev. Stat., respecting affidavits generally. *Anderson v. Cochran*, 93 Tex. 583, 584, 57 S. W. 29. See, generally, the title AFFIDAVITS, vol. 1, p. 165.

Need Not Use Language of Statute.

—In an affidavit to authenticate a claim against an estate the precise words of the statute need not be used. It is sufficient if the substance appear. *Crosby v. McWillie*, 11 Tex. 94; *Walters v. Prestidge*, 30 Tex. 65; *Harper v. Stroud*, 41 Tex. 367, 372.

Must Possess All Essential Requisites.—Where an affidavit authenticating a claim against the estate of a deceased person is wanting in any of the essential requisites prescribed by law, the administrator is forbidden to allow the claim and if he does allow it his act is expressly declared to be of no effect. *Walters v. Prestidge*, 30 Tex. 65.

An affidavit for the authentication of a claim against a decedent's estate must contain the requisites prescribed by the statute, and, failing to do so, the allowance of the claim by the administrator, or even its approval by the probate judge, can give it no valid-

ity. *Gillmore v. Dunson*, 35 Tex. 435.

Forms Held Sufficient.—Where a claim against the estate of a deceased person contains a jurat, "Sworn to and subscribed before me this December 16, 1873. Attest: L. Bostwick, Clerk,"—the claim contains a sufficient affidavit to entitle it to be proven as a claim against the estate. *Etter v. Dugan*, 1 Posey Unrep. Cas. 175.

Form of authentication of claim adopted herein, approved as proper. *Harper v. Stroud*, 41 Tex. 367, 372.

(b) Must Be in Writing.

The affidavit required to establish a claim against an estate (Rev. Stat., arts. 2072, 2074) must comply with the requirements of Rev. Stat., art. 6, as to affidavits, and be in writing. *Anderson v. Cochran*, 93 Tex. 583, 57 S. W. 29. See, also, *Lanier v. Taylor* (Civ. App.), 41 S. W. 516 (see 93 Tex. 712, no op.). See the title AFFIDAVITS, vol. 1, p. 166.

(c) Signature.

Rev. St. art. 2072, provides that executors and administrators shall allow no claim unless accompanied by an affidavit of its correctness. Article 2074 permits such affidavit to be made before an officer authorized to administer oaths. Article 2075 declares that an allowance or approval of a claim without "such affidavit" shall be of no force or effect. One who presented a claim to an administratrix accompanied it with an affidavit with a properly signed jurat, but without the signature of the affiant. Held, that the affidavit was insufficient, and that the claim was not properly presented. *Anderson v. Cochran*, 57 S. W. 29, 93 Tex. 583.

The tender to an administrator of a claim against an estate, and an instrument purporting to be an affidavit, but which is fatally defective for want of the signature of the affiant, does not constitute a presentation of the claim, in view of Rev. St. 1895, art. 2072, pro-

viding that no claim against an estate shall be allowed unless accompanied by an affidavit in writing. *Lanier v. Taylor* (Civ. App.), 41 S. W. 516. See *Alford v. Cochrane*, 7 Tex. 485. See the title AFFIDAVITS, vol. 1, p. 166.

(d) Contents of Affidavit.

An affidavit authenticating a claim against the estate of a deceased person in these words: "The within account, as charged against the estate," etc., "is correct and just, after allowing all proper credits, to the best of his knowledge and belief," is not a sufficient compliance with the statute (Pasch. Dig. arts. 1309, 1310), which requires that such affidavit shall state that "the claim is just, and that all legal offsets, payments, and credits, etc., have been allowed," because the affidavit omits "offsets" and "payments," and employs no equivalent words. *Walters v. Prestidge*, 30 Tex. 65; *Cannon v. McDaniel*, 46 Tex. 303; *National, etc., Trust Co. v. Fly*, 29 Tex. Civ. App. 533, 534, 69 S. W. 231; *Puckett v. McCall*, 30 Tex. 457; *Robertson v. Paul*, 16 Tex. 470, 475; *Trigg v. Moore*, 10 Tex. 197, 199; *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815; *Gillmore v. Dunson*, 35 Tex. 435, 438.

Act 1848 (Pasch. Dig., art. 1309) provides that no executor or administrator shall allow any claim unless accompanied by a written affidavit "that the claim is just, and that all legal offsets, payments, and credits known to affiant, have been allowed." Held, that the affidavit was substantially the same as that required by the probate law of 1870 (Pasch. Dig., art. 5650), providing that the executor or administrator shall not allow any claims unless accompanied by an affidavit "that the claim is just, that nothing has been paid or delivered towards the satisfaction of such claim, except what is mentioned or credited (if any), that there are no counterclaims known to affiant

which have not been allowed (if any), and that the sum claimed is justly due." *Gaston v. McKnight*, 43 Tex. 619.

A verification of a claim against an estate, made by the administrator of the estate owning it, which fails to state that the account is just, or that the facts stated in the affidavit are known to him, is insufficient, under Sayles' Civ. St. art. 2072, requiring such verification to show that it is just, and, if made by a person other than the owner, to state that affiant is cognizant of the facts therein stated. *Strickland v. Sandmeyer*, 52 S. W. 87, 21 Tex. Civ. App. 351.

Meaning of "Offsets, Payments and Credits."—Paschal's Dig., arts. 1309, 1310, provides that the affidavit authenticating a claim against the estate of a deceased person must state that the claim is just and that all legal offsets, payments and credits known to the affiant have been allowed, or equivalent words must be employed. Held, that "offsets, payments and credits" were intended to comprehend every claim for money of whatever character existing in favor of the testator or intestate and every right or equity which, if allowed, would reduce the claim presented. *Walters v. Prestidge*, 30 Tex. 65.

Omission of "Offsets"—"Credits" Does Not Include "Offsets."—An affidavit for the authentication of a claim against a decedent's estate averring that "all legal payments and credits" had been allowed, is fatally defective for omitting to mention "offsets" in the same connection. *Gillmore v. Duncan*, 35 Tex. 435, following *Walters v. Prestidge*, 30 Tex. 65, 66.

The word "credits" as employed in Paschal's Dig., arts. 1309, 1310, providing that the affidavit authenticating a claim against the estate of a deceased person must state that the claim is just and that all legal offsets, payments and credits known to the affiant have been allowed, has a

limited as well as a general meaning and as used in the statute it does not include offsets as well as payments. *Walters v. Prestidge*, 30 Tex. 65.

When Equivalent Terms Used They Must be Equally Comprehensive.—Paschal's Dig., arts. 1309, 1310, provides that the affidavits authenticating a claim against the estate of a deceased person must state that the claim is just and that all legal offsets, payments and credits, known to the affiant have been allowed or equivalent words must be employed. Held, that if equivalent words to "legal offsets, payments and credits" are employed they must be equally comprehensive, certain, expressive and exhaustive upon the conscience. *Walters v. Prestidge*, 30 Tex. 65.

Disclosing Means of Information.—Although an affidavit by an agent or attorney, probating a claim against an estate, does not disclose his means of information, it is sufficient, if the executor or administrator does not object to it on that account, when it is presented for his allowance or objection. *Keesee v. Beckwith*, 32 Tex. 731.

Reference to New Promise Taking Claim Out of Statute of Limitations.—There was presented to an administratrix a claim, consisting of a note and mortgage, apparently barred by the statute of limitations, but accompanied by written acknowledgments of the justice of the claim, and the affidavit stated that the above claim (referring to the note and mortgage) was just, etc. The claim was rejected by the administratrix on the ground that it had been "paid and discharged," and it was held that the affidavit contained a sufficient description of the claim. *Hansell v. Gregg*, 7 Tex. 223.

Affidavit of Justness of Debt Embraces Attorney's Fees.—Before the maturity of a note calling for attorney fees, if collected by judicial proceedings, the maker died, and plaintiff, the

holder of the note, employed an agent who was not an attorney to present the note against the maker's estate. Such presentment was made before the maturity of the note, and the amount due, with interest, was allowed. The claim on the note not having been paid when the note matured, plaintiff employed attorneys who procured an order of the probate court for the sale of property of the estate to pay the note, after which they presented a claim for attorney's fees, which was not allowed by the executor. The affidavit to the original claim by the agent stated that "the claim represented by said note and deed of trust was just." Held, that this was broad enough to embrace the whole debt, including the attorney fees. *Wicks-Nease v. James*, 31 Tex. Civ. App. 151, 72 S. W. 87, affirmed in 97 Tex. 642, no op.

d. Who May Authenticate Claims.

It is left to the judgment and discretion of administrator to decide if affidavit to claim be made by proper person. *Walters v. Prestidge*, 30 Tex. 65, 75. See, also, *Dunn v. Sublett*, 14 Tex. 521; *Hansell v. Gregg*, 7 Tex. 223; *McIntosh v. Greenwood*, 15 Tex. 116; *Shelton v. Berry*, 19 Tex. 154; *Alford v. Cochran*, 7 Tex. 485.

Where an administrator would reject a claim, because it is authenticated by the affidavit of a person who does not purport to be the owner or his agent, and does not state the means of information of the deponent, he must place his rejection on that ground. *Shelton v. Berry*, 19 Tex. 154; *Dunn v. Sublett*, 14 Tex. 521, 531; *Hansell v. Gregg*, 7 Tex. 223; *Walters v. Prestidge*, 30 Tex. 65.

Affidavit Need Not Be Made by Owner.—It is not essential to the due presentation of a claim to an administrator for allowance under article 1158 of the digest that the affidavit accompanying the claim be made by the

owner. *McIntosh v. Greenwood*, 15 Tex. 116; *Hansell v. Gregg*, 7 Tex. 223. See *Dunn v. Sublett*, 14 Tex. 521; *Shelton v. Berry*, 19 Tex. 154.

May Be Made by Agent or Attorney.—The statute does not require that the owner of a claim presented to an administrator for allowance should make the affidavit, but it may be made by an agent or attorney, who is conversant with the facts. *Hansell v. Gregg*, 7 Tex. 223; *McIntosh v. Greenwood*, 15 Tex. 116, 117.

An administrator may approve a claim against the estate of his intestate supported by an affidavit made by one whom the administrator knows to be the agent of the owner of the claim. *Heath v. Garrett*, 46 Tex. 23.

Not Necessary That Affidavit Show Agency.—An affidavit supporting a claim against an estate, made by an agent, is not invalid because it does not show such agency. *Heath v. Garrett*, 46 Tex. 23.

The holder of a mortgage against property belonging to the estate of a decedent, but for a debt not owed by the estate, may make oath to his claim, not as a claim against the entire estate, but as one against a specific part thereof. *Whitmire v. May*, 96 Tex. 317, 72 S. W. 375 affirming 69 S. W. 100.

Foreign Administrator.—As a foreign administrator can not as such prosecute suits in this state, to collect choses in action due his intestate, he can not verify claims for the purpose of having them recognized or established against the administrator of the debtor. *Cherry v. Speight*, 28 Tex. 503, 520. See, also, *Cobb v. Norwood*, 11 Tex. 556.

An administrator in another state, who has there recovered a judgment in personam against a decedent whose estate and personal representative are in this state, is competent to verify the judgment as a claim against the representative of the debtor in this state. *Cherry v. Speight*, 28 Tex. 503.

e. Before Whom Authentication May Be Made.

In certifying to an affidavit made in another state, and accompanying a note presented to an administrator, and required by Hart. Dig. art. 1158, to be made before some judge of a court of record having a seal, the certificate is properly attested by the clerk by his official seal, as the clerk of a court of record is ordinarily the official keeper of its seal, and the seal of the court is his official seal. *Moore v. Carson*, 12 Tex. 66.

In 1874, the district court had jurisdiction of administrations and estates and the clerk of the court being empowered to perform all the duties theretofore performed by county clerks, was an officer having a seal of office and generally authorized to administer oaths and was an officer before whom a claim against an estate could be authenticated. *Swift v. Trotti*, 52 Tex. 498.

Commissioner of Deeds.—A commissioner appointed by the governor to take acknowledgments of deeds in another state has authority to take and certify an affidavit in authentication of a claim against the estate of a deceased person. *Greenwood v. Woodward*, 18 Tex. 1; *Hailey v. McGee*, 19 Tex. 107.

f. Operation and Effect.

The only effect of an affidavit to a claim is to make it optional with the administrator to allow or reject the claim. Without it, he could not, under the statute, legally allow the claim; with it, he may allow or reject, at his discretion and according to his own sense of justice. *Hansell v. Gregg*, 7 Tex. 223, 229.

g. Defects and Objections.

See ante, "Contents of Affidavit," VII, E, 2, c, (2), (d).

Time of Objection.—Mere irregularities in the form of a jurat to a claim against an estate should be objected to, if at all, by the administrator, when the claim is presented for allowance

or rejection. *Etter v. Dugan*, 1 Posey 175; *Hansell v. Gregg*, 7 Tex. 223.

An affidavit probating a note against an estate alleged that the note "was just," instead of that it "is just;" but on its presentation to the executors they took no objection to the affidavit. Held, that after suit brought, their objection, based upon the use of the past instead of the present tense, could not avail as a defense. *Keesee v. Beckwith*, 32 Tex. 732.

Objection Postponed Till Suit Brought.—Where a claim is presented against the estate of a decedent and the affidavit is imperfect in authentication the administrator should object to it at the time, and not having done so the objection can not be raised in an action on the claim. *Etter v. Dugan*, 1 Posey Unrep. Cas. 175; *Keesee v. Beckwith*, 32 Tex. 732, 736.

Objection to Person Making Affidavit Must Be Stated in Rejection.—If administrator's objection to claim goes to person making affidavit he must state it in his rejection. *Walters v. Prestidge*, 30 Tex. 65, 74.

Where a claim against an estate is authenticated by the affidavit of a person who does not purport to be the owner thereof or the agent of the owner, if the administrator would reject the claim on that ground, he must state such cause specially in his rejection; and can not raise it, for the first time, when sued for the establishment of such claim. *Dunn v. Sublett*, 14 Tex. 521.

Objection to Words of Affidavit.—If administrator's objection be to words of affidavit he need not state that fact, but may raise it for first time when sued. *Walters v. Prestidge*, 30 Tex. 65, 74.

Affidavit Presumed Sufficient on Appeal When No Objection Made below.—When the affidavit upon which claims were allowed is not contained in the record but it is merely stated that they were allowed and approved,

and no objection was made in the court below to their ranking as secured claims, the affidavit must be presumed to contain all the essential requisites. *Warhund v. Merritt*, 60 Tex. 24, 28.

F. ALLOWANCE AND DISALLOWANCE.

1. Necessity.

In the case of *Danzev v. Swinney*, 7 Tex. 626, "the court say that a claim, 'until either approved or disapproved, has no judicial standing, and can not be made the foundation of an action in any court, at least for the purpose of satisfaction out of the assets of the estate.'" *Thompson v. Branch*, 35 Tex. 21, 25.

2. Allowance or Rejection by Executor or Administrator.

a. Necessity for Allowance.

A probate court can not enforce payment of a claim against an estate until the same has been allowed by the administrator. *Price v. McIver*, 25 Tex. 769; *Danzev v. Swinney*, 7 Tex. 617.

b. Authority of Executor or Administrator.

(1) In General.

Administrator can do no more than pass upon indebtedness and allow or reject claim. *Western Mortg., etc., Co. v. Jackman*, 77 Tex. 622, 626, 14 S. W. 305.

In passing on a claim an administrator is authorized to pass on the question of indebtedness only and the power of classifying the claims, including those for the payment of which a lien on property is asserted, devolves on the court. *Western Mortgage & Investment Co. v. Jackman*, 77 Tex. 622, 14 S. W. 305.

(2) Administrator Who Resigned but Whose Successor Not Qualified.

An administrator who has petitioned the county court to resign, had his account audited, and been ordered to deliver over the estate to his successor when qualified, is not authorized to al-

low a claim against the estate, or do any other official act, no matter if his successor is disqualified. *Oldham v. Smith's Adm'r*, 26 Tex. 530.

(3) Administrator Pro Tem. Whose Powers Suspended.

An administrator pro tem., whose functions are suspended by the restraining order of a district judge, has no authority to allow a claim against his intestate's estate. *Oldham v. Smith's Adm'r*, 26 Tex. 530.

(4) Independent Executor.

Where, by will, three executors were appointed, with authority to administer without control of the court of probate, and all qualify as such, it is incompetent for two of such executors to allow a claim against the estate. *McLane v. Belvin*, 47 Tex. 493.

c. Claims Which May Be Allowed.

(1) In General.

The provisions of the statute respecting the allowance of claims by the executor or administrator apply in terms only to such claims as existed against the testator or intestate in his lifetime and not to claims incurred by the personal representative. *Adriance v. Crews*, 45 Tex. 181.

(2) Mortgage of Estate Property for Debt Other than of Estate.

A mortgagee of property belonging to an estate, for a debt other than that of the estate, may make oath to his claim, not as a claim against the entire estate, but as a claim against a specific part thereof, and have it allowed and approved or otherwise established as provided by law. *Whitmore v. May*, 96 Tex. 317, 72 S. W. 375. See *Robertson v. Paul*, 16 Tex. 470; *Buchanan v. Monroe*, 22 Tex. 537.

(3) Claims Owned by Executor or Administrator.

Claims Held by Executor or Administrator.—"An administrator has no authority to allow claims which he holds against the estate." *Henderson v. Ayers*, 23 Tex. 96, 103.

Under Hart's Dig. art. 1242 providing a special mode for the establishment of claims owned by an administrator against the estate which he is administering, an administrator could not allow claims against the estate held for him by another as attorney in fact, but they must be allowed in the manner prescribed. *Henderson v. Ayers*, 23 Tex. 96.

Claims in Hands of Administrator as Agent for Collection.—An administrator serving as the attorney of a creditor of his intestate, and as such interested in the allowance of his claim, has no authority to allow such claim against the estate. *Henderson v. Ayers*, 23 Tex. 96.

Claim against estate which is held for collection by administrator as agent, must be established by judgment of chief justice. *Henderson v. Ayers*, 23 Tex. 96, 102.

(4) Credit on Claims Due Estate.

Administrator may properly allow without suit a credit on a claim due the estate where he knows same to be just and legally enforceable. *Stonebraker v. Friar*, 70 Tex. 202, 204, 7 S. W. 799.

d. Acts Constituting Allowance.

Erasure of Rejection.—A claim against a decedent's estate, which has been indorsed by the administratrix and rejected, is not reinstated by an erasure of her signature thereto more than three months afterwards. *Burks v. Bennett*, 62 Tex. 277.

Withdrawal of Answer and Consenting to Judgment.—In a suit on a rejected claim against an estate, the act of the administrator in withdrawing his answer and consenting to judgment is equivalent to an approval of the claim. *Heath v. Garrett*, 46 Tex. 23.

Executor's Giving Note for Amount of Claim.—The fact that an executor gives for a claim against the estate a note for the amount thereof, which states for what it was given, does not amount to an allowance of the claim. *Price v. McIvire*, 25 Tex. 769.

e. Acts Constituting Rejection.

(1) Refusal to Indorse Allowance or Rejection on Claim.

Refusal of administrator to indorse allowance or rejection on claim amounts to refusal to allow it, and will authorize commencement of suit against administrator. *Cobb v. Norwood*, 11 Tex. 556, 560.

(2) Rejection by Part of Several Executors or Administrators.

If a claim be presented to, and rejected by, one of several administrators, that is sufficient to authorize the institution of suit to establish it. *Dean v. Duffield*, 8 Tex. 235.

f. Form and Proof of Rejection.

Disallowance of claim against estate may be indorsed on claim or proved by evidence aliunde. *Garrett v. Gaines*, 6 Tex. 435, 445.

Where claim is rejected by administrator because affidavit is not made by proper party, he must state that fact specifically in the rejection. *Dunn v. Sublett*, 14 Tex. 521, 531; *Shelton v. Berry*, 19 Tex. 154.

g. Grounds of Rejection.

See ante, "Requisites and Sufficiency," VII, E, 2, c, (2); "Defects and Objections," VII, E, 2, g.

General rejection of claim is presumed to be on the merits and not for formal defects in presentation. Thus a rejection will not be presumed to be for the want of proper authentication, unless they be wanting in some of the requisites especially prescribed by the law. *Dunn v. Sublett*, 14 Tex. 521, 531.

A mere technical inaccuracy in a claim as presented to an executor for allowance, or in the description of the claim in the affidavit to it, will not justify the executor in disallowing the claim, if the claim and affidavit as presented show a valid liability against the testator. *Cherry v. Speight*, 28 Tex. 503, overruling *Taney v. Edwards*, 27 Tex. 224.

h. Operation and Effect.**(1) In General.**

"Neither the rejection nor the acceptance by the administrator of a claim can be regarded as a test of its validity or invalidity. The claim is to be submitted to the further test of suit on rejection, or of re-examination by the probate judge on acceptance. If the claim be established by suit, the rejection by the administrator goes for nothing; or if it be disapproved by the probate judge the acceptance by the administrator is likewise treated as a mere nullity." *Danzy v. Swinney*, 7 Tex. 617, 632.

(2) On Right to Sue.**(a) Effect of Acceptance.****aa. In General.**

When claim against successor is presented to executor and accepted, claimant can not sue on it. *Binge v. Smith*, *Dallam* 616, 617.

bb. Application of Allowed Claims as Set-Offs.

Where a claim is presented to administrator and allowed it is presumed that presentation was necessary, and the claim becomes an established debt against the estate and requires no evidence other than the allowance to permit a recovery. *Reynolds v. McFadden*, 36 Tex. 129, 131.

The authentication of claims against an estate, and their allowance by the administrator, do not prevent their application as set-offs, in a proper case. *Eborn v. Cannon's Adm'rs*, 32 Tex. 231.

(b) Effect of Rejection.

In an action against an administrator for fraud in a sale of a land certificate by the intestate to the plaintiff, the claim against the estate, which has been rejected by the administrator, is admissible in evidence, not to show the truth of the claim, but that the claim has been rejected, so as to authorize suit. *Goss v. Dysant*, 31 Tex. 186.

(3) Fraudulent Claim.

Claim fraudulent and without consid-

eration allowed by executor can only be recovered to extent that it is free of taint of fraud. *Montgomery v. Nash*, 23 Tex. 157, 162.

(4) Administrator's Filing Objection to Allowed Claim.

Where an administrator has allowed in full a claim against the estate, his filing objections to the claim before it is acted on by the county court does not so nullify his allowance of it as to oust the county court of jurisdiction to pass on it. *Hensel v. International Building & Loan Ass'n*, 85 Tex. 215, 20 S. W. 116.

3. Approval or Disallowance by Court.
a. Necessity.**(1) Allowance.**

"No claim can be paid to a creditor by the administrator until it, after being properly verified, has been allowed by the administrator and approved by the court." *Chifflet v. Willis & Bro.*, 74 Tex. 245, 251, 11 S. W. 1105.

The case of *Danzy v. Swinney*, 7 Tex. 617, was decided upon the law of 1848. The law of 1848 differs essentially from that of 1840 in that it requires the claim to be presented to the chief justice for his approval. (*Hart. Dig.*, art. 1160.) The act of 1840 contained no such provision. *Francis v. Williams & Co.*, 14 Tex. 158.

Under Act 1870, providing that at each term of court all claims against decedent's estates, which have been allowed and filed, shall be examined and approved or disapproved by an order duly entered, and that the order of approval has the effect of a judgment, an account which was not approved until after it was barred was not a claim against the estate, the order of approval being necessary to make it such. *Wygal v. Woodlief's Heirs*, 76 Tex. 604, 13 S. W. 569.

Mortgage.—A claim secured by a mortgage must be allowed and approved before payment can be required, or legally made by the administrator, otherwise than upon his own

personal responsibility, in case there should not be assets sufficient to satisfy the preferred claims. After the mortgage has been "allowed and approved, or established by suit," the manner of proceeding to enforce it is prescribed by the statute (art. 1168). *Robertson v. Paul*, 16 Tex. 472, 475; *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815, 816.

The allowance of claims against an estate administered by an independent executor need not be approved by the county court. *McLane v. Belvin*, 47 Tex. 492; *Roy v. Whitaker*, 92 Tex. 346, 355, 48 S. W. 892, 49 S. W. 367.

(2) Disallowance.

See post, "Disallowance or Rejection," VII, J, 3, a.

b. Jurisdiction.

See ante, "In General," VII, F, 2, h, (1).

Effect of Filing Objections to Allowed Claim.—See ante, "Administrator's Filing Objection to Allowed Claim," VII, F, 2, h, (4).

c. Time.

(1) In General.

Quære, whether there is not some limit, short of the closing of the administration and of the expiration of the time allowed by the general law of limitations, within which a creditor must present his claim to the judge for approval after it has been allowed by the administrator. *Danzey v. Swinney*, 7 Tex. 617.

"Certainly the estate, and the parties interested adversely to the claimant, should not suffer prejudice from such delay; nor can its partition be retarded by the laches and negligence of a creditor." *Danzey v. Swinney*, 7 Tex. 617, 633.

(2) More than Year after Publication of Notice.

Letters of administration were granted and notice published in 1839, and a claim against the estate was allowed by the administrator and ap-

proved by the probate judge in 1842. Held, that a suit brought in 1850 to compel the administrator to pay the claim could not be defeated by the objection that the claim had not been allowed within a year after such publication of notice, or that it has not been duly authenticated, although the latter might be the fact. *Howard v. Battle*, 18 Tex. 673.

d. Form and Proof.

(1) Approval.

(a) Entry on Record.

In General.—The requirement that an approval of claim against an estate by clerk of district court in vacation under act of May 27, 1873, be spread on the records, is merely clerical. *Wygall v. Woodlief*, 76 Tex. 604, 13 S. W. 569.

A mistake in entering an order approving a claim against an estate, whereby such claim is ranked as of the third instead of the fifth class, will not vitiate the order where the recitals correct the mistake. *Ayers v. Waul*, 44 Tex. 549.

Entry and Approval on Claim Docket Record.

—The claim docket required to be kept in administration proceedings (Rev. Stat., arts. 2729, 2558, 2714, 2080, 1847) is a record of the court within the meaning of art. 1853 making orders in such proceedings nullities unless entered of record, and the entry of the claim and its approval on such docket is a compliance with the latter article and establishes the claim against the estate, though the order be not spread upon the minutes of the court. *De Cordova v. Rogers*, 97 Tex. 60, 75 S. W. 16, reversing 67 S. W. 1042.

(b) Proof When Not Indorsed on Claim.

In Texas, the probate judge is required, when a claim is presented to him, to indorse thereon, or annex thereto, a memorandum in writing, signed by him, stating that he approves or disapproves of the allowance, etc. Held that, leaving open the question

whether such approval or disapproval might not in some cases be proved by evidence aliunde, yet, unless such approval be indorsed or annexed, the prima facie presumption, at least, in a proceeding commenced since the act of 1846, is that it does not exist, even, it seems, where the succession was opened, and the claim presented to the administrator, under the act of 1840. *Danzev v. Swinney*, 7 Tex. 617.

Presumption from Part Payment.—Where an administrator had admitted and allowed a claim against the estate, and a subsequent administrator de bonis non had made payments thereon, such claim, in a subsequent proceeding to compel its payment, will be presumed, in the absence of a statement of facts showing a contrary inference, to have been ranked among the established claims against the estate, and the administrator will not be entitled to plead the statute of limitations thereto. *Francis v. Williams*, 14 Tex. 158.

(2) Entry of Disallowance.

It would seem that the proper practice in allowing or rejecting claims against estates by the chief justice, is to enter an order in the minutes of the court, and not merely to indorse a memorandum on the claim. *Davenport v. Lawrence*, 19 Tex. 317.

e. Grounds for Disapproval.

Fraudulent addition of name in promissory note by holder after death of one of the makers, after allowed by administrator, is good ground for disapproval by court. *Harper v. Stroud*, 41 Tex. 367, 374.

f. Operation and Effect.

(1) In General.

The approval or rejection of a claim against an estate of a decedent by the county court has the effect of judgment. *Williams v. Robinson*, 63 Tex. 576, 580.

(2) Effect of Approval as Judgment.

The acknowledgment by the administrator, and the approval by the pro-

bate judge, of a claim against the estate, is a quasi judgment against the estate and has (at least in a high degree) all the effects of a judgment in favor of the creditor; and, as such, it establishes the right and concludes the matter in controversy. *Baker v. Rust*, 37 Tex. 242, 244; *Eccles v. Daniels*, 16 Tex. 136, 139; *Williams v. Robinson*, 63 Tex. 576, 580; *Sutton v. Page*, 4 Tex. 142, 147; *Jones v. Underwood*, 11 Tex. 116; *Neill v. Hodge*, 5 Tex. 487; *Swenson v. Walker*, 3 Tex. 93; *Toliver v. Hubbell*, 6 Tex. 166; *Finley v. Carothers*, 9 Tex. 517; *Moore v. Hillebrant*, 14 Tex. 312, 315; *Smith v. Downs*, 40 Tex. 57; *Hillebrant v. Burton*, 17 Tex. 138; *Campbell v. Wilson*, 23 Tex. 253, 254; *Mosely v. Gray*, 23 Tex. 496; *Giddings v. Steele*, 28 Tex. 732; *Gibson v. Hale*, 57 Tex. 405, 408; *Cone v. Crum*, 52 Tex. 348, 351; *McDonough v. Tutt*, 31 Tex. 199, 201; *Willis & Bro. v. Smith*, 65 Tex. 656, 658; *Walker v. Taul*, 1 App. Civ. Cases, §§ 28, 30.

"The allowance and approval of a claim in the probate court establish that claim against the estate as fully, for all purposes, as a judgment in the district court could. *Neill v. Hodge*, 5 Tex. 487." *Thompson v. Branch*, 35 Tex. 21, 26.

When a claim has been presented to the executor or administrator for allowance, and allowed, and then approved by the county court, a judicial proceeding has been instituted, prosecuted and carried to a successful termination as much as though a regular suit for debt and foreclosure had been obtained in a district court. *Wicks-Nease v. James*, 31 Tex. Civ. App. 151, 72 S. W. 87, affirmed in 97 Tex. 642, no op.

Judgment of probate court approving claim is conclusive where there has been no appeal. *Sabrinovs v. Chamberlain*, 76 Tex. 624, 629, 13 S. W. 634.

The approval of a claim against an estate by the county court, is binding upon both residents and nonresidents.

Such probate proceedings are, in a sense, proceedings in rem, and it is not necessary that notice be given to heirs resident or nonresident, who by reason of their interest are presumed to be in court. *Thomas v. Bonnie Bros.*, 66 Tex. 635, 2 S. W. 724.

County court's approval of a claim against an estate is a judgment conclusively establishing validity thereof until set aside by direct proceedings. Pleas of payment although effective in such proceedings, are otherwise of no avail. *Thomas v. Bonnie Bros.*, 66 Tex. 635, 638, 2 S. W. 724.

Account.—In a suit by an administrator to recover the value of property alleged to have been wrongfully appropriated, the defendant relied on the action of the administrator in approving, and the county court in allowing, an account presented by him against the estate, in which the estate was credited with the value of the property. The action of the county court was after the institution of the suit in the district court. Held: (1) The action of the county court approving the claim had the effect of a final judgment. (2) The same effect followed with reference to the credits on the account allowed. (3) The judgment of the county court determined the state of the account. (4) The conclusiveness of the judgment of the county court on the account both as to debits and credits was not affected by the fact that the approval of the account by that court was subsequent to the institution of a suit by the administrator in the district court, which involved the correctness of the items of the account allowed. *Williams v. Robinson*, 63 Tex. 576.

(3) Where Approval Unnecessary.

Where approval of claim by probate judge is unnecessary, such approval is of no effect. *Francis v. Williams & Co.*, 14 Tex. 158, 164.

(4) Executorship Free from Control of Court.

Where an allowance is made by an

independent executor, the approval of the county court is a nullity. *Howard v. Johnson*, 69 Tex. 655, 7 S. W. 522; *Smyth v. Caswell*, 65 Tex. 379; *Wood v. McMeans*, 23 Tex. 481, 486; *McLane v. Belvin*, 47 Tex. 492, 493; *Evans v. Taylor*, 60 Tex. 422.

The allowance, by the probate court, of a claim against an estate in the hands of executors, with power under the will to administer, etc., is without jurisdiction, and void as against the estate. *McLane v. Belvin*, 47 Tex. 492, 493.

Joint Executors.—Where claim is allowed by two independent executors without consent of third, its approval by probate court gives it no force. *McLane v. Belvin*, 47 Tex. 492, 501.

(5) Effect upon Negotiability of Note.

The fact that a note had previous to the transfer been approved by the chief justice as a claim against the estate of a deceased person, and was consequently invested with the character of a quasi judgment, "would not destroy its negotiability, but would subject it, when assigned, to defenses against it in the hands of the assignor; and if lost or stolen, or if it have otherwise come unlawfully into the possession of a holder, it is subject to recovery from his hands by the true owner, or from the hands of any person with whom it may be found." *Weathered v. Smith*, 9 Tex. 623, 626.

(6) Joint Note of Husband and Wife for Community Debt.

Allowance of married woman's note executed jointly with husband in consideration of community property, by wife's administrator and its approval by judge merges it into quasi judgment. *Snow v. Mather*, 52 Tex. 650, 656.

(7) Effect on Claims Secured by Specific Liens.

Allowed claims can have all benefits of their specific liens without necessity for suit. *Graham v. Vining*, 1 Tex. 639, 645.

Debt Secured by Mortgage.—"A debt, secured by a mortgage on specific property, * * * if presented, allowed and placed on the tableau of acknowledged debts, * * * can have all the benefit of its specific lien without the necessity of suit. Should the funds of the estate be sufficient, it will be paid out of the general funds; if not sufficient without sale, the sale will be ordered by the court on the application of the executor or administrator, or on their failure to make such application, of the creditor, and in making the order of sale the judge will have regard to the nature of the claims." *Graham v. Vining*, 1 Tex. 639, 644.

The fact that the owner of a steam boiler placed in possession of a mechanic for purposes of repair dies before its redelivery and payment for the repairs, and the claim therefor is presented to and allowed against his estate, being approved and classified by the county judge, does not take away the mechanic's lien given by Rev. St. 1895, art. 3320, providing that, when any article shall be repaired by any mechanic or other workman, he is authorized to retain possession until the amount due is fully paid off; nor does it impair the power of sale given to such lienor by article 3322. *Lithgow v. Sweedborg* (Civ. App.), 78 S. W. 246.

(8) Effect on Judgment against an Estate.

A judgment lien springs from a judgment by operation of law and the allowance and approval of a judgment against the debtor's estate carries with the approval the enforcement of the lien. *Ayers v. Waul*, 44 Tex. 549.

The approval of a judgment against an intestate, attaches its lien upon all lands in the county where rendered without further description of the lands. *Ayers v. Waul*, 44 Tex. 549.

(9) Claims Payable in Confederate Money.

An administrator's allowance of a

claim which was payable in Confederate money, and approval of the same by a probate judge, is an absolute nullity, without proof that the allowance and approval were made or procured by mistake or fraud. *McGar v. Nixon*, 36 Tex. 289.

(10) Claims Apparently Barred by Limitations.

Every presumption will be indulged in favor of the allowance of a claim claimed to have been allowed by the administrator after limitations had run against it, and it must be shown that no fact existed that would have suspended the statute of limitations during the period of its apparent operation. *Howard v. Johnson*, 69 Tex. 655, 7 S. W. 522; *Jones v. Underwood*, 11 Tex. 116, 118; *Firebaugh v. Ward*, 51 Tex. 409, 414.

If a claim against an estate was apparently barred by the statute of limitations at the time of its allowance, the presumption will be indulged that it was within one of the exceptions preventing the bar. To overcome this presumption, the burden of allegation and proof is on the administrator. *Cone v. Crum*, 52 Tex. 348; *Moore v. Hillebrant*, 14 Tex. 312, 315.

As to Administrator's Liability on Final Settlement.—See post, "Credits," IX, B, 2, c.

(11) Claims Allowed without Authentication.

Where an administrator has allowed a claim, without authentication, and it has been approved by the probate judge, the payment of such claim can not afterwards be defeated at the instance of the administrator, on the ground merely of the want of authentication when allowed and approved, especially where such claim has been assigned, and the payment thereof has been delayed for years by promises of payment made by the administrator. *Howard v. Battle*, 18 Tex. 673.

(12) Whether Deed a Mortgage.

Plaintiff's intestate, prior to his de-

mise, executed an instrument in form a deed to secure a debt. After his death, defendant presented a claim against the estate, which was allowed, and credited with the realty at a certain value. Plaintiff sued to declare the deed a mortgage, and to recover the land. Held, that the judgment of the probate court was not *res judicata*, for that court did not have before it the question whether the instrument was a deed or mortgage. *Rice v. Ward*, 54 S. W. 318, judgment reversed 56 S. W. 747, 93 Tex. 532.

(13) Allowance of Part of Claim.

See post, "Partial Allowance and Rejection," VII, F, 4.

(14) Effect as Suspending Statute of Limitations.

See post, "Allowance and Approval," VII, J, 8, b, (5), (b), bb.

g. Review.

No appeal lies to the district court from the probate court's disallowance of a claim against an estate. The remedy is by suit. *Campbell v. Tackaberry*, 51 Tex. 37.

An appeal does not lie from the allowance and approval of a claim by the administrator, and the chief justice; nor is it such an order as can be revised upon certiorari by the district court. *Heffner v. Brander*, 23 Tex. 631.

Where the probate court had allowed a claim in favor of an administrator under art. 1394, and entered such allowance upon the minutes of his court, it became a quasi judgment, from which any creditor, whose claim had been allowed and approved, may prosecute a certiorari to the district court for the revision of such judgment, and where the district court affirmed such action of the probate court, this court reversed the judgment for want of such affidavit. *Puckett v. McCall*, 30 Tex. 457.

Article 203, Rev. Stat., conferring right of appeal from final judgment of probate court approving claims against an estate, embraces only such claims

as originated before commencement of administration. *Richardson v. Kennedy*, 74 Tex. 507, 509, 12 S. W. 219.

Final Judgment.—Texas statute makes action of court in approving or disapproving claim against estate of decedent a final judgment. *Walker v. Keer*, 7 Tex. Civ. App. 498, 502, 27 S. W. 299.

Jurisdiction.—The allowance of a claim by an administrator, and its approval by the probate judge, is a quasi judgment, which can not be reviewed by the county court. *Moore v. Hillebrant*, 14 Tex. 312, 65 Am. Dec. 118.

"The probate court could not review its decision, nor could it be revised by the district court when carried into that court by an appeal, because if the court from whence the appeal is taken can not take cognizance of the subject matter the court to which the appeal is taken can not. (See *Aulanier v. Governor*, 1 Tex. 653.)" *Moore v. Hillebrant*, 14 Tex. 312, 315.

Person Who May Appeal.—Under Rev. Stat. 1879, art. 2200, permitting an appeal from any order or judgment of a county court in a matter pertaining to the estate of a deceased person by any person considering himself aggrieved thereby, the minor children of an intestate decedent may appeal from an order allowing a claim against his estate. *Tanner v. Ames* (Civ. App.), 37 S. W. 373.

Under Rev. Stat., art. 2031, which gives the decisions of the probate courts approving or disapproving claims against estates the force and effect of judgments, and allows the claimant, or any person interested, to appeal to the district court as from other judgments of the county court in probate matters; and articles 2201, 2202, relating to the mode of perfecting such appeal—the heirs of an estate may appeal from the allowance of a claim against the estate, without giving notice of such appeal, though they did not appear and contest the claim in

the probate court. *Glenn v. Kimbrough's Estate*, 70 Tex. 147, 8 S. W. 81.

An administrator may appeal from an order of the district court approving a claim which he has allowed, and which he wishes to controvert for reasons arising subsequent to such allowance. *Harper v. Stroud*, 41 Tex. 367.

Notice of Appeal.—An heir may appeal from order of probate court allowing claim against estate without notice of appeal. *Glenn v. Kimbrough*, 70 Tex. 147, 8 S. W. 81.

Effect.—An appeal from a judgment of the probate court vacates that entire judgment, and the case stands in the district court for trial de novo. Such a judgment can not be accepted in part and contested as to the remainder; it is indivisible. *Callaghan v. Grenet*, 66 Tex. 236, 18 S. W. 507. So held where the county court allowed a claim but placed it in the wrong class.

"Upon appeal the district court tries the whole case de novo for all persons interested. One person having the right of appeal and exercising it, does so for all persons having a similar right. The appeal is for the purpose of revising the management of the estate, and affects the rights of all persons interested therein." *Glenn v. Kimbrough*, 70 Tex. 147, 8 S. W. 81.

Necessity for Presenting Facts on Which Case Decided in County Court.—An administrator de bonis non filed in the county court an application for the disallowance of a claim allowed by the administrator. The court disapproved of the allowance and an appeal was taken to the district court, and it sustained the appeal for want of jurisdiction. The facts on which the case was decided in the county court was not brought to the supreme court. Held, that the supreme court could not determine whether the action of the county court was erroneous. *Campbell v. Tackaberry*, 51 Tex. 37.

An allowance of a medical account by the probate court will not be set aside by the supreme court on account of its magnitude, in the absence of any facts going to show that the account was fraudulent or extortionate. *Baker v. Rust*, 37 Tex. 242.

Presumptions.—Where, in the affidavit of an administrator authenticating claims held by him against an estate, there is a defect, which the court below finds but a clerical omission, in the absence of a statement of facts or bill of exceptions, it must be presumed that it was such an omission as would not invalidate the affidavit. *Wright v. Pate* (Sup.), 1 S. W. 661.

Burden of Proof.—On appeal by minor heirs from order allowing claim against decedent's estate, burden is on claimant to establish claim and appellants have status of defendants. *Tanner v. Ames* (Civ. App.), 37 S. W. 373, 374.

Harmless Error.—When a claim against an estate is considered on its merits and disallowed, the claimant can not complain because the court denied his motion to strike out, for want of verification, an answer setting up that he had assigned his claim before its presentation to the administrator, since such ruling, if incorrect, is harmless. *Glenn v. Kimbrough's Estate*, 70 Tex. 147, 8 S. W. 81.

Judgment.—An order of approval of a claim against an estate was set aside by the probate court on application of the heir. On appeal, the district court affirmed the judgment of the probate court, and rendered judgment for the amount against the executors personally. Held, that the judgment against the executors was erroneous. *Bailey v. Collins*, 14 Tex. 151.

h. Collateral Attack.

The allowance of a claim against the estate of a deceased person by the probate court is a quasi judgment and can not be collaterally impeached. *Baker v. Rust*, 37 Tex. 242, 244; *Eccles v.*

Daniels, 16 Tex. 136, 139; Harper v. Stroud, 41 Tex. 367, 369; Williams v. Robinson, 63 Tex. 576, 580; Neill v. Hodge, 5 Tex. 487; Pitner v. Flanagan, 17 Tex. 7; Cannon v. McDaniel, 46 Tex. 303, 309; Moore v. Hillebrant, 14 Tex. 312; Swan v. House, 50 Tex. 650, 653; Smith v. Downes, 40 Tex. 57, 60; Firebaugh v. Ward, 51 Tex. 409, 414; Moore v. Moore, 59 Tex. 54, 61; Howard v. Johnson, 69 Tex. 655, 657, 7 S. W. 522; Leaverton v. Leaverton, 40 Tex. 218, 223.

"And though its allowance and approval may be the result of accident, mistake, or fraud, still it is conclusive until annulled or set aside by decree of a court having jurisdiction to make such order." Swan v. House, 50 Tex. 650, 653; Moore v. Hillebrant, 14 Tex. 312; Eccles v. Daniels, 16 Tex. 136; Heffner v. Brander, 23 Tex. 631; Smith v. Downs, 40 Tex. 57.

The approval of a creditor's claim against a decedent's estate by the probate court is a judgment on the claim, and hence is not subject to collateral attack in subsequent proceedings for the allowance of the administrator's account. Neill v. Hodge, 5 Tex. 487.

A creditor's claim having been approved by a probate judge, creditor can not question it at subsequent term of same court. Neill v. Hodge, 5 Tex. 487.

"The same conclusiveness as to the effect of such allowance and approval applies to the estate as to the holder of a claim against it. Swan v. House, 50 Tex. 650. The estate is bound by the judgment until it is set aside by a court of competent jurisdiction." Williams v. Robinson, 63 Tex. 576, 580.

In a suit by an administrator to recover the value of property alleged to have been wrongfully appropriated, the defendant relied on the action of the administrator in approving, and the county court in allowing, an account presented by him against the estate, in

which the estate was credited with the value of the property. The action of the county court was after the institution of the suit in the district court. Held, the judgment of the county court determined the state of the account, in respect to all the items which were embraced by it, which could not be reopened in a collateral proceeding. Williams v. Robinson, 63 Tex. 576.

When the account was duly approved and allowed as provided for by law, its character as a claim and open account was changed and merged into the more solemn form of a judgment of the county court; a court possessing unquestioned and exclusive jurisdiction of claims against the estates of deceased persons. Such a judgment is conclusive of the matters thus acted on, and whether correct or not is binding upon every other court until annulled or set aside by decree of a court having jurisdiction to make such order. Swan v. House, 50 Tex. 650, and cases there cited. Williams v. Robinson, 63 Tex. 576, 580.

A claim for waste and conversion of personal property presented by a widow against the administrator of her husband's estate and allowed by him, can not be inquired into or attacked in a collateral proceeding after it is approved by a court of competent jurisdiction. Moore v. Moore, 59 Tex. 54.

Grounds—Fraud.—Items of allowed and approved probate claim can not be attacked collaterally as false and fraudulent. Moore v. Moore, 59 Tex. 54, 61.

Limitation.—Acceptance of claim by administrator and its approval by probate court merge it into quasi judgment which can not be attacked in collateral proceeding by other creditors on ground of limitation. Firebaugh v. Ward, 51 Tex. 409, 414.

Defective Authentications.—See post, "Grounds," VII, F, 3, i, (2), (b), bb, (bb).

i. Setting Aside Allowance or Disallowance.**(1) During Term.**

During the term at which claim against estate was approved, probate court may set aside such approval. *Hicks v. Oliver*, 78 Tex. 233, 235, 14 S. W. 575. See *Moore v. Hillebrant*, 14 Tex. 312, 315.

(3) After Term.**(a) By Probate Court.**

The approval of a claim by the probate court after it was allowed by the executor or administrator is a quasi judgment, which can not at a subsequent term be set aside by the probate court. *Moore v. Hillebrant*, 14 Tex. 312, 315. See *Swenson v. Walker*, 3 Tex. 93; *Neill v. Hodge*, 5 Tex. 487, 490; *Toliver v. Hubbell*, 6 Tex. 166; *Finley v. Carothers*, 9 Tex. 517; *Jones v. Underwood*, 11 Tex. 116.

The validity of a claim against an estate for money, duly allowed by the administrator, and approved by the chief justice, can not afterwards be questioned in the county court. *Heffner v. Brander*, 23 Tex. 631.

Bill of Review.—Quære, whether bill of review in the probate court will lie to set aside the allowance and approval of a claim against an estate. *Firebaugh v. Ward*, 51 Tex. 409, 414.

(b) By District Court.**aa. General Rule.**

The allowance and approval of a claim against an estate has the effect of a judgment, and can only be set aside or corrected by a direct proceeding for that purpose in the district court. *Swan v. House*, 50 Tex. 650; *Smith v. Downes*, 40 Tex. 57, 60; *Heffner v. Brander*, 23 Tex. 631, 632; *Neill v. Hodge*, 5 Tex. 487; *Jones v. Underwood*, 11 Tex. 116; *Moore v. Hillebrant*, 14 Tex. 312, 313; *Eccles v. Daniels*, 16 Tex. 136; *Giddings v. Steele*, 28 Tex. 733, 756; *Cannon v. Bonner*, 38 Tex. 487; *Pitner v. Flanagan*, 17 Tex. 7; *Swenson v. Walker*, 3 Tex. 93; *Campbell v. Tack-*

aberry, 51 Tex. 37, 40. See, also, *Firebaugh v. Ward*, 51 Tex. 409, 414. See post, "Jurisdiction," VII, F, 3, i, (2), (b), cc.

Where a creditor's claim, after being allowed by the executor, does not require the approval of the court, its validity could not be impeached by the county court. In such case it could only be attacked by a direct action in the district court. *Campbell v. Tackaberry*, 51 Tex. 37, 40, citing *Heffner v. Brander*, 23 Tex. 631; *Eccles v. Daniels*, 16 Tex. 136; *Jones v. Underwood*, 11 Tex. 116.

Rule of Decision.—In suits to set aside allowance of claim by probate judge, the equities are considered and the superior equity prevails. *Jones v. Underwood*, 11 Tex. 116, 117.

bb. Grounds.**(aa) In General.**

After term of probate court at which claim against estate has been approved, such approval can not be set aside, in absence of fraud, accident, mistake, want of jurisdiction, or circumstances which would render judgment void. *Hicks v. Oliver*, 78 Tex. 233, 235, 14 S. W. 575; *Heath v. Layne*, 62 Tex. 686, 694; *Harper v. Stroud*, 41 Tex. 367.

(bb) Fraud, Accident or Mistake.

Where an executor, or administrator, allows a claim against the estate which he represents, from mistake or ignorance of the facts, which constitute its invalidity, or from fraudulent representations, on the part of the holder of such claim, such executor, or administrator, may sue in the district court, and have the allowance of such invalid claim annulled. *Mosely v. Gray*, 23 Tex. 496; *Neill v. Hodge*, 5 Tex. 487; *Jones v. Underwood*, 11 Tex. 116; *Eccles v. Daniels*, 16 Tex. 136; *Hillebrant v. Burton*, 17 Tex. 138; *Montgomery v. Culton*, 18 Tex. 736, 750; *Giddings v. Steele*, 28 Tex. 733. But see *Baker v. Rust*, 37 Tex. 242.

"If allowed under such circumstances

as would show affirmatively that the administrator intended to commit a fraud upon the estate, or that he was guilty of such gross negligence in the performance of his duty as would amount to such fraud, and that in consequence thereof the claim was approved and thus became a charge upon the estate, then he could not consistently ask relief, but might be made responsible on his bond." *Cone v. Crum*, 52 Tex. 348, 351.

A claim which has been allowed against the estate of his testator by an executor and approved by the chief justice of the county will not be set aside when allowed through no ignorance or mistake of fact, where there was no fraudulent representation by the holder. *Lott v. Cloud*, 23 Tex. 254; *Mosely v. Gray*, 23 Tex. 496; *Hicks v. Oliver*, 78 Tex. 233, 14 S. W. 575; *Heath v. Layne*, 62 Tex. 686, 694; *Eccles v. Daniels*, 16 Tex. 136; *Harper v. Stroud*, 41 Tex. 367.

The allowance by an administrator of a claim barred by limitations in reliance on the false representations of his counsel and the counsel of claimant representing that the claim was valid against the estate and that costs would be saved by allowing it, may, at the suit of the administrator, be set aside on the ground of mistake. *Cone v. Crum*, 52 Tex. 348.

An order allowing a claim against an estate will be set aside on the ground of mistake if the relief is applied for by the administrator within a reasonable time, and does not prejudice the rights of the claimant. *Cone v. Crum*, 52 Tex. 348, citing *Jones v. Underwood*, 11 Tex. 116.

"The facts of fraud and collusion between an executor and creditors, in establishing claims against an estate, can be set up to defeat such claims by other creditors, by heirs or persons interested in the estate. This would be allowed as against a judgment in the district court, where the presump-

tion is that the matter had been litigated and the debt finally proven before judgment; much more would such defense be available to the heirs, as against those quasi judgments, which rest alone upon the acknowledgment of the executor or administrator and the approval of the chief justice, and especially where these acts are done during the progress of proceedings for the removal of the executor from office." *Montgomery v. Culton*, 18 Tex. 736, 750.

Fraud in Procuring Administration.

—Where certain claims were allowed against a decedent's estate, and the administrator was ordered to sell certain real estate for the payment thereof, a contest filed by plaintiff objecting to the confirmation of a sale had under such order because the debts were barred by limitations, and charging fraud on the part of the husband of one of the heirs in procuring the administration to be opened for the purpose of allowing such claims, constituted a direct, and not a collateral, attack on the proceeding allowing the claims. *Smart v. Panther*, 42 Tex. Civ. App. 262, 95 S. W. 679.

Instruction as to Effect of Fraud and Collusion.—The defendant, by plea, attacked the allowance by an executor of a claim against the estate (duly approved by the chief justice) for fraud, averring that the plaintiffs and the executor had colluded to cheat and defraud the estate, and for that purpose had "contrived" the claim, which the executor had fraudulently allowed; the court, by their instructions, fully and fairly submitted to the jury the question of fact, whether the claim, or any part of it, was tainted with fraud, to which the plaintiffs were parties; or whether, for any part thereof, the estate had received no consideration; and charged them that, as to any part thereof so tainted with fraud, to which the plaintiffs were parties, or which was without a valuable

consideration, the plaintiffs could not recover. Held, that the court below had properly and sufficiently instructed the jury as to the law of the case. *Montgomery v. Nash*, 23 Tex. 157.

Burden of Proof.—In a suit by the administrator of an estate, to annul the allowance and approval of a claim, on account of mistake, or ignorance of facts, in the allowance and approval thereof, the burden of showing that the claim was not a valid subsisting one, is upon the plaintiff. *Mosely v. Gray*, 23 Tex. 496.

Weight and Sufficiency of Evidence.—Allowance and approval of wife's note executed by her jointly with husband for community property not set aside after great lapse of time on testimony of husband who perpetrated fraud. *Snow v. Mather*, 52 Tex. 650, 656.

Finding That Approval Free from Fraud.—Finding of fact that approval of claim by probate court at former term was free from fraud disposes of case in favor of claimant. *Hicks v. Oliver*, 78 Tex. 233, 235, 14 S. W. 575.

(cc) Claims Barred by Statute or Satisfied When Allowed.

Quasi judgment of probate court establishing claim that is barred, may be set aside in district court. *Yarborough v. Leggett*, 14 Tex. 677, 681.

The mere fact that a claim was barred by the statute when allowed by the administrator is not a ground for setting aside the court's approval of the allowance. *Campbell v. Shotwell*, 51 Tex. 27.

In a suit to set aside the allowance and approval of a claim against a decedent's estate, the administrator is not entitled to have it annulled on the ground that the claim appears on its face to have been barred by the statute of limitations at the time of its allowance, where the executors omitted to avail themselves of such statute. *Lott v. Cloud*, 23 Tex. 254; *Eccles v. Daniels*, 16 Tex. 136; *Hillebrant v.*

Burton, 17 Tex. 138; *Mosely v. Gray*, 23 Tex. 496; *Heffner v. Brander*, 23 Tex. 631, 632; *Henderson v. Ayres*, 23 Tex. 96.

Where an executor was directed by the will to disregard the statute of limitations and he allowed claims, an annulment of a claim allowed could not be decreed, in the absence of a clear violation of the executor's discretion in allowing the debt. *Campbell v. Shotwell*, 51 Tex. 27.

Approval by executor or administrator of claim barred by limitations, while invalid, is not a nullity, and it can only be set aside upon direct proceedings by beneficiaries of decedent, and upon direct proof that debt was barred, and that no fact existed which would have suspended the statute during the time of its apparent operation. *Howard v. Johnson*, 69 Tex. 655, 657, 7 S. W. 522, citing *Moore v. Hillebrant*, 14 Tex. 312; *Eccles v. Daniels*, 16 Tex. 136.

Where a note which was barred by the statute of limitations, had been allowed by the administrator and approved by the probate judge by mistake, and afterwards the administrator brought suit in the district court to vacate such allowance and approval, and it appeared that there had been a subsequent written acknowledgment of the justness of the debt, within four years from the allowance and approval of the claim, but more than four years from that time when it was brought forward, by the claimant, the court held that to set aside the allowance and approval would be to defeat a legal and just claim and refused to do so. Equity did not demand that the consequences of the mutual mistake should be transferred from the shoulders of the plaintiff to those of the defendant; it not being competent to restore the defendant to the same position which he would have occupied, had his claim, when first presented, been rejected, instead of

allowed and approved. *Jones v. Underwood*, 11 Tex. 116; *Firebaugh v. Ward*, 51 Tex. 409.

Where a judgment allowing certain claims against a decedent's estate was sought to be vacated solely on the ground that the claims were barred by limitations, and it was not alleged that the claimant and deceased were sureties on the original indebtedness only and that claimant had paid the entire indebtedness as surety, it was error for the court to set aside the original judgment and award the claimant only one-half of the amount so paid, on the theory that he was only entitled, as a cosurety, to contribution in that amount. *Smart v. Panther*, 42 Tex. Civ. App. 262, 95 S. W. 679.

Presumption and Burden of Proof.—Where a suit is commenced by the creditor of an intestate to have a claim on the estate of such intestate, which has been approved and allowed by the administrator, set aside, either because it was barred at the time of such presentation and allowance, or had been satisfied in his lifetime by the intestate, the burden of proof is upon the plaintiff. *Henderson v. Ayres*, 23 Tex. 96.

Where a claim has been allowed and approved, and the heirs apply to set it aside on the ground that it was outlawed when allowed and approved, the burden of proof is on them. *Hillebrant v. Burton*, 17 Tex. 138; *Jones v. Underwood*, 11 Tex. 116; *Moore v. Hillebrant*, 14 Tex. 312; *Lott v. Cloud*, 23 Tex. 254; *Giddings v. Steele*, 28 Tex. 733, 757; *Eccles v. Daniels*, 16 Tex. 136; *Mosely v. Gray*, 23 Tex. 496; *Cone v. Crum*, 52 Tex. 348, 351.

Where a claim against an estate which is barred apparently by the statute, has been allowed and approved by the probate court, the presumption will be indulged that the holder of the claim was within some of the exceptions which would prevent the bar of the statute. *Cone v. Crum*, 52 Tex. 348, 351.

Weight and Sufficiency of Evidence.

—In a suit by an administrator of an estate to annul the allowance and approval of a claim, on the ground that the same was barred by limitation when it was allowed, the fact that the claim appears on its face to have been barred is not sufficient to sustain the petition. *Mosely v. Gray*, 23 Tex. 496, following *Eccles v. Daniels*, 16 Tex. 136; *Hillebrant v. Burton*, 17 Tex. 138.

Affirmative proof that the bar of the statute had become complete when the allowance was endorsed is required. It must be proved that no fact existed which would have suspended the statute during the time of its apparent operation. *Howard v. Johnson*, 69 Tex. 655, 657, 7 S. W. 522; *Moore v. Hillebrant*, 14 Tex. 312; *Eccles v. Daniels*, 16 Tex. 136; *Jones v. Underwood*, 11 Tex. 116; *Giddings v. Steele*, 28 Tex. 733, 757; *Mosely v. Gray*, 23 Tex. 496; *Lott v. Cloud*, 23 Tex. 254.

To warrant the setting aside of an order allowing certain claims against a decedent's estate because the claims were barred by limitations, mere proof of the claims themselves appearing on their face to be barred is insufficient, without evidence that the facts or circumstances which would have taken the claim out of the operation of the statute at the time it was allowed did not exist. *Smart v. Panther*, 42 Tex. Civ. App. 262, 95 S. W. 679.

Where, from the allegations of the petition, in a suit by a creditor, to set aside the approval of a claim against an estate on the ground that it was barred by the statute of limitations, it appeared that on the obligation which had been approved and allowed, there were acts to be performed before any right of action would accrue upon the covenants of the intestate, and there was no time for performance specified, and there was nothing in the evidence to show within what time they ought reasonably to have been performed, and it was also alleged that the intestate left the country, and never re-

turned, it was held, that there was no error in a judgment against the plaintiff; and that the claim having become a money demand, before its presentation for allowance and approval, it was not shown to be barred by the statute of limitations. *Henderson v. Ayers*, 23 Tex. 96.

(dd) Invalidity in General.

In suit by devisee to set aside allowance of claim, it is sufficient to prove claim invalid. *Bailey v. Collins*, 14 Tex. 151, 152.

(ee) Claims Payable in Confederate Money.

An administrator's allowance of a claim which was payable in confederate money is wholly void, and an approval of the same by a probate judge is an absolute nullity. To maintain an injunction against the enforcement of such a claim, it is not necessary that the plaintiffs (who were administrators 'de bonis non and legatees) should prove that the allowance and approval were made or procured by mistake or by fraud. *McGar v. Nixon*, 36 Tex. 289. See *Bailey v. Collins*, 14 Tex. 151.

(ff) Contracts within Statute of Frauds.

A quasi judgment arising from the acknowledgment by an administrator, with the approval of the probate judge, of a claim against his decedent's estate, will be set aside simply on the ground that the contract on which the judgment was rendered was within the statute of frauds. *Eccles v. Daniels*, 16 Tex. 136.

(gg) Defective Authentication.

The heirs of a decedent may set aside a claim allowed by an administrator and approved by the district court, where the claim is not authenticated as prescribed by the statutory affidavit. *Jones v. Boulware*, 39 Tex. 367; *Boulware v. Jones*, Id.

That an affidavit, proving up notes against an estate, for allowance and

approval, was made by one not a party to them, nor representing himself in the affidavit to be an agent of the party is available, only in a direct proceeding to set aside the approval; the allowance and approval, being in the nature of a judgment establishing the notes, and the same rule applying for approval, when, in the certificate of authentication for allowance, the word "payments" has been left out. *Cannon v. McDaniel*, 46 Tex. 303.

cc. Jurisdiction.

See ante, "General Rule," VII, F, 3, i, (2), (b), aa.

To set aside a judgment of the probate court, approving the allowance of a claim by an administrator, proceedings for that purpose must be instituted in the district court, and within, it seems, some reasonable time. *Moore v. Hillebrant*, 14 Tex. 312.

The allowance and approval of a claim against an estate by its administrator and the chief justice in a county court is conclusive in that court, and can only be set aside or nullified by an original proceeding commenced for that purpose in the district court. *Heffner v. Brander*, 23 Tex. 631.

If an account against an estate has been admitted and allowed from ignorance of the facts, or from fraudulent representations of the holder, the remedy of the administrator is by suit in the district court. *Neill v. Hodge*, 5 Tex. 487; *Jones v. Underwood*, 11 Tex. 116, 118.

A suit instituted in a district court county to set aside and annul an appeal claim which had been established in the county court against the estate of appellee's intestate, is a correct method of procedure. *Puckett v. McCall*, 30 Tex. 457, 458; *Heffner v. Brander*, 23 Tex. 631.

Const. art. 4, § 15, and Hart. Dig. art. 642, giving the district court power to review decrees and orders of the probate court either by appeal or cer-

tiorari, does not deprive it of jurisdiction to vacate, because of fraud, in a proceeding originally instituted in the district court, an order of the probate court approving an account against the estate of a deceased person. *Lott v. Ballaud*, 21 Tex. 167.

Probate Court.—Where a personal claim by an administrator against the decedent's estate has been approved by the county court, that court has no power, after the term, to set the approval aside, when it is not shown that the court was without jurisdiction, or that the order was procured by fraud, or for some other reason, was void. *Hicks v. Oliver*, 78 Tex. 233, 14 S. W. 575; *Moore v. Hillebrant*, 14 Tex. 312, 315.

dd. Time to Sue.

Proceedings to set aside an approval of a claim against an estate by the probate judge must be instituted within a reasonable time after the rendition of the judgment of approval. *Giddings v. Steele*, 28 Tex. 733, citing *Neill v. Hodge*, 5 Tex. 487; *Jones v. Underwood*, 11 Tex. 116; *Moore v. Hillebrant*, 14 Tex. 312, 315; *Cone v. Crum*, 52 Tex. 348.

Where an administrator sues to have the allowance and approval of a claim canceled, he must come forward within a reasonable time. *Eccles v. Daniels*, 16 Tex. 136; *Moore v. Hillebrant*, 14 Tex. 312.

In 1861 a husband and wife executed a note for merchandise and negroes purchased by him, which note was, in 1866, allowed as a claim against her estate. In June, 1874, the holder applied for an order to sell land of her estate to satisfy the note, and in October, 1874, her heirs brought an action praying to set aside the allowance of the claim. Held, that after such lapse of time the prayer should not be granted. The proper remedy was by suit upon the administrator's bond. *Snow v. Mather*, 52 Tex. 650.

Where orders approving certain

claims against a decedent's estate as legal charges against the same were entered, respectively, November 7, 1901, and January 30, 1902, a suit brought to set aside such orders, filed April 24, 1902, was instituted within a reasonable time. *Smart v. Panther*, 42 Tex. Civ. App. 262, 95 S. W. 679.

ee. Persons Who May Have Allowance Set Aside.

The beneficiaries or persons interested in the estate have the right to sue to set aside the approval. *Howard v. Johnson*, 69 Tex. 655, 7 S. W. 522; *Pitner v. Flanagan*, 17 Tex. 7.

An administrator may have claim allowed by him set aside on ground of fraud by the claimant. *Montgomery v. Culton*, 18 Tex. 736, 750; *Pitner v. Flanagan*, 17 Tex. 7; *Howard v. Johnson*, 69 Tex. 655, 7 S. W. 522.

The administrator *de bonis non* may take steps to have the allowance and approval of a claim against an estate set aside. *Williams v. Robinson*, 63 Tex. 576.

Heirs, legatees, devisees, and creditors may sue to set aside the allowance and approval of a claim against a decedent estate. *Jones v. Boulware*, 39 Tex. 367; *Montgomery v. Culton*, 18 Tex. 736, 750.

Where an administrator has improperly allowed claims against the estate, through ignorance or mistake, and more especially where he colludes with the creditor, to the injury of the estate, the heir who has taken the estate and assumed the debts may have such acknowledgments set aside. *Montgomery v. Culton*, 18 Tex. 736; *Montgomery v. Jones*, 18 Tex. 751.

It is competent for the heir of an estate to institute in the district court a proceeding to annul the approval by the probate judge of a claim against the estate on the ground that the allowance of the claim by the administrator was fraudulent. *Giddings v. Steele*, 28 Tex. 732.

ff. Pleading and Proof.**(aa) Burden of Allegation and Proof.**

See ante, "Grounds," VII, F, 3, i, (2), (b), bb.

The burden of both allegation and proof is upon the administrator, in a direct proceeding to set aside the approval of claim to show not only that the claim was barred, but also that he has some good ground, by reason of fraud, accident, or mistake, for the relief sought. *Cone v. Crum*, 52 Tex. 348, 351; *Eccles v. Daniels*, 16 Tex. 136, 140.

Where a claim against a decedent has been allowed and proved, every presumption is in its favor, and its vices must be clearly and distinctly shown by one attempting to impeach it. *Hillebrant v. Burton*, 17 Tex. 138; *Eccles v. Daniels*, 16 Tex. 136; *Mosely v. Gray*, 23 Tex. 496, 497.

This rule requires a great deal more stringency if a great length of time is permitted to elapse before it is impeached. *Hillebrant v. Burton*, 17 Tex. 138, 140.

(bb) Petition.

In a proceeding to set aside allowance of an account, petitioner should, by averment, negative the existence of any fact or exception which could be a basis of a judgment. *Eccles v. Daniels*, 16 Tex. 136, 140; *Mosely v. Gray*, 23 Tex. 496; *Hillebrant v. Burton*, 17 Tex. 138.

A note was given by a husband and wife in consideration of community property. The wife died and her administrator allowed the note as a valid claim which allowance was approved by the chief justice of the county court. Held, that the note was merged into a quasi judgment and the heirs of the wife could not years afterwards, vacate the judgment by a proceeding in the nature of a bill of equity without sufficient averments and proof to, authorize it. *Snow v. Mather*, 25 Tex. 650.

General allegations of fraud, in suit attacking legality of administrator's

action in allowing claims and paying under order of court, are insufficient. Such allegations must be specific. *Cameron v. Morris*, 83 Tex. 14, 19, 18 S. W. 422.

Where a claim has been allowed by administrators, approved by the court and a portion of it paid, the administrator can not have the allowance set aside on general allegations of fraud and mistake without a specification of facts from which the fraud and mistake could be inferred. *Baker v. Rust*, 37 Tex. 242.

(cc) Pleas.

General Denial.—In a proceeding to set aside a quasi judgment allowing an account, a general denial suffices. *Eccles v. Daniels*, 16 Tex. 136, 140.

(dd) Weight and Sufficiency of Evidence.

See ante, "Grounds," VII, F, 3, i, (2), (b), bb.

An allowance and approval of a claim against an estate can only be annulled on fullest proofs. It is not done as a matter of course. *Heffner v. Brander*, 23 Tex. 631.

gg. Instructions.

See ante, "Grounds," VII, F, 3, i, (2), (b), bb.

hh. Judgment.

Where a claim against a decedent's estate is already allowed, and entitled to be paid in due course of administration, a judgment for the defendant for his claim on a suit brought in the district court for setting aside and annulling the allowance of the claim is unnecessary, and will be set aside on appeal, if the defendant be not entitled to it on his pleadings. *Lott v. Cloud*, 23 Tex. 254.

A judgment in a district court in a proceeding to correct the improper approval of a claim against an estate under probate act 1848 is conclusive as between the holder of the claim and the estate. *Swan v. House*, 50 Tex. 650.

ii. Review.

See ante, "Judgment," VII, F, 3, i, (2), (b), hh.

4. Partial Allowance and Rejection.

If any part of a claim against an estate is just, that part should be allowed by administrator. *Wilcox v. Alexander* (Civ. App.), 32 S. W. 561.

The rejection in part by the administrator of a claim against the estate authorizes the holder, if not satisfied with such rejection, to bring suit on the claim for the full amount and the amount in controversy is the amount of the claim and not the rejected part. *Simmons v. Terrell*, 75 Tex. 275, 12 S. W. 854; *Gibson v. Hale*, 57 Tex. 405, 408.

An action is not maintainable to establish the balance of an account against an estate, after it has been presented duly authenticated to the administrator, and has been by him in part allowed and in part rejected, and the holder has then proceeded to procure its approval by the probate judge. That approval has upon the entire claim the force and effect of a judgment, and the holder of it can not maintain a suit to establish such claim. *Gibson v. Hale*, 57 Tex. 405; *Williams v. Robinson*, 63 Tex. 576, 580.

When a claim against an estate is for an amount within the jurisdiction of the district court, and suit is brought for the full amount thereof, the jurisdiction of the district court is not affected by the fact that the administrator had previously allowed all the claim except an amount less than five hundred dollars. *Simmons v. Terrell*, 75 Tex. 275, 12 S. W. 854.

Note Providing for Attorney's Fees.

—Where an administrator allows principal and interest but rejects the attorney's fees provided in a note, when presented after default by an attorney, suit may be brought for whole amount including attorney's fees in district court. *Simmons v. Terrell*, 75 Tex. 275, 278, 12 S. W. 854.

Plaintiff was the owner of two notes signed by defendant's decedent, both of which provided for an attorney's fee of 10 per cent for cost of collection. Before either note matured the maker died, and defendant qualified as executor, after which plaintiff employed an agent not an attorney to present the notes against the maker's estate, which he did before maturity, without claiming attorney's fees, and the amount due, with interest, was allowed. The claims on the notes not having been paid when the notes matured, plaintiff procured attorneys, who procured an order of the county court for the sale of the decedent's property to pay the notes, after which such attorneys presented a claim for attorney's fees, which was disallowed. Held, that the failure to claim attorney's fees when the notes were originally presented, and the allowance of the claims without attorney's fees, constituted a bar to a subsequent action to recover them. *Nease v. James*, 72 S. W. 87, 31 Tex. Civ. App. 151.

The collection of the note through the probate court was by judicial proceedings, and no attorneys having been employed to procure the allowance of the claim, the holder of the note was not entitled to maintain a suit against the estate for the attorney fees on the ground that after the judgment of the probate court was obtained he employed attorneys to collect the claim, or to accelerate its payment. *Wicks-Nease v. James*, 31 Tex. Civ. App. 151, 72 S. W. 87, affirmed in 97 Tex. 642, no op.

5. Contested or Disputed Claims.

a. Persons Who May Contest.

(1) Administrator.

(a) In General.

"The administrator can neither on his rejection nor his acceptance take the initiative for the purpose of ascertaining whether the claim may be finally recognized." *Danzey v. Swinney*, 7 Tex. 617, 632.

(b) Estoppel to Dispute.

Where an administrator verbally admitted the validity of a claim against his intestate's estate which had been allowed and approved, and declared that it would be paid, and thereby induced a third person to take the claim, he will be estopped thereby from interposing any defense against it in the hands of such third person. *Swenson v. Walker's Adm'rs*, 3 Tex. 93; *Howard v. Battle*, 18 Tex. 673, 677; *Johnson v. Brown*, 25 Tex. Supp. 120, 128.

An administrator authorizing a debtor to purchase claims against the estate is not thereby precluded from the right to pass upon them. *Johnson v. Brown*, 25 Tex. Supp. 120.

(3) Heirs.

See ante, "Persons Who May Have Allowance Set Aside," VII, F, 3, i, (2), (b), ee.

b. Objections and Exceptions.**(1) Time of Making.**

Administrator must object to sufficiency of claim on its presentation. *Hansell v. Gregg*, 7 Tex. 223, 229.

On presentation of a claim against an estate, the administrator is required to make all proper defenses, and he can plead non est factum or any other plea that would defeat the claim. *Simpson v. Reily*, 31 Tex. 298.

Objection to claim not made at time claim presented to administrator, can not avail to abate action on it. *Keesee v. Beckwith*, 32 Tex. 731, 736.

Where an administrator fails to give any reason for the rejection of a claim against the estate presented to him, so as to put the owner or agent upon notice of his objection, he can not be allowed to plead or urge any on the trial; but this rule does not preclude a defense to the merits. *Keesee v. Beckwith*, 32 Tex. 731.

(2) Objection to Affidavit.

See ante, "Requisites and Sufficiency," VII, E, 2, c, (2); "Defects and Objections," VII, E, 2, g.

(3) Plea of Adverse Possession.

Invalidity of Firm Transfer.—Application was made by an administrator de bonis non for an order of sale enforcing the vendor's lien for the payment of a claim allowed and approved during the former administration, while it was owned by a firm, one member of which was surety on the bond of the administrator allowing the claim. The widow and children resisted the application, alleging that the administrator had squandered the property of the estate, was insolvent, and owing the estate; that the claim was assigned to plaintiff with full knowledge of all the facts and also pleaded limitation of three and five years and that the land was the homestead of the family, etc. Held, that the plea of adverse possession was not applicable to a money demand, and that the facts were insufficient to invalidate a transfer of the claim by the firm pending the administration. *Ball v. Hill*, 48 Tex. 634.

(4) Form.

See ante, "Form and Proof of Rejection," VII, F, 2, f.

Necessity for Affidavit.—Claims presented for approval of the probate court against an estate may be contested without affidavit supporting the objections thereto. *Glenn v. Kimbrough's Estate*, 70 Tex. 147, 8 S. W. 81.

Law requiring denial under oath of correctness of an account properly sworn to, has no application to proceedings in probate court. *Glenn v. Kimbrough*, 70 Tex. 147, 149, 8 S. W. 81.

(5) Answer to Exceptions.

Where invalid claims are inserted in a petition with claims apparently good, it is no answer to exceptions to the invalid claims, to announce to the court that the invalid claims are not relied on. *Carson & Lewis v. Cock*, 50 Tex. 325.

(6) Proceedings of Probate Court.**(a) Jurisdiction.**

"The probate court has no general jurisdiction, except in the mode expressly provided by law, to establish claims against an estate, and in all cases in which an indebtedness of an estate is sought to be established, if resisted by the representative of the estate, it must be established by suit in some court having jurisdiction of the matter; and in cases in which there are conflicting claims between an estate and some other person to specific property, such claims must be settled in some other than the probate court." *Peters v. Phillips*, 19 Tex. 70; *Norris v. Duncan*, 21 Tex. 594; *Booth v. Todd*, 6 Tex. 137; *Wise v. O'Malley*, 60 Tex. 588, 589.

Probate courts have no power to investigate the merits of disputed claims against estates. *Neill v. Hodge*, 5 Tex. 487.

Controverted facts as to the indebtedness of an estate can not be tried in the probate court. *Neill v. Hodge*, 5 Tex. 487.

"The law has conferred on the executor or administrator the authority to judge, in the first instance, of the propriety of incurring expense on account of the estate. If he disallow the claim, it necessarily involves litigation between him and the claimant, and the probate court is not the appropriate forum for conducting such litigation. The manifest intention and policy of the law, deducible from its several provisions, is opposed to the institution of suits in the probate court by third persons for the establishment of claims against the estate. That court has no authority to order the payment of claims by the executor or administrator which have not been allowed by him, or established by suit to which he was a party." *Price v. McIver*, 25 Tex. 769, 771.

"The probate law, in prohibiting a suit from being brought against an ad-

ministrator on any moneyed demand against his intestate, unless such demand had been presented to the administrator authenticated by the oath of the claimant, and rejected by him or disapproved by the probate judge, and in requiring that then the suit should be brought in the district court, shows that it was not intended that any controverted fact as to the indebtedness or the amount should be tried in the probate court." *Neill v. Hodge*, 5 Tex. 487, 490.

Where a creditor has presented his account against an estate making no reference to any mortgage or lien, and the account was allowed, and afterwards the creditor presented a petition to have a lien declared, the previous allowance of the claim gave the county court jurisdiction of a hypothecation of the collateral securities. *Simpson v. Reily*, 31 Tex. 298.

Bequest of Insurance Policy.—Under const. 1876, art. 5, § 16, and Rev. Stat. 1895, art. 2102, giving the probate court jurisdiction to administer decedents' estates, and to direct the distribution of assets, said court may determine whether the proceeds of a policy of life insurance, payable to decedent, "his executors, administrators, or assigns," shall be distributed to creditors of the estate, on their application therefor, or to the widow and child, claiming said fund as legatees. *Dulaney v. Walsh* (Civ. App.), 37 S. W. 615, affirmed in 90 Tex. 329.

In the exercise of the jurisdiction here exerted, this case is analogous to that of *Mullins v. Thompson*, 51 Tex. 7, where the jurisdiction of the probate court was recognized in a controversy over the proceeds of a life insurance policy payable to the heirs or assigns of the assured, between the heirs of the deceased and his creditors. *Dulaney v. Walsh* (Civ. App.), 37 S. W. 615, 616, affirmed in 90 Tex. 329.

(b) Jury Trial.

Prior to May, 1873, neither the party

presenting claim against estate nor the party opposing it were entitled to jury trial. *Harper v. Stroud*, 41 Tex. 367, 368.

(c) Evidence.

aa. Presumptions and Burden of Proof.

In an action on a claim against an estate of one deceased, plaintiff makes a prima facie case on proving the debt, and it is not necessary for him to prove that payment has not been made. *Kartoghian v. Harboth* (Civ. App.), 56 S. W. 79.

Where a suit was brought to establish a note as a claim against the estate of a deceased maker, the note having been given to raise money for the payment of a judgment against the maker, it was not necessary for the holders to show that the judgment had not been paid; there being no evidence that the payee of the note had any connection therewith, or that it was kept on foot as security for the note. *George v. Ryon* (Civ. App.), 61 S. W. 138.

A claim without consideration and fraudulently allowed against the estate of his testator by an executor, although duly approved by the chief justice of the county, can not be recovered on, in so far as it is tainted with fraud and without consideration, but the burden of proof is on the party resisting such claim. *Montgomery v. Nash*, 23 Tex. 157.

bb. Admissibility.

Testimony as to Standing in Lodge.

—Testimony that witness attended a lodge pretty often, and saw deceased there only once or twice, and he once heard of his being suspended for non-payment of dues, but that he was carried along, and was reinstated when he paid up, is not prejudicial to one defending against a claim against deceased on the ground that he was a member in good standing of the lodge, which was therefore liable on the

claim. *Bonart v. Lee* (Civ. App.), 46 S. W. 906.

(d) Review.

aa. Right.

If probate court refuses to permit administrator to contest claim or to allow appeal, district court can afford remedy. *Swenson v. Walker*, 3 Tex. 93, 97.

bb. Time.

Where a creditor objects to the confirmation of an administrator's account on the ground that he has a claim unpaid, and at a subsequent date the account of the administrator was allowed, and finally a part of the creditor's claim was allowed, his appeal from the final order allowing a part of his claim was in time. *Neill v. Hodge*, 5 Tex. 487.

cc. Trial De Novo.

"If it had been properly presented and acknowledged and petitioner failed to prove it in the probate court, after the case went to the district court on his appeal, he had an opportunity of improving his evidence in that court, as the cause was then to be tried de novo." *Millican v. Millican*, 15 Tex. 460, 462.

G. ARBITRATION AND COMPROMISE.

Administrator could, at common law, submit claim to arbitration. *Yarborough v. Leggett*, 14 Tex. 677, 678.

An administrator has no authority to submit a claim against the estate to arbitration so as to bind the estate by the award. *Callaghan v. Grenet*, 66 Tex. 236, 239, 18 S. W. 507.

A contested and rejected claim against the estate of a deceased person can not be submitted to arbitration, but can be established only by suit in the probate court. *Yarborough v. Leggett*, 14 Tex. 677.

Words "court" and "suit," as used in statute prescribing mode for establishment of claims against estates, have distinctive meaning from arbitrators

and arbitration. *Yarborough v. Leggett*, 14 Tex. 677, 681.

The administrator c. t. a. has no right to submit to arbitration an attorney's claim for services rendered under a contract with the executor, since the allowance of claims should depend on the administrator's own judgment, and the award of the arbitrators does not bind the estate. *Callaghan v. Grenet's Estate*, 66 Tex. 236, 18 S. W. 507.

Compromise.—An executor or administrator may compromise a doubtful claim against the estate of his decedent. *Adriance v. Crews*, 38 Tex. 148, 153.

Where an administrator made a settlement with a creditor of the estate by a payment pro rata upon the claim, taking a receipt in full, the settlement was binding on the creditor, in absence of fraud, mistake, or evidence that it was conditional. *Adriance v. Crews*, 38 Tex. 148.

If a creditor is induced by the misrepresentations of an heir to compromise his claim with the administrator for a less sum, his remedy would be against such heir. His interest is sufficient consideration to bind him to make good his representations. *Adriance v. Crews*, 38 Tex. 148.

H. PAYMENT.

1. Mode.

a. By Retention of Funds Collected.

Attorney's Fees.—An administrator may authorize an attorney to appropriate to the payment of his fees, for services rendered in settlement of the estate, money which he has collected for the estate. *Gammage v. Rather*, 46 Tex. 105.

b. By Set-Off.

See ante, "Set-Off and Counterclaim," V, S, 11; "Application of Allowed Claims Set-Offs," VII, F, 2, h, (2), (a), bb.

2. Time.

Estate is pledged to pay all claims entitled to payment according to ex-

hibit filed within one month after expiration of one year after grant of letters. *Buchanan v. Wagnon*, 62 Tex. 375, 378.

"Some claims clearly may be paid by an administrator, without the delay of twelve months or an order of the court, as, for instance, funeral expenses, those of the last sickness, of administration, etc. These are first in rank, and none others can claim a pro rata distribution with them." *Lockhart v. White*, 18 Tex. 102, 108.

Where there is danger of insolvency, administrator should delay payment until pro rata due each creditor can be ascertained. *Lockhart v. White*, 18 Tex. 102, 108.

3. Order of Payment.

a. In General.

The statute directs the order in which debts shall be paid as follows: 1st. Funeral expenses, and those of the last sickness. 2d. The expenses of administration, including the allowances made to the widow and children, and expenses incurred in the preservation, etc., of the estate. Then come the debts secured by lien. *Chandler v. Burdett*, 20 Tex. 42, 44; *Lockhart v. White*, 18 Tex. 102.

b. Classification and Priority among Particular Claims.

(1) Vendor's Lien.

See post, "Vendor's Liens," VII, H, 3, b, (4), (c).

(2) Expenses of Illness, Burial Administration, Allowance, etc.

See, also, post, "Costs and Attorney's Fees," VII, H, 3, b, (3).

Funeral expenses, expenses incurred in the last sickness, and expenses of administration, together with the statutory allowance to widow and children, are entitled to priority of payment over claims for which a specific lien on property was created, except where such lien is on a claim for purchase money of the property on which the lien is secured. *Robertson v. Paul*, 56 Tex. 472; *Blair & Co. v. Thorp*, 33

Tex. 38; *McLane v. Paschal*, 47 Tex. 365; *McMiller v. Butler*, 20 Tex. 402, 404; *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815.

A debt against an estate, secured by a mortgage or deed of trust, must be postponed to payment of expenses of sickness, burial, and administration. *McLane v. Paschal*, 47 Tex. 365; *Dwight v. Overton*, 35 Tex. 390, 409; *Robertson v. Paul*, 16 Tex. 472.

Claims for funeral expenses, expenses of last sickness and of administration including the allowance made to the widow and children and the expenses incurred in the preservation, care, etc., of the estate, take precedence over debts of the decedent secured by a lien on property of the estate. *Chandler v. Burdett*, 20 Tex. 42.

The widow's allowance takes precedence of all of decedent's debts, save vendors' liens. *Mabry v. Ward*, 50 Tex. 404.

Attachment.—Widow's allowance takes precedence over lien of attachment creditor. *Mayman v. Reviere*, 47 Tex. 357, 361; *Giddings v. Crosby*, 24 Tex. 295.

Judgments.—Proceeds of administrator's sale can not be subjected to judgment against deceased, so long as widow's allowance is unsatisfied. *Giddings v. Crosby*, 24 Tex. 295, 299.

The administrator sued for the price of land sold by him, and defendant set up that he had a judgment which was a lien on the land. Held, that the lien was no defense, and that he could not have it satisfied out of the price of the land until the widow's allowance had been paid. *Giddings v. Crosby*, 24 Tex. 295.

Landlord's Lien.—Since the statute makes the allowance for the widow's support for one year payable in preference to all other debts and charges against the estate except funeral expenses and expenses of last sickness, a creditor of the estate can not ob-

ject to such allowance on the ground that the only proceeds of the estate that could be used for its payment was money realized from a sale of certain property on which he had a landlord's lien. Rev. Stat., arts. 2037, 2044, 2069. In *re Laurence's Estate*, 32 Tex. Civ. App. 465, 74 S. W. 779, affirmed in 97 Tex. 638, no op.

Mortgages.—It is so held as to mortgages. *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815; *Robertson v. Paul*, 16 Tex. 472.

Exception—Lien for Purchase Money.—See post, "Vendor's Liens," VII, H, 3, b, (4), (c).

(3) Costs and Attorney's Fees.

Attorney's Fees Included in Expenses of Administration.—The expenses of administration provided for by section 207 of the probate law embrace reasonable attorney fees for services in a controversy between the estate and other persons and for advice in administering the estate. *Williams v. Robinson*, 56 Tex. 347; *Callaghan v. Grenet*, 66 Tex. 236, 18 S. W. 507.

Reasonable attorney's fees for necessary services actually rendered are part of administration expenses, which are entitled to priority of payment over all charges against estates, except funeral expenses. *Gammage v. Rather*, 46 Tex. 105, 107.

Suits upon claims against an estate having an executor, independent of the probate court, may be instituted against him; and judgments rendered therein may be collected from the assets of the estate. In case the assets are insufficient to pay all debts, equity will direct that a judgment upon claim for services of an attorney shall be given preference over ordinary claims against the decedent. *Callaghan v. Grenet*, 66 Tex. 236, 18 S. W. 507.

Priority Not Affected by Death of Executor.—An independent executor contracted with an attorney to assist in winding up the estate. Before the fee

agreed upon was paid, the executor died, leaving the estate to be managed by his administrator, by appointment of court. Held, that if the contract was reasonable, and the services contracted for were fully performed, the compensation agreed upon became a debt against the estate; and any part thereof remaining unpaid at the executor's death was entitled to the same preference in payment as it had before his death. *Callaghan v. Grenet*, 66 Tex. 236, 18 S. W. 507.

Fees for Defending Suit Superior to Judgment in Same Suit.—Reasonable attorney's fees for defending suit against administrator are "expenses of administration," hence entitled to priority over judgment obtained in said suit. *Williams v. Robinson*, 56 Tex. 347, 351.

Judgment for Costs.—Under Rev. St. art. 2037, which provides that "the expenses incurred in the preservation, safe-keeping, and management of the estate" shall be claims of the second class, a judgment for costs, rendered against an administrator in an action brought against him to try title, and to partition land of his intestate, belongs in the second class. *Manning v. Mayes*, 79 Tex. 653, 15 S. W. 638.

But the costs of enforcing a vendor's lien where foreclosure does not pay lien and costs and estate is insolvent, do not become costs of administration to detriment of other claims. *Greer, etc., Co. v. Riley*, 92 Tex. 699, 707, 53 S. W. 578.

(4) Liens.

(a) In General.

Claim secured by special lien is not ranked in first class of debts against estate. *Alford v. Smith*, 40 Tex. 77, 87.

The statute places all mortgage and other lien creditors of a decedent's estate on the same footing and in the same class, without distinction, except that it gives to each mortgage or lien creditor preference in respect to the very property mortgaged to him, and

hence a chattel lien can not be subordinated to a lien on realty by requiring the administration to resort first to the chattel mortgage property for the payment of debts in the classes ahead. Rev. Stat., art. 2091. *Barnes v. Scottish-American Mortg. Co.*, 29 Tex. Civ. App. 443, 68 S. W. 529, affirmed in 97 Tex. 626, no op.

Debts secured by mortgage or having a lien by judgments are to be paid out of the proceeds of the property subject to such lien, but they have no preference over other debts, except with regard to the property so subjected. *Chandler v. Burdett*, 20 Tex. 42.

A deed of trust, upon the death of the party by whom it was executed, only secures the creditor, for whose benefit it was made, priority over such claims against the debtor's estate, as by the statute it is entitled to in the due course of administration. *McLane v. Paschal*, 47 Tex. 365.

Mortgage on Homestead.—A homestead mortgage with power of sale is but an incident to the debt, and the claim thereon is postponed to preferred claims. *Abney v. Pope*, 52 Tex. 288, 293.

Rev. St. 1879, art. 2037, classifies secured claims against an estate as claims of the third class, so far as they can be paid out of the proceeds of the property subject to such lien; and provides that when more than one mortgage or lien shall exist on the same property the oldest shall be first paid, but no preference shall be given to such claim further than regards the property subject to such mortgage or other lien. Held, that a mortgage on decedent's homestead, ordered by the probate court to be paid as a fourth-class claim, should be paid out of the proceeds of such homestead in preference to a prior judgment against decedent, ordered paid as a third-class claim. *Kiolbassa v. Raley*, 1 Tex. Civ. App. 163, 23 S. W. 253.

Since, under such statute, a claim

against an estate may be a claim of the third class as to a portion of the property, because secured by a lien thereon, and of the fourth class as to the remainder of the estate, in ordering such judgment to be paid as a third-class claim the probate court did not declare it to be a lien on the homestead, but that, if there was any of decedent's estate to which such judgment lien would attach under the law, then, as to such property, the judgment would be a third-class claim. *Kiolbassa v. Raley*, 1 Tex. Civ. App. 165, 23 S. W. 253, citing *Eastham v. Sallis*, 60 Tex. 576; *Western Mortg., etc., Co. v. Jackman*, 77 Tex. 622, 14 S. W. 305.

In the absence of a showing that the homestead was subject to a forced sale at the time or before such mortgage was executed, it does not appear that the former is a third-class claim and the latter a fourth-class claim. *Kiolbassa v. Raley*, 1 Tex. Civ. App. 165, 23 S. W. 253.

Priorities under Act of 1846.—The 22d section of the act to organize the probate courts, p. 316, acts of 1846, in directing the order in which the debts against the estate shall be paid, provides for the payment of "recorded mortgages and liens on specific property, then judgments of the courts of this state, the oldest first." *Martin v. Harrison*, 2 Tex. 456, 458.

Chattel Mortgage at Common Law.—"At common law chattel mortgages, the possession of the mortgaged property remaining with the mortgagor, were unknown. Such mortgages were given in the form of pledges, and in such cases the question here raised would not occur, because the pledgee was entitled to be paid in full before the administrator was entitled to take the property as assets of the estate. *Fulton v. National Bank*, 26 Tex. Civ. App. 115, 62 S. W. 84, affirmed in 94 Tex. 704, no op." *Barnes v. Scottish-American Mortg. Co.*, 29 Tex. Civ. App. 443, 444, 36 S. W. 529, affirmed in 97 Tex. 626, no op.

(b) Judgment Liens.

"Judgments are not the first in the order of preferred debts against an estate. The expenses of the last sickness, of administration, and the allowance to the widow and children, must be first paid." *McMiller v. Butler*, 20 Tex. 402, 404; *Chandler v. Burdett*, 20 Tex. 42, 44.

"There is nothing in the probate law in force at the time this application was made, and the sale ordered, indicating that in administering estates judgment liens are to be placed on a higher footing than other liens. (Paschal's Dig., arts. 5674, 5705.)" *Schmeltz v. Garey*, 49 Tex. 49, 59.

A judgment obtained in the district court against the administrator of an estate, and decreed "to be a preferred claim" against the estate, "and ordered to be paid in preference to all other debts," is not entitled to priority over the "expenses of administration" which the probate law of 1870, § 207, prefers to all other charges except funeral expenses; and the district court, exercising probate jurisdiction, did not err in decreeing that the expenses of administration should be paid before such judgment. *Williams v. Robinson*, 56 Tex. 347.

To warrant the probate court in classifying a claim on a judgment as one of the third class as to a certain fund of an estate, it must be shown that the land, the sale of which produced the fund, was subject to forced sale at the time that the judgment was recorded. *Kiolbassa v. Raley*, 1 Tex. Civ. App. 165, 169, 23 S. W. 253.

(c) Vendor's Liens.

In the application of the proceeds of the sale of land of a decedent, a vendor's lien, when held with a vendor's superior title, has precedence over every other claim. *Toullerton v. Manchke*, 11 Tex. Civ. App. 148, 32 S. W. 238; *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815.

Lien for purchase money has preference over funeral expenses, ex-

penses of last illness, administration and care of estate and allowance to widow and children. The payment of the purchase money is the essential constituent of title real estate. *Blair & Co. v. Thorp*, 33 Tex. 38, 49; *Robertson v. Paul*, 16 Tex. 472; *McLane v. Paschal*, 47 Tex. 365, 370.

Where a vendor's lien is reduced to judgment, the vendor is entitled to have his claim allowed against the vendee's estate, and the estate can not have the land till purchase money is paid. *Converse & Co. v. Sorley*, 39 Tex. 515, 531.

Vendor's Lien for Half Interest—Share Insufficient to Pay Whole Amount.—Deceased executed three notes in payment for an undivided one-half interest in 1,280 acres of land, which was already subject to a trust deed for \$1,000. The notes were allowed by the court as a lien on the land. The land was afterwards sold under the trust deed, and the tract was divided between the purchaser at the sale and the estate, the purchaser taking 730, and the estate 550 acres. Later, by order of the court, the 730 acres were purchased by the estate for \$1,750. The whole tract was then sold, \$2,000 being received for the 550 acres, and \$3,750 for the 730 acres. Held that, the estate being insolvent, the administrator should only have paid upon the notes the \$2,000, the balance being paid pro rata with the other creditors of the deceased out of the general assets, as the notes were a lien on the 550 acres only. *Walker v. Kerr*, 7 Tex. Civ. App. 498, 27 S. W. 299.

Under such a state of facts the administrator is subrogated to the rights of the creditor of the estate and is entitled to have balance of his claim shifted from third to fourth-class claims, and to be paid pro rata out of general assets of estate. *Walker v. Kerr*, 7 Tex. Civ. App. 498, 501, 27 S. W. 299. See post, "Subrogation," VII, H, 11.

Division of One of Two Notes into Smaller Notes.—Where two notes were given for the purchase price of the same land, and both were secured by a vendor's lien thereon, the fact that one of the notes was subdivided into several smaller notes, owned by the party owning the original note, did not give such subdivided note priority of payment from the proceeds of the sale of the land after the vendee's death, since both notes, being secured by the same land, were of the same class, and should be paid pro rata. *Stell v. Lewis*, 2 Posey 533.

Not Superior to Costs of Its Enforcement.—Debt secured by vendor's lien under executory contract is not subject to postponement to expenses of administration, or other secured claims yet is not superior to costs of its enforcement, nor can latter, where foreclosure does not pay lien and costs and estate is insolvent, become costs of administration to detriment of other secured claims. *Greer, etc., Co. v. Riley*, 92 Tex. 699, 703, 53 S. W. 578.

(d) Landlord's Lien.

See ante, "Expenses of Illness, Burial Administration, Allowance, etc.," VII, H, 3, b, (2).

A landlord has a lien for rent on the property on the premises in the possession of the lessee's administrator. *Wilcox v. Alexander* (Civ. App.), 32 S. W. 561.

(5) Secured and Unsecured Claims.

An unsecured creditor has a charge upon all the assets of an estate in general not exempt from execution; a lien creditor has a special claim against the property subject to the lien. *Howard v. Johnson*, 69 Tex. 655, 659, 7 S. W. 522.

(6) Claims of Executor or Administrator.

An order of the probate court decreeing a land certificate belonging to the estate to the administrator at its appraised value to cover a debt to him

was illegal and void. *Halsey v. Jones*, 86 Tex. 488, 25 S. W. 696.

A decree of the probate court purporting to invest an administrator of an insolvent estate with the title to a headright certificate for 1,280 acres of land, at its appraised value, in part payment of a claim held by him against such estate, is void. *Halsey v. Jones* (Civ. App.), 25 S. W. 679, affirmed in 86 Tex. 488, 25 S. W. 696.

(7) Other Claims.

Under art. 2037, Rev. Stat., a claim against an estate may be a claim of the third class as to portion of the property because secured by lien, and of the fourth class as to the remainder of the estate. *Kiolbassa v. Ral y*, 1 Tex. Civ. App. 165, 169, 23 S. W. 253.

Instance of facts under which creditor of an estate is entitled to have balance of his claim shifted from third to fourth-class claims and to be paid pro rata out of general assets of estate. *Walker v. Kerr*, 7 Tex. Civ. App. 498, 501, 27 S. W. 299.

c. How Priority Affected.

The classification of a claim against a decedent's estate is not affected by the judgment rendered in an action to establish it as a just claim. *Buchanan v. Wagon*, 62 Tex. 375.

Effect of Change of Administration.—Where there is a valid and subsisting claim against an estate under a contract with its independent executor, the death of that executor and subsequent appointment of an administrator will not deprive it of its precedence in payment. *Callaghan v. Grenet*, 66 Tex. 236, 18 S. W. 507.

Claims of Equal Dignity One of Which Not Presented.—See ante, "Necessity," VII, E, 1, b.

d. Proceedings to Determine Classification.

All claims must be classified. *Bradford v. Knowles*, 86 Tex. 505, 508, 25 S. W. 1117, reversing 24 S. W. 1095.

Statutory Provisions.—Remedies of creditors, having lien upon particular

property of estate, are provided in § 21, act 1840, classifying order of claims. *Graham v. Vining*, 1 Tex. 639, 645.

Jurisdiction.—It is the province of the probate courts to classify claims when established in any manner. *Porter v. Sweeney*, 61 Tex. 213.

Probate court alone has power to classify claims against estates, however such claims may have been established. Its jurisdiction is exclusive. *Porter v. Sweeney*, 61 Tex. 213, 214; *Bradford v. Knowles*, 86 Tex. 505, 508 25 S. W. 1117, reversing 24 S. W. 1095.

The probate court, in classifying claims against an estate, secured by mortgage upon land, can determine which of several claims secured by lien on the same land is entitled to priority of payment. *Eastham v. Sallis*, 60 Tex. 576.

The county court for civil business exceeds its powers, in attempting to direct an administrator as to the manner in which he shall disburse the funds of the estate in his hands, and such direction is not binding on any other person holding claims against the estate. *Porter v. Sweeney*, 61 Tex. 213.

Judgment of county court against an estate only establishes the claim, and its classification must be done by probate court upon the judgment being certified thereto. *Porter v. Sweeney*, 61 Tex. 213, 214.

Interference with Right of Probate Court.—The judgment of the district court that decedent's estate is indebted to plaintiff in a certain amount, and that a lien exists on certain land to secure its payment on account of a judgment and lien obtained against decedent in his lifetime, is not an interference with the right of the probate court to classify the claim. *Jenkins v. Cain* (Sup.), 12 S. W. 1114.

Hearing Evidence of Mistake in Terms of Contract.—Both the county court sitting in probate, and the district court on appeal, may, in classify-

ing claims against the estate of a decedent, hear evidence of a mistake in the terms of a written contract entered into by the decedent, in order to determine what the real status of the claim arising out of the contract is, and, having heard such evidence, may grant the appropriate relief. *Zieschang v. Helmke* (Civ. App.), 84 S. W. 436; *Allardyce v. Hambleton*, 96 Tex. 30, 70 S. W. 76, reversing 68 S. W. 834.

Revision by Certiorari of Classification.—Creditor of estate has right to compel reclassification of claims improperly classified, by certiorari. *Phillips v. Watkins Land Mortg. Co.*, 90 Tex. 195, 200, 38 S. W. 270, 470, affirming 38 S. W. 270.

Appeal.—The remedy of a party aggrieved by the probate court's classification of claims and payment in order is by appeal. He can not bring an original suit thereon in another court. *Porter v. Sweeney*, 61 Tex. 213.

Rev. St. art. 2091, relative to the classification of claims against estates of decedents, places in the second class of claims expenses of administration, and in the third class claims secured by liens, so far as the same can be paid from the proceeds of the property subject to the lien; and article 2085 declares that the court's action in approving or disapproving a claim shall have the effect of a final judgment from which an appeal will lie. An administrator of an estate held a vendor's lien note against the estate, and it was classified in the probate court as within the second class. Held that, on proceedings by the holder of another vendor's lien note while the administration was still pending, it was proper for the court to reclassify the administrator's claim and place it in the third class, the original classification of the claim of the administrator not having had the force and effect of a judgment which could only be revised on an appeal therefrom. *Hardcastle's Estate v. Archer*, 81 S. W. 368, 36 Tex. Civ. App. 112.

Parties on Appeal.—An administrator is neither a necessary nor proper party to an appeal by creditors from a judgment of the county court classifying approved claims against the estate of the decedent. *Zieschang v. Helmke* (Civ. App.), 84 S. W. 436.

Appeal Brings up Entire Case.—Where there is only one fund out of which claims against an estate can be paid, and it is insufficient to satisfy them, and in the contest in the county court among the respective claimants for priority of payment a judgment is rendered so classifying the claims as to give one nearly the entire fund, to the exclusion of the others, and appeal to the district court by one of the unsuccessful claimants ipso facto brings up the entire case, with its subject matter and all the parties contesting with one another for it. *Zieschang v. Helmke* (Civ. App.), 84 S. W. 436.

Failure to Pass on One Claim in District Court Immaterial Error.—The failure of the district court, on appeal from a judgment of the county court classifying claims against the estate of a decedent, to pass upon the claim of one creditor, although based on the erroneous assumption that such creditor's rights were not before it, is not ground for a reversal of the judgment of the district court, where the action of the county court upon that claim was correct, and the effect was the same as if the district court had properly passed upon it. *Zieschang v. Helmke* (Civ. App.), 84 S. W. 436.

4. Payment without Order of Court.

The payment by an administrator of a claim against the estate which has been allowed and approved is valid without a previous order from the probate court, if such payment is in itself proper, and such as the court could decree. *Lockhart v. White*, 18 Tex. 102.

Claims against an estate, other than those of administration, should be probated according to statute; but when a bona fide settlement has been had

between the administrator and the heirs, in which they have allowed him for claims paid which were not probated, the same claims may be allowed in a subsequent suit by the heirs to compel an accounting. *Hanlon v. Wheeler* (Civ. App.), 45 S. W. 821.

5. Erroneous or Improper Payment.

The fact that an administrator makes a whole or partial payment to one or more creditors of an estate without an order of the court will not render him personally liable for debts of the same class not paid. *Lockhart v. White*, 18 Tex. 102.

In such case, in the settlement of his account, the administrator will be entitled to credit for such amounts only as shall be found to be due and payable to the creditors so paid by him, not to exceed the amount actually paid. *Lockhart v. White*, 18 Tex. 102.

Where, because of an administrator's improper application of funds, of the estate to payment of claims over which another claim was entitled to preference, there were not enough funds remaining to satisfy such preferred claim, the administrator is liable for the deficiency. *Clifford v. Campbell*, 65 Tex. 243.

Liable Only for Payment of Excess of Share.—Where an administrator, without authority, pays money to a person who is entitled to only a pro rata share therein, he is not to be charged with the whole sum so paid, but only the excess of the amount paid over the pro rata share of such person, as he is subrogated to such person's rights. *Walker v. Kerr*, 7 Tex. Civ. App. 498, 27 S. W. 299.

Payment under Order of Court.—Orders of the probate court, allowing against the estate of a deceased married woman, who had survived her husband, debts contracted by the husband while holding property in community with the wife, although erroneous, are not void; and the administrator of the wife, who, in good faith,

has paid such claims, and who has been discharged upon approval of his final account, is not liable in an action against him by her next of kin. *Cameron v. Morris*, 83 Tex. 14, 18 S. W. 422.

6. Failure to Make Payment.

See ante, "Erroneous or Improper Payment," VII, H, 5.

7. Interest.

Interest may be computed on money withheld by administrator for unreasonable time. *McKinney v. Nunn*, 82 Tex. 44, 49, 17 S. W. 516.

An administrator will be charged with interest on claims against the estate which have been approved if he had funds in his hands with which to pay them, or neglected to take proper steps to create a fund with which to discharge debts. *Finley v. Carothers*, 9 Tex. 517.

Where a claim against a decedent's estate has been allowed by the administrator, the approval thereof by the probate court constitutes a judgment, and the claim, though an open account, bears interest from the date of its approval. *Finley v. Carothers*, 9 Tex. 517.

8. Penalty.

Clear case must be presented before court will inflict onerous damages upon executors or administrators for failure to pay over to creditor funds of estate in their hands provided by act of May 23, 1871. *Moore v. Letchford*, 35 Tex. 185, 224.

By the statute of May 23, 1871, executors and administrators are made liable for damages at the rate of 10 per cent per month, when they fail or refuse to obey an order of the court directing them to pay over to a creditor of the estate funds in their hands. Held, that courts will not inflict such damages, except as a penalty in a case of contumacy. *Van Hook's Ex'rs v. Letchford*, 35 Tex. 598.

9. Effect of Payment.

Payment in Confederate Money.—An executor obtained an order of sale

during the Civil War, and sold for confederate notes, which he paid to such creditors of the estate as would accept them. After the war, he was permitted to resign and settle his accounts in Confederate money returns and vouchers. Held, in an action for an accounting, that such creditors as received from the administrator full payments in such notes should not be allowed to revive their claims against the estate. *Trammel v. Philleo*, 33 Tex. 395.

An executor obtained an order of sale during the Civil War, and sold for Confederate money, which he paid to such creditors of the estate as would accept. After the war, he was permitted to resign and settle his accounts in Confederate money returns and vouchers. Held, in an action for an accounting, that, the estate being insolvent, the pro rata dividends to which such creditors would be entitled if paid in legal currency were to be allowed to the administrator as credits. *Trammel v. Philleo*, 33 Tex. 395.

10. Deficiency of Assets—Reservation of Funds.

Reservation for Reasonable Expenses and Fees.—Hart. Dig. art. 1195, provides that a creditor of decedent's estate can require the administrator to make an exhibit, and that if it appears from the exhibit, or by other evidence, that the administrator has funds subject to distribution among the creditors, the chief justice shall order the same to be paid. Article 1188 declares that administrators shall receive a stated commission for their services, that all reasonable expenses shall be allowed by the chief justice thereof, and that extra compensation may be allowed by him when reasonable. A creditor petitioned for a distribution of funds, and objected to certain charges made for the expenses of administration and as extra compensation. It did not appear that the charges had been allowed by the chief justice. Held

that, though a creditor in the proceedings for distribution could not contest an order made by the chief justice, the administrator must show that the charges had been allowed by the chief justice, or that they were reasonable and correct, so as to procure their allowance, or he could not be permitted to retain the funds. *Davenport v. Lawrence*, 19 Tex. 317.

11. Subrogation.

A creditor of the third class, having a lien on the only known property of an estate as security for his claim, who applies part of the proceeds thereof to payment of claims of the first and second class, is entitled to be subrogated to the rights of such claims on distribution of a fund arising from property of the estate afterwards discovered, and to be paid the amounts so applied by him to their payment before distribution to claims of the fourth class. *Clifford v. Campbell*, 65 Tex. 243.

I. COLLECTION AND ENFORCEMENT.

1. Mode.

a. In General.

The ordinary mode of enforcing claims against an estate is by administration except where such administration is impeded or prevented. *Ansley v. Baker*, 14 Tex. 607, 612.

A claim against an estate can, ordinarily, be collected in no other way than that prescribed by the statute regulating the administration of estates of deceased persons. The statute furnishes general rules for settlement of debts and liabilities of estates of deceased persons, which are ordinarily exclusive of all others and must be pursued. *Collins v. Barbee*, 3 App. Civ. Cases, § 126; *Texas Loan Agency v. Dingee*, 33 Tex. Civ. App. 118, 120, 75 S. W. 866, affirmed in 97 Tex. 649, no op.; *Emmons v. Williams*, 28 Tex. 776.

"There are some recognized exceptions to this general rule, as where it is alleged and approved that the de-

fendant is the sole creditor of the estate, or where, from the peculiar circumstances of the case, the interposition of the equitable powers of the court is rendered absolutely necessary to prevent great hardship and oppression. But when the benefit of an exception is claimed, the facts which constitute the exception must be fully and specifically averred." *Collins v. Barbee*, 3 App. Civ. Cases, § 126; *Hall v. Hall*, 11 Tex. 326; *Atchinson v. Smith*, 25 Tex. 228, 231; *Alford v. Smith*, 40 Tex. 77; *Robb v. Smith*, 40 Tex. 89.

b. Resort to County or Probate Court.

(1) In General.

Unless where there is an exception by statute, claims against an estate which is under administration must be paid under the order and direction of the county court. *Key v. Craig*, 21 Tex. 491, 492.

As a general rule, debts against estates can be enforced only by process from the county courts. *Carroll v. Carroll*, 20 Tex. 731; *Schmidtke v. Miller*, 71 Tex. 103, 8 S. W. 638.

No general jurisdiction to establish claims against an estate can be exercised by the probate court except in the mode provided by law; and where there are conflicting claims between the estate and some other person to specific property, they must be settled in some other than the probate court. *Wise v. O'Malley*, 60 Tex. 588.

The necessity for creditor to pursue their remedies against the estates of deceased debtors through the jurisdiction of the county courts must be presumed to exist in every case until facts are shown which make it an exception. *Green v. Rugely*, 23 Tex. 539. See *Ansley v. Baker*, 14 Tex. 607; *McMiller v. Butler*, 20 Tex. 402; *Cunningham v. Taylor*, 20 Tex. 126, 129.

County court can not take cognizance of, and settle unsettled claims and accounts between, representatives of deceased partners, and proceed to settle

and adjust their respective claims. *Booth v. Todd*, 8 Tex. 137.

Art. 2096, Rev. Stat., does not confer upon the probate court jurisdiction over contracts which are not executory in their character. *Wise v. O'Malley*, 60 Tex. 588.

Under arts. 2176-2179, Rev. Stat., the probate court determines the right to sue and nothing further, except that it may order payment not exceeding one thousand dollars. *Nichols v. Oliver*, 64 Tex. 647, 652.

The decision of the probate court fixes the right of the creditor to sue, but does not determine any other right. The purpose of the statute was to prevent persons from unnecessarily involving estates in litigation, and to give a creditor a means, involving little expenses, of determining whether a suit be necessary to protect his rights. *Nichols v. Oliver*, 64 Tex. 647.

Classification.—All claims must be passed upon, classified, and paid under orders of the probate courts. *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815.

(2) Executorship Free from Control of Court.

"No creditor can go into the probate court to enforce his claim against an executor so long as his independent control is allowed to continue, whereas all creditors are required to go into that court to enforce claims against regular administrators. In the case of independent administrations the statutes have not required any course of procedure through which relief may be had, while in the other case the mode of proceeding is carefully and exclusively prescribed. The conclusion is that the creditor is left to pursue the general rules of law by which remedies are given." *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815. See, also, *Carroll v. Carroll*, 20 Tex. 731, 746.

Independent executors make allowances, pay claims, and settle up es-

tates without any control from the probate court. "They are liable to suits to recover debts or allowances, and to enforce liens or other rights, existing against the estates in any of the courts of civil jurisdiction, and the judgments of such courts are enforced against property of the estate in their hands, by the usual processes." *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815, 817.

(3) Claims Secured by Specific Liens.

The operation of the probate law in its action on debts is not limited to such as are not secured by a conventional lien. *Graham v. Vining*, 2 Tex. 433.

Where a claim for money against an estate, secured by a lien on land of the estate, has been established by allowance by the administrator and the approval by the probate court, the lien must be enforced through the court under the law regulating administrations. *George v. Ryon*, 94 Tex. 317, 60 S. W. 427; *Cannon v. McDaniel*, 46 Tex. 303; *Cunningham v. Taylor*, 20 Tex. 126.

Claims secured by liens upon real estate constitute no exception to the rule. *Buchanan v. Wagon*, 62 Tex. 375. Neither can it make any difference that the lien is to secure the purchase money of the real estate, as was expressly decided in the case of *Robertson v. Paul*, 16 Tex. 472. *Texas Loan Agency v. Dingee*, 33 Tex. Civ. App. 118, 120, 75 S. W. 866, affirmed in 97 Tex. 649, no op.

Where a claim for money against an estate, secured by a lien on land of the estate, has been allowed and the lien denied by the administrator, suit can not, as a rule, be maintained in the district court to establish the lien inasmuch as the action of the administrator can not affect it and the claimant still has his remedy in the probate court for its enforcement. But in some cases claimant may have some legal or equitable right connected with

his claim for the adjudication of which the powers of the probate court are inadequate and for the enforcement of which suit may be maintained in the district court. *George v. Ryon*, 94 Tex. 317, 60 S. W. 427; *Western Mortg., etc., Co. v. Jackman*, 77 Tex. 622, 14 S. W. 305.

Notes given in return for bond for title are claims for money within *Hartley's Dig.*, art. 1156. *Cunningham v. Taylor*, 20 Tex. 126, 129.

Where one of two persons owning land jointly, subject to mortgage, died, and his administrator conveyed decedent's interest to other joint owner, reserving vendor's lien, and vendee, failing to pay purchase money deeded entire tract to deceased's estate, held mortgagee bound to assert its claim through probate court, and failing to do so, purchaser at subsequent administrator's sale took such interest free from the lien, except as to undivided interest of deceased at date of his death. *American, etc., Mortg. Co. v. McDonell* (Civ. App.), 54 S. W. 259; *Wheeler v. Love*, 21 Tex. 583.

Suit to Compel Application of Particular Fund to Payment of Debts.—

Probate court has jurisdiction to hear application of creditor to compel application of particular fund of estate to payment of debts. *Dulaney v. Walsh*, 90 Tex. 329, 332, 38 S. W. 748, affirming 37 S. W. 615.

Distribution of Proceeds of Insurance Policy.—See the title **COURTS**, vol. 5, p. 319.

2. Allowed and Approved Claims.

a. In General.

The act of 1848, concerning the settlement of estates, provides the mode of establishing claims for money against an estate, to be ranked as acknowledged debts and paid in due course of administration, by a system of rules designed to be complete within itself, and to comprise the only rules which should govern in their settle-

ment. *Birdwell v. Kauffman*, 25 Tex. 189.

Claim allowed by executor and approved by chief justice can not be sued upon, but must abide due course of administration. The holder of such claim is required to go into the county court to obtain satisfaction of it. *Hogue v. Sims*, 9 Tex. 546, 550; *Carroll v. Carroll*, 20 Tex. 731; *Willis & Bro. v. Smith*, 65 Tex. 656.

The payment of a claim allowed by the executor or administrator and approved by the court may be enforced in the ordinary course of administration prescribed by law, in the same manner as a judgment of the district court, upon a rejected claim. *Sutton v. Page*, 4 Tex. 142, 148.

Claim Approved after Suit Brought.—Plaintiff sought to subject to the payment of a note, certain property claimed to have been conveyed by a deceased maker of the note in fraud of his creditors, and also to subject the proceeds of property descended to the maker's heirs and sold by them. This suit was brought in the district court; afterwards, an administrator was appointed, the claim sued on was presented to and accepted by him, and approved by the county court. Held, that ordinarily the plaintiff would be required to go into the county court to obtain satisfaction of it. *Willis & Bro. v. Smith*, 65 Tex. 656.

b. Order to Pay Allowed Claims.

(1) Necessity and Power of Court.

Upon the approval of a claim for money against the estate the law classifies it with others, and the probate court, upon application of the holder of such claim, will make the necessary orders to enforce payment by sale of property which may then be held subject to such claim. *Western Mortg., etc., Co. v. Jackman*, 77 Tex. 622, 14 S. W. 305.

Accepted and approved claim against an estate must ordinarily be enforced in the county court, through an order

for its payment or for sale of property in satisfaction of it. *Willis & Bro. v. Smith*, 65 Tex. 656.

County court has authority to order administrator to pay allowed claim. *Gray v. McFarland*, 29 Tex. 163, 169.

Existence of Property in Hands of Administrator as Authorizing.—That there is "property" in the hands of the administrator, is not sufficient to authorize a peremptory order for the payment of a claim and execution to enforce it. *Ray v. Parsons*, 14 Tex. 370.

That there are bills receivable in hands of administrator, is not sufficient to authorize judgment against him for payment of claim. *Ray v. Parsons*, 14 Tex. 370, 372.

(2) Time of Order.

This order may be obtained at any regular term of the county court after administration. *McMiller v. Butler*, 20 Tex. 402.

(3) Effect of Order, Conclusiveness, Collateral Attack.

The order of the county court upon an administrator to pay an allowance to a creditor is a conclusive and binding judgment upon the parties and their privies, as to all points directly involved and necessarily determined by it. *Gray v. McFarland*, 29 Tex. 163.

Not a Final Judgment.—The Texas statutes making action of court in approving or disapproving a claim against an estate of the decedent a final judgment, does not apply to orders of court to administrator to pay out money; such orders are treated as interlocutory orders. *Walker v. Keer*, 7 Tex. Civ. App. 498, 502, 27 S. W. 299.

Collateral Attack.—The judgment of the probate court, ordering a claim against an estate to be paid, can not be set aside and held to be invalid on a collateral inquiry into its sufficiency. Such judgment is binding until it has been reversed or set aside by a proceeding having that object directly in view. *Toliver v. Hubbell*, 6 Tex. 166;

Sutherland v. De Leon, 1 Tex. 250; *Lynch v. Baxter*, 4 Tex. 431; *Neill v. Hodge*, 5 Tex. 487.

The probate court, in 1845, ordered a claim to be paid "in due course," and, on petition of the creditor, in 1849, for a settlement and payment, ordered the claim to be paid after the payment of all claims allowed within the year. From this order the administrator appealed, and the district court decreed that the claim should be paid in due course, pursuant to the judgment of 1845. Held, that the proceedings of 1849 was collateral to the judgment of 1845, and that that judgment could not be impeached. *Toliver v. Hubbell*, 6 Tex. 166.

c. Suit against Administrator for Refusal to Pay Allowed Claim.

In suit against administrator for amount of approved claim which he refuses to pay from funds in his hands, judgment should be against him personally. *Pitner v. Flanagan*, 17 Tex. 7, 10.

Sale under Execution.—See post, "Sales under Execution," VII, J, 17, e, (5).

3. Claims Incurred by Executor or Administrator.

a. In General.

If an attorney is not paid for services rendered an administrator he could on the refusal of the administrator to allow his claim, bring suit in the district court, where his claim, if reasonable, would be adjudicated in his favor, and certified to the probate court for payment in the due course of the administration. If allowed by the administrator, it would be the duty of the probate judge, unless he thought unreasonable, to approve the claim, and order it to be paid. *Jones v. Lewis*, 11 Tex. 359, 363; *Portis v. Cole*, 11 Tex. 157. See ante, "Attorney's Fees and Costs of Litigation," VII, B, 5.

b. Jurisdiction.

A claim against an estate, created

by the administrator, if contested must be established by suit, and the probate court has no jurisdiction to determine it. *Price v. McIvire*, 25 Tex. 769.

c. Limitations.

The general rule is that the pay for services, including those of an attorney, is due as soon as the services is rendered, and the statute of limitations begins to run immediately; this does not apply to particular acts of service, where there has been an entire contract to perform a continuous service, as, for example, to advise and assist an administrator in the settlement of an estate or to prosecute, or defend a suit to final judgment; in such cases the pay is not due until the service is terminated by performance or by discharge of the attorney. *Jones v. Lewis*, 11 Tex. 359.

If an administrator should employ an attorney, by a continuous and entire contract, to advise and assist in the settlement of the estate, for a certain compensation, and die, resign, or be removed, and the new administrator should continue the attorney in his service, the presumption would be that the first contract was continued or ratified; but the law will not raise a presumption of such contract with the former administrator; and in the absence of proof of its having been made, the attorney would be entitled to demand compensation for his services, as they were performed; and the statute of limitations would run accordingly. *Jones v. Lewis*, 11 Tex. 359.

"Every action brought for services rendered to the estate should be prosecuted within the time prescribed, after the services rendered, or should be held as barred by the statute of limitations." *Jones v. Lewis*, 11 Tex. 359, 363.

d. Parties.

Demurrer was properly sustained to an action brought against the administrator *de bonis non* to enforce the

payment of a debt created by a former administrator. *McMahan v. Harbert*, 35 Tex. 451, 460.

e. Petition.

Application to probate court for payment of claim incurred by administratrix in management of estate is defective, if it does not set out account or show facts that would render estate liable for payment thereof, but merely avers that account was incurred by order of court, and that administratrix had reported her action to court and had admitted that account was just liability against estate without averring any facts showing that it had ever been established as claim against estate or that administratrix had ever allowed or court had ever approved same. *Marx v. Freeman*, 21 Tex. Civ. App. 429, 431, 52 S. W. 647; *Reinstein v. Smith*, 65 Tex. 247.

4. Rejected Claims.

See post, "Actions on Rejected Claims," VII, J.

J. ACTIONS ON REJECTED CLAIMS.

1. Nature of Remedy.

The remedy on a rejected claim given by art. 1311, Pas. Dig. is very much in the nature of an appeal. *Walker v. Taul*, 1 App. Civ. Cases, §§ 28, 30; *Cotton v. Jones*, 37 Tex. 34, 35.

2. Right of Action.

Where plaintiff, after presenting a note held by him for allowance against the estate of the deceased maker, crased the names of indorsers thereon, and then brought suit against the estate, the cause of action sued upon was identical with that presented for allowance, and the action could not be dismissed as being on a different claim. *Morris v. Cude*, 57 Tex. 337. See the title ALTERATION OF INSTRUMENTS, vol. 1, p. 197.

One may sue an administrator for an amount less than his respect claim, the amount sued for being identified as part of the claim rejected. *Wilcox v. Alexander* (Civ. App.), 32 S. W. 561.

3. Conditions Precedent.

a. Disallowance or Rejection.

No suit to establish a moneyed demand against an estate, being administered under the control of the probate court, is allowed, except as a consequence of the refusal of the administrator or of the probate court to allow or approve it, and then only to establish it and not to enforce its payment. Until a claim has been rejected either by the administrator or the probate judge, it has no judicial standing in any court other than the probate court, and an action to establish it will not lie. *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815; *Danzey v. Swinney*, 7 Tex. 617; *Millican v. Millican*, 15 Tex. 460; *Thompson v. Branch*, 35 Tex. 21; *Wiley v. Pinson*, 23 Tex. 486; *Neill v. Hodge*, 5 Tex. 487, 490; *Ansley v. Baker*, 14 Tex. 607; *Jenkins v. Cain*, 72 Tex. 88, 10 S. W. 391; *Buchanan v. Wagnon*, 62 Tex. 375.

Under art. 2028, Rev. Stat., it is only when claim for money has been rejected by administrator that claimant can bring independent suit for its establishment. *Western Mortg., etc., Co. v. Jackman*, 77 Tex. 622, 624, 14 S. W. 305.

The legal representatives of one of several joint makers of a promissory note can not be joined in an action against the surviving makers, unless the claim has been rejected. *Wiley v. Pinson*, 23 Tex. 486.

The rule that no suits in the district court can be sustained upon a money demand against a decedent's estate unless the demand was first presented to the administrator for allowance and the prescribed action taken for the establishment of it in the probate court, was not changed by the adoption of the constitution of 1869 vesting in the probate court the jurisdiction of the district court. *Thompson v. Branch's Adm'rs*, 35 Tex. 21.

Allowance and approval of the demand made subsequent to the institution of the suit will not obviate the

difficulty. *Thompson v. Branch*, 35 Tex. 21; *Danzey v. Swinney*, 7 Tex. 617, 626; *Millican v. Millican*, 15 Tex. 460.

Pleading and Proof.—To maintain suit against an administrator it must be averred and approved that the claim was presented to him and rejected. *Tolbert v. McBride*, 75 Tex. 95, 98, 12 S. W. 752; *Fulton v. Black*, 21 Tex. 424; *Hall v. McCormick*, 7 Tex. 269, 278; *Gaston v. McKnight*, 43 Tex. 619, 624; *Darby v. Chevallier*, *Dallam* 555; *Cummings v. Jones*, *Dallam* 531.

Under 4 St. p. 116, providing that no claimant shall commence an action against the succession before presenting such claim to an administrator, no action will lie against an administratrix for breach of covenant by the defendant, where no demand and refusal to allow a claim was shown. *Cummings v. Jones*, *Dall.* 531.

Weight and Sufficiency of Evidence.—Under Rev. St. art. 2028, providing that the memorandum of the executor or administrator indorsed on claims presented to him, may be given in evidence, to prove the facts stated therein, without proof of the handwriting, unless the same is denied under oath, where the note sued has a rejection indorsed with defendant's name, without being signed as administrator of the estate sued, it sufficiently proves the presentation and rejection of the note by the administrator, in the absence of a sworn denial and of evidence to show that there is another person bearing the same name as himself. *Tolbert v. McBride*, 75 Tex. 95, 12 S. W. 752.

Demurrer.—Where suit was brought, upon a claim against decedent before same was allowed and approved, a demurrer was properly filed and should have been sustained. *Thompson v. Branch*, 35 Tex. 21, 26.

Where suit was brought upon a claim against decedent before same was allowed and approved and demurrer was filed, court had no jurisdic-

tion of the cause. *Thompson v. Branch*, 35 Tex. 21, 26.

b. Application to Require Interested Parties to Give Bond.

A suit against an executrix in possession of property under the will of her husband, made in accordance with article 1219, *Hart. Dig.*, is not maintainable until after application has been made to the county court to require those interested to give a bond, etc. *Fulton v. Black*, 21 Tex. 424; *Hogue v. Sims*, 9 Tex. 546.

c. Property Subject to Payment of Debt.

In an action against an independent executrix, the fact that the estate represented by defendant is insolvent, and that there are other debts or grades of indebtedness superior to plaintiff's, and that the only property left by decedent is exempt to defendant as widow, is no defense, and does not preclude the recovery of judgment. *Hartz v. Hausser* (Civ. App.), 90 S. W. 63.

4. Form of Action or Proceeding.

Where a creditor of an estate filed his petition in the county court, alleging that his claim had been allowed and approved, and ordered to be paid, and that the administrator had funds but refused to pay, wherefore he prayed judgment and execution against the administrator, on which petition citation was issued to the administrator and served upon him, it was held that there was no valid objection to this form of proceeding in such a case. *Pitner v. Flanagan*, 17 Tex. 7.

5. Joinder of Causes.

It is competent in this state for a creditor to proceed, in the same suit, to establish his claim against his debtor's administrator, and also to cancel a fraudulent conveyance made by the debtor, the administrator and the fraudulent grantee being joined as defendants. Such a suit is not demurrable for multifariousness or for mis-

joinder of defendants. *Waddell v. Williams*, 37 Tex. 351.

6. Jurisdiction.

a. County or Probate Court.

A county court sitting as a probate court has no jurisdiction of an action for payment of a rejected claim against a decedent's estate, but, where the amount of such claim is within the jurisdiction of the court, a suit may be brought on its civil side, under Rev. Stat., art. 2082, providing that, when a claim for money has been rejected by an executor or administrator, the owner may bring suit for its establishment within 90 days in any court having jurisdiction of the same. *Marx v. Freeman*, 52 S. W. 647, 21 Tex. Civ. App. 429.

Executory Contract to Convey Land.

—Perhaps the only case in which litigation on a claim against a deceased person is conducted before the probate court is for the enforcement of an executory contract to convey title to lands. In all other cases, the jurisdiction of the district court is exclusive, under the acts now in force. *Booth v. Todd*, 8 Tex. 137.

On the advance of \$1,400 A. gave bond to B. to convey to him a certain tract of land. Soon afterwards he surrendered his title and died. B. then brought an action against the administrator on the bond, not claiming any special damage. Held, that B.'s claim was a money claim, and therefore could not be the subject of a suit in the district court, but must be laid before the probate court. *Sutton v. Page*, 4 Tex. 142.

Estate Not in Control of County Court.—Creditor of estate not in control of county court must make complaint in county court, in suit against executrix. *Shaw v. Ellison*, 24 Tex. 197, 199.

A creditor of a testator, who has provided that no other action should be had in the county court in relation to the settlement of his estate than the

probate and record of the will and the return of an inventory, can not maintain an action against the executrix to recover the amount of his debt without first making complaint in the county court for his debt, so that the persons entitled to any portion of the estate under the will may be cited to give bond to pay the debts of the estate, or permit the estate to be administered in the county court as in ordinary cases. *Shaw v. Ellison*, 24 Tex. 197.

b. District Court.

Executorship Free from Control of Court.—The statute of 1862 (Pas. Dig., art. 1371), provided for the establishment, by suit in the district court, of claims against estates of decedents who had directed by will that the probate court should not have jurisdiction of their estates. *Pleasants v. Davidson*, 34 Tex. 459.

Paschal's Dig., art. 1371, does not authorize creditors, by suit in district court against executor of independent will, to divest devisee of his title to land devised to him, and transfer same to a trustee to sell it for benefit of testator's creditors. *Allen v. Von Rosenberg* (Sup.), 16 S. W. 1096. See *Rogers v. Kennard*, 54 Tex. 30.

Issues Involved.—It is competent for the district court, in a suit before it, to determine upon the issues between the parties that the plaintiff should recover the sums specified in the judgment, and to direct in a legal and appropriate manner their classification and payment by the probate court; but this exhausts its powers, and any direction to the probate court as to the adjustment of the rights of creditors, not before the district court, is not binding upon the former. *Williams v. Robinson*, 56 Tex. 347.

Validity of Deed of Trust.—In a suit to establish a rejected claim against a decedent's estate, the district court has jurisdiction to determine the validity of a trust deed given to secure it.

Ryon v. George, 75 S. W. 48, 32 Tex. Civ. App. 504.

Where a suit was brought to establish a note as a claim against a decedent's estate, after its rejection by the administrator, the district court had jurisdiction to try the question of the validity of a deed of trust as a lien on land, which was given as security for the payment of the note, though no foreclosure or adjudication as to the lien was asked for. *George v. Ryon*, 60 S. W. 427, 94 Tex. 317, reversing judgment (Civ. App.), 59 S. W. 825.

Part of Claim Allowed.—See ante, "Partial Allowance and Rejection," VII, F, 4.

7. Death of Executor or Administrator Pending Suit.

An action against an independent executrix on a claim against her testator is not abated by her death. (Civ. App.), *Parks v. Lubbock*, 50 S. W. 466, reversed 51 S. W. 322, 92 Tex. 635. See *Low v. Felton*, 84 Tex. 378, 19 S. W. 693.

Death of Administrator before Issuance of Writ.—On death of administrator, after judgment, no process could issue until judgment revived. *Austin v. Townes*, 10 Tex. 24, 27.

8. Time within Which Suit Prohibited and Limitations.

a. Time within Which Suit Prohibited.

Where, in a suit on a liquor dealer's bond to recover damages for unlawful sales of liquor to plaintiff's son, one of the sureties on the bond died before trial, and his executrix was made a defendant, and the surviving surety filed a cross bill, it was proper to refuse to require plaintiff to continue his case until the expiration of twelve months from the probate of the deceased surety's will,—the period during which the executrix was not required to answer the cross bill. *Lucas v. Johnson* (Civ. App.), 64 S. W. 823. See the title DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 6, p. 433.

Does Not Apply to Suits Pending at Death of Decedent.—Rev. St. 1895, art. 1996, providing that no executor shall be required to plead to any suit brought against him for money until the expiration of twelve months from the date of the probate of decedent's will, does not apply to suits pending at the death of the testator, but only to suits on claims instituted against his estate. *Altgelt v. D. Sullivan & Co.* (Civ. App.), 79 S. W. 333; *Lemmel v. Pauska*, 54 Tex. 505.

Right Waived by Voluntary Appearance.—Where an executor, sued before the expiration of twelve months after testator's death, appeared voluntarily and resisted a motion to consolidate the action against him and an action by the same plaintiff against a third person, he waived the right given by Rev. St. 1895, art. 1996, providing that no executor shall be required to plead until the expiration of twelve months after the probate of decedent's will. *Altgelt v. D. Sullivan & Co.* (Civ. App.), 79 S. W. 333.

Although an executor is not obliged to plead to a suit within twelve months from the date of probate, under Pasch. Dig. art. 1371, yet, if he does plead, he waives his privilege, and a judgment rendered against him is valid. *Lemmel v. Pauska*, 54 Tex. 505; *Stevenson v. Roberts*, 25 Tex. Civ. App. 577, 64 S. W. 230.

Judgments Merely Voidable.—Under Rev. St. 1895, art. 1996, an executor need not plead to a suit against him for money until a year has expired from the probate of the will. Held, that such a judgment against an executor in a suit brought before the year had expired was merely voidable. *Woolley v. Sullivan*, 46 S. W. 629, 92 Tex. 28.

Suit by City for Taxes.—Where it did not appear from the pleadings, in an action by a city against executors to recover taxes, at what date their decedent died, or when the executors were appointed, the judgment rendered

for the city could not be held void on the theory that it was rendered within a year of the death of the decedent, and before the executors could be required to plead under the statute. *Ross v. Drouilhet*, 80 S. W. 241, 34 Tex. Civ. App. 327.

b. Limitation of Actions.

(1) Construction, Operation and Effect of Statutes.

(a) Construction.

Bar of limitations prescribed in sixteenth, is not restricted by sixty-fifth and sixty-sixth sections of probate act of 1840. *McDougald v. Hadley*, 1 Tex. 490, 492.

A liberal construction should be given to statutes of limitation prescribing the time within which suits must be brought to enforce claims against allowed and rejected claims. *v. Hadley*, 1 Tex. 490, 493.

(b) Claims to Which Applicable.

Statute of limitations runs both against allowed and rejected claims. *Danzey v. Swinney*, 7 Tex. 617, 629.

Where plaintiff claimed that money sued for was left on deposit with defendant's decedent, to be used in a business conducted by her, while defendant claimed that the money was contributed by plaintiff to the business, and that she was a partner, limitations could not be successfully pleaded in either event. *Altgelt v. El mendorf* (Civ. App.), 86 S. W. 41.

Estate of Surety Not Released Because of Barr as to Principal.—A claim against the estate of a surety upon a note (not barred as against such surety because of the suspension of limitation by his death) was not released by the fact that it was barred by limitation as to the principal when presented for allowance against the surety's estate. *Willis & Bro. v. Chowning*, 90 Tex. 617, 40 S. W. 395, followed in *Charbonneau v. Bouvet*, 98 Tex. 167, 82 S. W. 460.

(c) Effect.

Suit on note not presented to admin-

istrator within time prescribed under act of 1840 is barred. *Duty v. Graham*, 12 Tex. 427, 432. See *McDougal v. Hadley*, 1 Tex. 490; *Millican v. Millican*, 15 Tex. 460, 463.

As to suit on claim not presented within twelve months, see ante, "Necessity," VII, E. 1, b.

(2) Periods of Limitation.

A claim against an estate if based on an offer by letter which is accepted is not barred in two years. *Eccles v. Daniels*, 16 Tex. 136, 141.

Judgment.—Action against an administrator being founded on a judgment, it is not, under Rev. St. art. 3815, subject to the two-years limitation. *Mills v. Terry*, 54 S. W. 780, 22 Tex. Civ. App. 277.

Renewal Notes.—Renewal notes executed by an independent executor for money borrowed for the purpose of carrying on the decedent's business, which were sued on within four years after maturity, on payment being refused, are not barred by the statute of limitations. (Civ. App.), *Altgelt v. Alamo Nat. Bank*, 79 S. W. 582, judgment reversed 83 S. W. 6, 98 Tex. 252.

Application for Distribution of Insurance Fund Four Years Statute.—

An application by creditors for the distribution of insurance fund is not an assault on the provisions of will, which provided for the payment of testator's debts, and which bequeathed policy payable to testator, his executors and administrators or assigns, to his widow and child, and hence the defense of four years' limitations is inapplicable. *Dulaney v. Walsh* (Civ. App.), 37 S. W. 615, affirmed in 90 Tex. 329.

Claim by Surety.—Where decedent's note paid by surety is not owned by surety, a claim against estate by the surety for such payment is subject to two year statute of limitation. *Miers v. Betterton*, 18 Tex. Civ. App. 430, 435, 45 S. W. 430.

Attorney's Fees.—Money value of

each act of service performed by attorney for administrator becomes due on its performance and the whole becomes an account against the estate, which when sought to be collected by suit, is barred as to items due over two years prior to commencement of suit. *Mott v. Riddell*, 2 Posey 107, 110. See *Jones v. Lewis*, 11 Tex. 359, 366; *Stark v. Hart*, 22 Tex. Civ. App. 543, 55 S. W. 378.

An account created in 1861 was barred in 1874 without reference to date of debtor's death or grant of letters on his estate. If the account was for money loaned, payable on demand, limitation began as soon as the period during which limitation was suspended had expired. *Swift v. Trotti*, 52 Tex. 498, 504; *Cook v. Cook*, 19 Tex. 434.

Under Act of 1840.—Where a demand against an estate was not presented to the executor within the time prescribed by law, and suit was not commenced thereon until more than twelve months after letters testamentary had been issued, it was held that, under the probate law of 1840, the action was barred. *McDougald v. Hadley*, 1 Tex. 490.

Rejected Claims.—See post, "Statute Requiring Suit within Three Months after Rejection of Claim," VII, J, 8, b, (4).

(3) Time from Which Statute Runs.

A cause of action for services rendered by a niece for her uncle on the faith of his parol promise to give her at his death all his estate accrues on the uncle's failure to perform his agreement, which takes place on his death without giving her his estate. *Raycroft v. Johnston*, 93 S. W. 237, 41 Tex. Civ. App. 466.

Suit for Attorney's Fees.—Where a suit was brought against one who was himself a lawyer, and he bespoke other attorneys to assist him in defense of the case, without any specific contract as to the extent of their services or compensation, his death, pending the

suit, terminated the contract of employment, and the attorneys, having presented the claim for their fee to his administrator more than two years after his qualification as such, could not avoid the bar of limitation by reason of the fact that they, after the death of the client, considering themselves as still employed in the cause, had noticed the docket and filed objections to a surveyor's report made in the case. *Stark v. Hart*, 22 Tex. Civ. App. 543, 55 S. W. 378.

Limitation on an account having its origin in 1861 began as soon as the period during which limitation was suspended had expired. *Swift v. Trotti*, 52 Tex. 498.

(4) Statute Requiring Suit within Three Months after Rejection of Claim.

(a) In General.

If a claim be rejected by the administrator, the creditor must sue within three months. *Danzey v. Swinney*, 7 Tex. 617, 632; *Marx v. Freeman*, 21 Tex. Civ. App. 429, 431, 52 S. W. 647; *Cotton v. Jones*, 37 Tex. 34; *Burks v. Bennett*, 62 Tex. 277, 280; *Crosby v. McWillie*, 11 Tex. 94, 97; *Nixon v. Jacobs*, 22 Tex. Civ. App. 97, 53 S. W. 595; *Walker v. Taul*, 1 App. Civ. Cases. § 28, so holding under Pas. Dig., § 1311.

Suit must be brought, on a claim against an estate, within three months after its rejection by the administrator, where such rejection is by operation of law; that is, where the administrator refuses to indorse or annex his allowance or rejection in writing. *Cobb v. Norwood*, 11 Tex. 556.

Nature.—Pasch. Dig. art. 1311, requiring suit to be instituted on a claim rejected by an administrator or executor within three months after its rejection, is not a statute of limitations, within the meaning of const. 1869, which suspends all statutes of limitations in civil suits up to March 30, 1870. *Walker's Adm'r v. Taul*, 1 White & W. Civ. Cas. Ct. App. § 29.

The time limited in which suit shall be brought on claims presented for allowance to an executor or administrator of an estate, and by him disallowed, is not a statute of limitations suspended by const. 1869, but is a regulation of probate law, which imposes the loss of the claim if the party fails to sue on it within the time prescribed. *Stanfield v. Neill*, 36 Tex. 688.

Requirement (Pas. Dig., art. 1310), that suit be brought on claim rejected by executor, within three months, is not a statute of limitations suspended by executor's absence from the state. *Cotton v. Jones*, 37 Tex. 34, 36.

(b) Construction and Effect.

The failure to sue within the time limited when a claim is rejected by the administrator effectually extinguishes the claims even against the heirs, administration being had of real as well as personal property. *Gaston v. Boyd*, 52 Tex. 282; *Crosby v. McWillie*, 11 Tex. 94, 96.

Before the maturity of a note calling for attorney fees, if collected by judicial proceedings, the maker died, and plaintiff, the holder of the note, employed an agent who was not an attorney to present the note against the maker's estate. Such presentment was made before the maturity of the note, and the amount due, with interest, was allowed. The claim on the note not having been paid when the note matured, plaintiff employed attorneys who procured an order of the probate court for the sale of property of the estate to pay the note, after which they presented a claim for attorney's fees, which was not allowed by the executor. The affidavit to the original claim by the agent stated that "the claim represented by said note and deed of trust was just." Held that this was broad enough to embrace the whole debt, including the attorney fees and the allowance of only the principal and interest was equivalent to a rejection

of the attorney fees, and claim therefor not having been brought within ninety days after the rejection, was barred by limitation. *Wicks-Nease v. James*, 31 Tex. Civ. App. 151, 72 S. W. 87, affirmed in 97 Tex. 642, no op.

Second Presentation after Lapse of Time for Suit.—Under Rev. St. art. 2028, providing that where a claim for money against an estate has been rejected, in whole or in part, by the administrator, the owner may, within 90 days after such rejection, and not thereafter, bring suit against the administrator for the establishment thereof, the statute of limitations is set in motion upon a claim which is rejected by an administrator, for the reason that proper credits have not been entered thereon, and after the lapse of 90 days from such rejection it can not be revived by a second presentation, and indorsement thereon by the administrator of a portion of the claim. *Willis v. Talbert* (Sup.), 11 S. W. 535; *Burks v. Bennett*, 62 Tex. 277, 281.

In the case of *Crosby v. McWillie*, 11 Tex. 94, a claim properly authenticated was presented to the administratrix on May 1, 1851, who indorsed thereon, "The within claim will not be paid." A second authentication and presentment were made of the same claim on the 27th and 28th August, 1852, fifteen months subsequently. It was held that as the rejection was absolute, and not based on any defect as to the form or substance of the authentication, which would have required a new authentication and presentment, and the first authentication, presentment, and rejection being valid in law, the holder had three months within which, from the first rejection, to bring suit, and not thereafter; and, having failed to do this, the claim was fully barred by the statute.

Foreign Administrators Having No Right to Make Claim.—Where the administrator of a creditor in Mississippi presented to the administrator of the

debtor in Texas a claim for allowance, which was rejected, and a suit thereon was not commenced within three months, it was held that the action was not barred, as the foreign administrator had no right to make the claim. An administrator of the creditor being appointed in Texas, he presented the claim and commenced suit within three months, and the action was sustained. *Cobb v. Norwood*, 11 Tex. 556.

Where first presentation of claim to executors and rejection by them are void, they can not put into operation statute limiting suit on rejected claims. *Henry v. Roe*, 83 Tex. 446, 451, 18 S. W. 806.

Where Claim Defectively Authenticated.—If a claimant presents his claim, defectively authenticated, to the administrator of an estate, he is not obliged to bring his suit within three months after the refusal by the administrator to allow such claim. Aliter, if the claim be perfectly authenticated. *Crosby v. McWillie*, 11 Tex. 94.

(c) Notice of Rejection.

See post, "In General," VII, J, 8, b, (4), (d), aa.

(d) When Statute Commences to Run and Computation of Time.

aa. In General.

Statute of three months begins running on day administrator refuses to indorse allowance or rejection on claim presented. *Cobb v. Norwood*, 11 Tex. 556, 560.

Where, before the running of a statute of limitations, a claim was presented against a decedent's estate, and was accepted by the executor, and he promised to allow and pay it, but, after holding it until he believed it barred by the statute of limitations, returned it disallowed, a suit brought within three months after such rejection is in time. *Kyle v. House*, 38 Tex. 155.

Failure to Give Notice of Rejection.

—Failure to sue within ninety days on a claim rejected by the administrator is excused by proof that the adminis-

trator, when it was presented, asked time to consider it, and after rejection omitted to notify claimant of his action until the ninety days had expired. *Nixon v. Jacobs*, 22 Tex. Civ. App. 97, 53 S. W. 595.

bb. Excluding Day of Rejection.

In computing the time within which the owner of a rejected claim against a decedent may sue the administrator, the day of the rejection is excluded, under Sayles' Civ. St. art. 2028, allowing suit to be brought "within 90 days after such rejection, and not thereafter." *Hunter v. Lanian*, 82 Tex. 677, 18 S. W. 201.

(5) Suspension of Statute.

(a) Power of Executor or Administrator to Suspend.

An independent executrix has power, before a claim against deceased is barred, to suspend the running of limitations by her promise to pay the claim. *Daniel v. Harvin*, 10 Tex. Civ. App. 439, 31 S. W. 421; *Howard v. Johnson*, 69 Tex. 655, 660, 7 S. W. 522; *Cone v. Crum*, 52 Tex. 348.

An executor, before a debt against the estate is barred, may suspend the operation of the statute of limitations by acknowledgment of the debt and a new promise to pay it, especially where he is the sole legatee. *Park v. Prendergast*, 4 Tex. Civ. App. 566, 23 S. W. 535.

After Claim Barred.—An executor can not revive a debt after it is barred by the statute. *Howard v. Johnson*, 69 Tex. 655, 7 S. W. 522; *Cone v. Crum*, 52 Tex. 348.

Where a widow is executrix and sole devisee and legatee, she may acknowledge an outlawed debt against decedent, so as to take the debt out of the statute to the extent of assets received by her from his estate. *Suhre v. Benton* (Civ. App.), 25 S. W. 822.

(b) How Suspended.

aa. Absence of Executor or Administrator.

The absence of an administrator

from the state stops the statute from running during his absence in favor of the estate. *Jennings v. Browder*, 24 Tex. 192.

Under Rev. St. art. 2070, providing that, if an executor absent himself from the state, the time of such absence shall not be computed in estimating the time within which claims may be filed against the decedent's estate, where there are two executors only, the joint absence of both of them will be excluded in computing the time within which claims may be filed. *Adoue v. Gonzales*, 54 S. W. 367, 22 Tex. Civ. App. 73.

Exception to Rule.—See ante, "In General," VII, J, 8, b, (4), (a).

bb. Allowance and Approval.

The acknowledgment of a claim by the administrator, and its approval by the judge of probate, stop the running of the statute of limitations. *Howard v. Battle*, 18 Tex. 673.

Where a claim has been established against an estate as valid, the statute of limitations does not run against it while the estate is in the process of administration. *Herbert v. Harbert* (Civ. App.), 59 S. W. 594; *Wygol v. Meyers*, 76 Tex. 598, 13 S. W. 567.

Allowance by Administrator but No Approval by Judge—Before Act of 1846.—The allowance of a claim by an administrator does not supervene and suspend the statute of limitations, but the statute continues to run, and will bar the claim, unless the probate judge approve it before the expiration of the time fixed by the general law of limitations, or, if the probate judge reject it, unless suit be instituted upon it in the district or justice's court. *Danzey v. Swinney*, 7 Tex. 617.

Where the succession was opened under the act of 1840, and before the act of 1846 was passed, a claim was presented to and acknowledged by the administrator, but it did not appear that the claim had been submitted to

the judge under the act of 1840, that it might be ranked among the acknowledged debts of the succession, or under the act of 1846 or 1848, that it might be approved or rejected by him, it was held that the administrator's acknowledgment did not supervene and suspend the statute of limitations, although the act of 1840 (literally construed) did not contemplate a rejection of the claims by the probate judge. *Danzey v. Swinney*, 7 Tex. 617.

Approval Not Entered of Record.—

Act 1870 provides that at each term of court all claims against a decedent's estate which have been allowed and filed shall be examined and approved or disapproved by an order duly entered, and that the order of approval of a claim has the force and effect of a judgment. Act May 27, 1873, authorizes the clerk of the district court to approve and disapprove such claims in vacation, and requires the approval to be entered on record. Held, that the allowance of an account by the clerk during vacation, and the indorsement of his approval thereon, sufficiently establish it as a claim to stop the running of the statute of limitations during the pendency of administration, though it is not entered on the record; such requirement being merely clerical. *Wygol v. Woodlief's Heirs*, 76 Tex. 604, 13 S. W. 569.

Sufficiency of Acknowledgment.—

The following letter, written by an administratrix to a creditor in reply to a statement of his claim sent by him to her, constitutes a sufficient acknowledgment: "I have had your statement investigated, and found no error. I will just state to you that before my husband died he told me there was about \$40.00 in deposit with you, but we will not fall out over a few dollars. I guess I should have responded sooner, but kept putting it off until now." *Suhre v. Benton* (Civ. App.), 25 S. W. 822.

cc. Application for Administration.

Application of creditor for letters of administration de bonis non does not have effect of stopping statute of limitations from running as against applicant. *Mott v. Riddell*, 2 Posey 107, 110.

dd. Commencement of Action.

Where, in a suit against an administrator, an amendment is filed alleging the due presentation of the account to the administrator, before suit brought, and his rejection thereof, such amendment does not set up a new cause of action, and the statute of limitations runs only to the date of the original petition, and not to the date of the amendment. *Coles v. Portis*, 18 Tex. 155.

Where the petition in an action against an administrator on a note of his intestate fails to allege that the note was for valuable consideration, or to state the precise date of the transfer to plaintiff, and that plaintiff is still the owner, an amendment curing these formal defects does not constitute a new cause of action entitling defendant to plead the statute of limitations prescribed in case of failure to bring suit within 90 days after a claim is rejected by an administrator. *Tolbert v. McBride*, 75 Tex. 95, 12 S. W. 752.

ee. For Year after Death of Decedent.

The fact that no administration is necessary upon decedent's estate does not prevent the operation of Rev. St. 1895, art. 3369, providing that upon the death of a person against whom there may be a cause of action, limitations shall cease for twelve months, unless an administrator is appointed. *Groesbeck v. Crow*, 91 Tex. 74, 40 S. W. 1028; *Low v. Fulton*, 84 Tex. 378, 19 S. W. 693.

ff. Provision in Will That Debts Be Paid.

A general provision in a will that testator's debts shall be paid out of

his estate does not let in debts barred by limitations. *Suhre v. Benton* (Civ. App.), 25 S. W. 822.

A will declared that all the testator's just debts should be paid by the executor, and appointed a certain person "trustee as well as executor;" and it was held that it did not create such a continuing trust in the hands of the executor in favor of creditors of the testator as would withdraw claims from the operation of the statute of limitations. *Parker v. Carter*, 8 Tex. 318.

gg. War.

The suspension of our statutes of limitation from January, 1861, to 1870, as declared by § 43, art. 12, of our present constitution, applies to our probate enactments which require claims against a decedent's estate to be presented to the administrator within a limited time. *Dwight v. Overton*, 35 Tex. 390; *Bender v. Crawford*, 33 Tex. 745, 759.

Where Act Merely Postpones Claim.

—The 6th section of the 11th ordinance of the constitutional convention of 1866 reads as follows: "In all civil actions, the time between the 2d day of March, 1861, and the 2d day of September, 1866, shall not be computed in the application of any statute of limitations." Pas. Dig., art. 4631a. This saving did not apply to the 47th section of the act to regulate proceedings in the county courts relative to the estates of deceased persons and which provides that claims which are not presented within twelve months will be postponed until those which have been thus presented have been entirely paid. Pas. Dig., art. 1307, note 482. *Ryan v. Flint*, 30 Tex. 382.

(6) Pleading and Proof.

Setting Out Items in Petition with Sufficient Certainty.—Under Paschal's Dig., art. 4614, relating to limitations in suits against executors, the items in such suits for debts claimed to be due on open account should be set out with sufficient certainty to show

that they were not barred. *Bremond v. Selligson*, 1 White & W. Civ. Cas. Ct. App. § 636.

Plea.—A plea by an administrator, that the claim properly authenticated, was presented and rejected more than three months before the suit was commenced, is good; although it may have been again presented and rejected within that time. *Crosby v. McWillie*, 11 Tex. 94. See, also, *Hansell v. Gregg*, 7 Tex. 223, 228.

Raising Question by Demurrer.—Where, in a suit on a claim against an estate, it appeared from the petition that the suit was not instituted within three months from the time of its rejection by the administrator, a general demurrer was proper. *Page v. Findley*, 5 Tex. 391.

Where a suit for payment of a claim against a decedent's estate is not brought within 90 days after it has been rejected, as required by Rev. St. art. 2082, the objection may be raised by a demurrer to the petition. *Marx v. Freeman*, 52 S. W. 647, 21 Tex. Civ. App. 429; *Cotton v. Jones*, 37 Tex. 134.

Absence of the executor from the state after his rejection of a claim is no excuse for the failure of a creditor to sue him within the time limited by law, and the question of limitation may be brought before the court on demurrer to such creditor's petition. *Cotton v. Jones*, 37 Tex. 34.

In an action against an executor upon an account rejected by him, the question of limitation may be properly brought before the court by demurrer to the plaintiff's petition—it appearing in the petition that more than three months had elapsed after the presentation and disallowance, and before the institution of the suit, and no good reason appearing in the petition, why the suit was not brought within the time allowed by law. *Cotton v. Jones*, 37 Tex. 34.

Where an administrator demurred

generally to a petition because one of the items of an account against the estate was barred by limitations, the demurrer should have been sustained as to the item which appeared to be barred; but it would not follow that the case should be remanded for another trial. *Alford's Adm'r v. Cochran*, 7 Tex. 485.

Duty of Executor or Administrator to Plead.—In general, administrators must avail themselves of statute where demand is barred by limitation. *Estes v. Browning*, 11 Tex. 237, 244.

Where Plea Detrimental to Estate.—The rule that it is the duty of executors and administrators to plead the statute of limitations, when it lies, does not require them to make such defense where its operation would be to cut off the rights of the estate against third parties. *King v. Cassidy*, 36 Tex. 531.

The rule that an administrator must plead the statute of limitations where it will defeat an action against the estate, is subject to exception where such plea would forfeit a more valuable right; for example, where the notes sued on were given in an executory contract for the purchase of land. *Estes v. Browning*, 11 Tex. 237.

9. Parties.

a. Necessary Parties.

Executor or Administrator in Action to Set Aside Fraudulent Conveyance.—Where a claim against an estate is rejected, the creditor should join the administrator and alleged fraudulent grantees of the decedent's property sought to be set aside in the same suit, praying for the establishment of the claim as against the administrator and for cancellation of the fraudulent conveyance as against the others. *Hall v. McCormick*, 7 Tex. 269.

Where a claim against an estate has been allowed and approved, and a creditor brings suit against third per-

sons to set aside a conveyance made by the decedent, which is alleged to be in fraud of creditors, the administrator is a necessary party defendant to the suit. *Hall v. McCormick*, 7 Tex. 269.

Action on Joint Contracts.—A holder of a joint promissory note should prosecute a suit on such note against the surviving makers in the district court, without making the executor of one of the makers, since deceased, a party to the suit. *Wiley v. Pinson*, 23 Tex. 486.

Independent Executor.—Suits upon claims against an estate under management of an independent executor may be instituted against him, and judgments thereon collected from assets of the estate. *Callaghan v. Grenet*, 66 Tex. 236, 238, 18 S. W. 507.

Heirs.—See post, "Parties," VII, J, 20, f; "Parties," VIII, D.

Residuary Legatees.—Although residuary legatees are interested in the object of a suit by a creditor against the executor to establish his claim or debt against the estate for the establishment of such debt goes pro tanto in strict diminution of their interest in the residue, etc., yet they are not required to be made parties. *Burleson v. Burleson*, 15 Tex. 423, 425.

Partners of Decedent.—Where the petition in an action against an administrator on a note contains no allegation of a partnership between defendant's intestate and other persons named, nor of any facts necessarily constituting a partnership as between the intestate and the other persons, the court properly overruled defendant's plea in abatement that the persons named should have been joined as defendants. (Civ. App.), *Altgelt v. Alamo Nat. Bank*, 79 S. W. 582, judgment reversed 83 S. W. 6, 98 Tex. 252.

Action to Enforce Judgment Lien.—The title of a purchaser of lands subject to a judgment lien is not affected by proceedings in the probate court

for the enforcement of the lien on his vendor's estate, to which he is not a party. *Poland v. Davenport*, 50 Tex. 276, following *Schmeltz v. Garey*, 49 Tex. 49, and *Lockhart v. Ward*, 45 Tex. 227.

b. Proper Parties.

In an action to establish a claim against an intestate's estate, the joinder of the heirs with the administratrix as defendants is harmless error, where the judgment is against the estate alone. *Jenkins v. Cain* (Sup.), 12 S. W. 1114.

Coexecutor Residing in Different Counties.—In suit brought in county of residence of one executor against that executor and a coexecutor, residing in another county and administering property there, it was proper to join both executors as joint defendants. *Kottwitz v. Alexander*, 34 Tex. 689, 711.

Executor of Partners in Suit on Partnership Liability.—Suit was brought in G. county not only against an executrix who resided and was administering her testator's estate in that county, but also against another decedent's executors who resided in another county, and were administering their testator's estate in such other county. The two testators had been partners, and the suit was on a partnership liability. Held, that there was no misjoinder of parties defendant and that in such a case the executors residing in the other county were not entitled to be sued in that, the county where they were administering their testator's estate. *Lewis v. Alexanders Ex'rs*, 34 Tex. 608; *Kottwitz v. Same*, 34 Tex. 689.

Actions on Joint Contracts Growing Out of Partnerships.—An executor or administrator may be sued jointly with the survivors on a joint contract. *Henderson v. Kissam*, 8 Tex. 46.

Where one of several defendants sued jointly on a promissory note dies

pending the action, his personal representatives are properly, on suggestion of his death, made parties to the action. *Bennett v. Spillars*, 9 Tex. 519.

c. Intervention.

Other creditors of decedent are properly refused right to intervene in suit in county court by creditors to establish claim against estate. *Porter v. Sweeney*, 61 Tex. 213, 215.

In an action brought by heirs of decedent against his executors held error to allow creditors of decedent to intervene. *Shackleford v. Gates*, 35 Tex. 781, 782.

When Widow May Intervene to File Plea of Non Est Factum.—See post, "Verification," VII, J, 11, b, (2), (d).

d. Interpleader.

Person Obtaining Allowance of Fraudulent Demand Impleaded.—See post, "Solvency or Insolvency," VII, J, 11, a, (2), (i).

10. Citation or Process.

See the title SUMMONS AND PROCESS.

Suit may be brought against an administrator by citation served on heirs personally to recover amount of claim allowed against estate, but which administrator refuses to pay. *Pitner v. Flanagan*, 17 Tex. 7.

Effect of Failure to Serve Coindependent Executor.—A judgment, in a suit against independent executors to recover taxes due on city lots, is not rendered void, but at most voidable, if erroneous at all, by failure to serve one of the executors. *Ross v. Drouilhet*, 80 S. W. 241, 34 Tex. Civ. App. 327.

Necessity for New Process upon Amendment of Pleadings.—Where, in a suit of creditors of a decedent, a homestead of decedent was sought to be subjected to the payment of their judgment, subject to the homestead rights of infant heirs of decedent, and judgment was entered for a sale of the lot, because it could not be divided, but, by mistake of the draughts-

man, it was discovered that the lot had been incorrectly described in the petition and judgment, no new summons was necessary on an amended petition, which merely set forth the facts, giving the correct boundary of the lot, but seeking no other or different relief than the original petition. *Moore v. Robinson* (Civ. App.), 91 S. W. 659.

11. Pleading.

a. Petition.

(1) Invalid Claims Inserted with Valid Claims.

A petition alleging ownership of valid claims against the estate, described therein, which have been duly presented to the administrator and have been by him rejected, is sufficient, on general demurrer, when one or more of such claims appear to be valid. *Carson v. Cock*, 50 Tex. 325.

The other claims set out in the petition on their face appear invalid, is no ground for sustaining a general demurrer. The court should have required plaintiff to replead, restricting his suit to the valid claims in his petition. *Carson v. Cock*, 50 Tex. 325.

Where invalid claims are inserted in a petition with claims apparently good, it is no answer to exceptions to the invalid claims, to announce to the court that the invalid claims are not relied on. *Carson v. Cock*, 50 Tex. 325.

(2) Averments.

(a) In General.

Petition alleging presentment of claim to administrator, and rejection by him, is sufficient. *Dean v. Duffield*, 8 Tex. 235, 236.

(b) Death.

In *scire facias* on forfeited bail bond, where one is sued as executrix of deceased surety, allegation of surety's death is necessary. *Morse v. State*, 39 Tex. Cr. App. 566, 572, 47 S. W. 645, 50 S. W. 342.

(c) Representative Capacity.

In *scire facias* on forfeited bail bond,

where one is sued as executrix of deceased surety, allegation of fiduciary characters of executrix is necessary. *Morse v. State*, 39 Tex. Cr. App. 566, 572, 47 S. W. 643, 50 S. W. 342.

Misdescription of Representative Capacity.—A mistake of naming defendants as administrators of the estate of B., when they are the administrators of A., in an action on a demand against the estate of A., is a mere misdescription of the representative capacity, and may be amended. *Kendall v. Riley*, 45 Tex. 20. See the title AMENDMENTS, vol. 1, p. 238.

(d) Demand and Refusal.

Petitions in actions against an executrix must state a demand and refusal. *Fulton v. Black*, 21 Tex. 424.

(e) Presentation and Rejection of Claim.

Petition in suit on claim against estate must aver that such claim was presented, properly authenticated, to executor and rejected in whole or in part. *Walters v. Prestidge*, 30 Tex. 65, 71; *Cummings v. Jones*, Dallam 531, 532; *Darby v. Chevallier*, Dallam 555; *Coles v. Portis*, 18 Tex. 155.

Petition in suit on rejected claim against an estate must allege the presentation and rejection of the claim. *Leverett v. Wherry*, 4 App. Civ. Cases, § 185, 15 S. W. 121; *Cummings v. Jones*, Dallam 531; *Darby v. Chevallier*, Dallam 555.

It is sufficient to allege that a claim, duly authenticated, was presented to the administrator for allowance, and was by him rejected. It is not necessary to aver specially the making of the affidavit, the affidavit constituting no part of the cause of action. *Dean v. Duffield*, 8 Tex. 235.

A petition, in a suit against an executor on a claim which had not been presented for acceptance, which fails to allege why it had not been so presented, is insufficient to sustain a judgment against the executor. *Rogers v.*

Harrison, 1 White & W. Civ. Cas. Ct. App. § 495.

Mortgage can not be sued on without presentation to executor of mortgagor. The fact that the mortgage sued on was presented to the executor must be averred in the petition. *Graham v. Vining*, 1 Tex. 639, 644. See ante, "Mortgages and Other Secured Claims," VII, E, 1, b, (2), (e).

Time of Presentation.—In a suit against an administrator on an account against his intestate, the petition must allege the time when the claim was presented to the administrator and rejected by him, for Rev. St. 1879, art. 2028, limits the time within which suit may be brought on such rejected claim to 90 days. *Leverett v. Wherry*, 4 Willson, Civ. Cas. Ct. App. § 185, 15 S. W. 121.

(f) Allegation Negating Necessity for Presentation.

If a claimant sues a testator's estate relying upon the will to take the estate and its management out of the statute requiring claims to be presented to the executor before suit, the facts relied on must be fully stated, it being insufficient to allege that an executor had been appointed without bonds. *Rogers v. Harrison*, 44 Tex. 169.

(g) Approval of Claim.

Same strictness in pleading is not required in probate as in district court. Accordingly it was held in *Danzev v. Swinney*, 7 Tex. 617, that the approval of the claim need not be averred. *Francis v. Williams & Co.*, 14 Tex. 158, 163.

(h) Existence of Assets.

In suing an executor, administering independently of the county court, on a claim against his testator, it is unnecessary to aver the existence of assets. *Smyth v. Caswell*, 65 Tex. 379.

In a suit against an executor on a claim against the estate, it is not necessary for the creditor to allege in his petition that there were assets of the estate in the executor's hands, where

the testator acting under the statute of 1862, art. 1371, Pas. Dig., had provided by his will that the probate court should have no control of his estate, but had placed the estate in the hands and subject to the discretion of the executor. *Pleasants v. Davidson*, 34 Tex. 459.

(i) Solvency or Insolvency.

Since solvency is presumed, a petition against an independent executrix need not allege the solvency of the estate. *Hartz v. Hausser* (Civ. App.), 90 S. W. 63.

Interpleading Creditor Obtaining Allowance of Fraudulent Demand.—In suit by creditor against administrator it is improper to interplead a third party alleging that latter had obtained allowance of fraudulent claim against the estate, without alleging that estate was insufficient to pay off all debts of insolvent. In the absence of such allegations the trial court should sustain a general demurrer to the petition interposed by such creditor. *Kerr v. Hutchins*, 36 Tex. 452.

(j) Averments in Suits for Services Rendered Decedent.

A petition to establish a rejected claim for services rendered to an estate under contract with the administrator must not only allege the contract, rendition of the services, and that they were for the benefit of the estate, but also that the price charged is reasonable. *Adriance v. Crews*, 45 Tex. 181, distinguishing *Adriance v. Crews*, 38 Tex. 148.

Request or Promise to Pay for Services.—The petition in an action against an intestate's estate for services rendered must allege either that deceased requested them, or that he promised to pay for them, in order to sustain a judgment on proof of facts from which the law will imply a liability. *Dulaney v. Dulaney* (Civ. App.), 24 S. W. 845, citing *Sneed v. Moodie*, 24 Tex. 159; *Gray v. Osborne*, 24 Tex. 157.

(k) That Legal Offsets, Payments and Credits Allowed.

Where, in an action against an administrator, the petition alleged that no part of the notes sued on had been paid except the payments which appeared as credits on the notes, the date and amount of which had been previously set out, and that the notes remained due and unpaid, the petition was not objectionable for failure to sufficiently allege that all legal offsets, payments, and credits had been allowed. *Dashiell v. W. L. Moody & Co.*, 44 Tex. Civ. App. 87, 97 S. W. 843.

The allowance by plaintiff, in his petition and account, of a credit in favor of the defendant, as follows: "By my indebtedness to the firm (not over the amount) \$250"—is sufficiently definite, on exception thereto for vagueness and uncertainty. *Chandler v. Meckling*, 22 Tex. 36.

(l) Items in Action of Account—Bill of Particulars.

In an action on an account against the estate of a deceased person, one item of which is a claim for the sale of one-third interest in a certain store, it is no valid objection to the petition, that it does not set out the articles, character of goods, price of each article, date of sale and delivery thereof, or any date when said goods were sold. The averment in the petition, of the sale of such interest, at the date specified, for the price agreed upon, held to be sufficient, in respect to such objection. *Chandler v. Meckling*, 22 Tex. 36.

Such account having been presented to, and rejected by, the administrators, it is not a sufficient objection to the petition that it does not show that a bill of particulars was attached to the said account, nor that the items of the goods, and the dates of their sale, were given in the account. *Chandler v. Meckling*, 22 Tex. 36.

(m) Terms of Will.

In an action on a claim against a decedent's estate, it is not necessary to set out the terms of the will. *Altgelt v. Elmendorf* (Civ. App.), 86 S. W. 41.

(n) Privity of Contract in Creation of Trust.

Sufficient privity of contract in the creation of a trust to entitle plaintiff to sue defendants as the trustee's executors was established by allegations that plaintiff was selected by a church committee, who were virtually the depositors of the money claimed, with decedent as their selected depository and were entitled to demand and receive the funds sued for and were directed so to do by them as their representative and agent, but decedent in his lifetime held the funds in trust and subject only to the call or order of the treasury of the church. *Kendall v. Calder*, 2 Posey Unrep. Cas. 732.

(3) Prayer for Relief.

A bond for title, being a claim for money, was presented to the administratrix, and allowed, and also approved by the chief justice, and was afterwards lost, together with the evidence of its allowance and approval; there was no allegation that the administratrix denied the existence of the bond, nor its approval. Held, in a suit to enforce the bond, that the district court could not entertain the suit, under the prayer for general relief, merely to supply the loss of the bond. *Sutton v. Page*, 4 Tex. 142.

(4) Objections to Petition.

Under Louisiana laws where objection to want of allegation of presentation of claim to administrator, and his refusal, is not objected to in court below, appellate court will not notice defect. *Darly v. Chevallier, Dallam* 555.

Where Invalid Claims Inserted with Valid Claims.—See ante, "Invalid Claims Inserted with Valid Claims," VII, J, 11, a, (1).

(5) Amendment.

Where original petition on rejected account contained value of items in currency, amendment setting out same items with values in gold or currency as contracted is not new cause of action, and need not be presented to administrator. It is a different statement of the account; but still it purports to be and is in fact, the same account which was presented to the administrator and declared upon in the original petition. *Thompson v. Swearingin*, 48 Tex. 555, 559.

b. Plea or Answer.**(1) In General.**

By art. 1319 (Pas. Dig.), administrator is required to make all proper defenses, when cited, and can plead any plea that would defeat request of plaintiff. *Simpson v. Reily*, 31 Tex. 298, 302.

(2) Form and Requisites.**(a) Averments.**

Averment of County in Which Estate Administered.—Under Rev. St. art. 1198, providing that a suit against an executor or administrator to establish a money demand against an estate must be brought in the county where the estate is being administered, an administrator in such an action, asserting his privilege to be sued in a particular county, must, by proper averments, state in what county the estate was being administered. *McKie v. Echols*, 1 White & W. Civ. Cas. Ct. App. § 1282.

Denial of Representative Capacity.

—A judgment against an administrator on a note given by his intestate is not invalidated by failure to prove that he is the administrator of the person who signed the note sued on, where there is no special plea that he is not the administrator, but a mere general denial. *Tolbert v. McBride*, 75 Tex. 95, 12 S. W. 752.

(b) Non Est Factum.

See the title **BILLS, NOTES AND CHECKS**, vol. 2, pp. 1063, 1067. See.

also, the title **APPEAL AND ERROR**, vol. 1, p. 790.

Representatives of deceased persons were not exempted from the operation of the act on the subject of the plea of "non est factum," and dispensing with proof in absence thereof. *Tarpley v. Poage*, 2 Tex. 139, 146.

In absence of plea of non est factum, an indorsement on a claim rejecting it, signed by same name as person sued as administrator, is sufficient evidence of such rejection. *Tolbert v. McBide*, 75 Tex. 95, 98, 12 S. W. 752.

Negative Averments Not Sufficient to "Cast Suspicion" on Note Sued on.—Plaintiffs sued V.'s executors on a note of a mercantile firm styled Moss & Co., and alleged that V. was a partner in that firm. The executors pleaded the general denial, and also a sworn special answer, in which they set forth that they were well acquainted with their testator in his lifetime, and often heard him speak of his business affairs, but never heard him say or intimate that he was a partner in the firm; that, never, during his lifetime, had they heard anyone else so state or intimate; but that a different person, one S. was generally understood to be the partner of Moss in the firm; and they prayed that this answer be taken both as a plea of non est factum and a denial of the partnership alleged by the plaintiffs. Held, that these negative averments are not sufficient to "cast suspicion" on the note sued upon, in compliance with the requirements of article 1442, Paschal's Digest, respecting pleas of non est factum filed by the representatives of other persons. *Van Hook's Ex'rs v. Letchford*, 35 Tex. 598.

Verification.—See post, "Verification," VII, J, 11, b, (2), (d). See the title **BILLS, NOTES AND CHECKS**, vol. 2, pp. 1065, 1068.

(c) **Plea of Payment.**

See post, "Issues, Proof and Variance," VII, J, 12.

(d) **Verification.**

See the title **BILLS, NOTES AND CHECKS**, vol. 2, pp. 1065, 1068.

Section 195, probate law of 1870, relating to verified pleas, referred to proceedings on probate side of court only. *Eborn v. Zimpelman*, 47 Tex. 503, 522.

Plea of non est factum may be made by an agent of the administrator; and may be made by an heir, with consent of the administrator as such agent, even when the administrator may be unwilling to make the necessary affidavit. *Eborn v. Zimpelman*, 47 Tex. 503; *Solomon v. Huey*, 1 Posey 265, 266.

Widow.—If administrator of estate is unwilling in suit on note against estate to make affidavit required by law to plea of non est factum, it is proper to allow widow to intervene in suit, and make necessary affidavit, provided such intervention works no delay. *Solomon v. Huley*, 1 Posey 265, 266; *Eccles v. Hill*, 13 Tex. 65, 67. See *Eborn v. Zimpelman*, 47 Tex. 503.

(3) **Construction of Plea.**

As to Authority of Surviving Partner to Execute Note.—A plea in an action on notes executed by an independent executor for money borrowed to carry on decedent's business, alleging that at the time of the death of the decedent the name averred to be signed to the notes was a partnership composed of decedent and other persons; that the partnership was dissolved by the death of decedent, and no authority existed in any of the surviving partners to execute notes binding the decedent's estate, relates merely to the authority of a surviving partner to execute such notes, and not to the authority of one of the alleged partners as executor of the decedent. (Civ. App.), *Altgelt v. Alamo Nat. Bank*, 79 S. W. 582, judgment reversed 83 S. W. 6, 98 Tex. 252.

(4) **Operation and Effect.**

A general denial in a suit to estab-

lish a rejected claim on an account against an estate, puts the plaintiff upon proof of such account. *Kendall v. Riley*, 45 Tex. 20.

Plea of Non Est Factum.—See ante, "Non Est Factum," VII, J, 11, b, (2), (b). See the title *BILLS, NOTES AND CHECKS*, vol. 2, p. 1062, et seq.

12. Issues, Proof and Variance.

Presentation.—Whether or not the account sued on was presented to the administrator previous to the institution, is a fact put in issue by the general denial of all the allegations in the petition and such presentation must be proved to entitle the plaintiff to recover. *Tompkins & Co. v. Bennett*, 3 Tex. 36, 49; *Cummings v. Jones*, Dallam 531; *Darby v. Chevallier*, Dallam 555.

Under allegation of refusal of administrator to allow claim in suit against administrator, proof of presentation as required by law, is admissible. *Coles v. Portis*, 18 Tex. 155, 156.

Proper Authentication.—It seems that, under an allegation of the refusal of the administrator to allow and pay an account against the estate, it may be shown that such account was properly authenticated. *Coles v. Portis*, 18 Tex. 155.

Payment.—Proof of payment of a claim against an estate can not be made by the administrator without pleading payment. *Kartoghian v. Harboth* (Civ. App.), 56 S. W. 79.

Payments, Credits or Offsets Although Not Pledged.—Under Rev. St. 1895, art. 2072, providing that "no executor or administrator shall allow any claim for money against his testator or intestate, nor shall any county judge approve the same unless such claim is accompanied by an affidavit in writing that the claim is just, and that all legal offsets, payments, and credits known were found to have been allowed," in an action against an administrator, payments, credits, or offsets are in issue, although not pleaded

by defendant. *Granberry v. Granberry*, 90 S. W. 711, 40 Tex. Civ. App. 420.

Proof of Terms of Will.—In an action on a claim against a decedent's estate, it was not necessary to set out the will, but plaintiff was entitled to prove the terms of the will under an allegation that it did not specifically direct how the executor should dispose of the property. *Altgelt v. Elmendorf* (Civ. App.), 86 S. W. 41.

Amount of Credit.—Where, in an action on an account against a decedent's estate, it appears that the account presented for allowance shows a larger credit than the account sued upon, plaintiff is not thereby estopped from correcting the statement, and suing for and recovering the amount actually due. *McCormick v. Blum*, 4 Tex. Civ. App. 9, 22 S. W. 1054, 1120.

Under a petition that money loaned to one deceased was payable on demand, proof that claimant loaned the money to deceased, and that deceased said to another that as soon as he sold his cotton he would pay the money, does not show a variance. *Kartoghian v. Harboth* (Civ. App.), 56 S. W. 79.

13. Evidence.

a. Presumption and Burden of Proof.

"The burden of establishment rests upon the creditor as well when the proceeding is by suit as on presentation to the probate judge for judicial sanction." *Danzey v. Swinney*, 7 Tex. 617, 632.

Fiduciary Character.—In *scire facias* against an executor on a bond executed by the testator as surety, the fiduciary character of the executor should be shown. *Order*, 47 S. W. 645, 39 Tex. Cr. 566, reversed on rehearing. *Mose v. State*, 50 S. W. 342, 39 Tex. Cr. R. 566.

In *scire facias* on forfeited bail bond, where one is sued as executrix of deceased surety, proof of surety's death is necessary. *Morse v. State*, 39 Tex.

Cr. App. 566, 572, 47 S. W. 645, 50 S. W. 342.

b. Admissibility.

A verified account is not evidence in suit against an estate. *Leverett v. Wherry*, 4 App. Civ. Cases, § 185, 15 S. W. 121.

Secondary Evidence of Contents of Testator's Account Book.—Where one sued an executor on an account against his testator, the statement of a witness that testator's account books showed that he was indebted to plaintiff is not admissible where it is not shown that the books were lost, or any excuse given for failure to produce them. *Garrett v. Garrett* (Civ. App.), 47 S. W. 76. See the title BEST AND SECONDARY EVIDENCE, vol. 2, p. 801.

Memorandum Evidencing Loan to Decedent.—In an action on a claim against a decedent's estate, a memorandum evidencing the loan sued for, and showing a consideration on its face, was admissible, though it might also tend to show a partnership between plaintiff and deceased. *Altgelt v. Elmendorf* (Civ. App.), 86 S. W. 41.

Statute of Frauds—Form of Account.—Though accounts were kept in the form of sales to tenants of decedent (he being entered as security), and were so presented to his administrator, the form of the accounts will not restrict claimant to proof of a written promise by decedent, nor conclude him from showing that, by the actual transaction, decedent was liable for such accounts as principal. *Nixon v. Jacobs*, 22 Tex. Civ. App. 97, 53 S. W. 595.

Judgment in Favor of Executor on Another Demand.—In an action against an executrix upon a note, the court admitted a judgment rendered against plaintiff in favor of the defendant in her representative capacity, long after the note in issue was alleged to be due. Held, that the fact that the plaintiff, if he had had an existing demand against

the defendant while her suit as executrix against him to recover debts alleged to be due her testator was pending, could have pleaded it in offset in that suit, and the fact that he did not do this, were circumstances tending to show that no such demand existed, and that the court did not err in admitting evidence of the judgment. *Smyth v. Caswell*, 67 Tex. 567, 4 S. W. 848.

c. Weight and Sufficiency.

Wife's declaration that she had received all to which she was entitled from husband's estate should have little weight, if received at all, in suit to subject remaining interest to creditors. *Debrell v. Ponton*, 27 Tex. 623, 626.

Broker's Certificate or Other Extra Judicial Evidence.—A planter delivered cotton to B. & M., his commission merchants in this state, to be forwarded by them to New York for sale. They consigned the cotton to their commission merchant in New York, who sold it to one D., by whom it was shipped to a house in Liverpool, and there sold. The purchaser there made reclamation on D., on the allegation that the cotton was "falsely packed," evidenced by a sworn certificate of a broker and representations of the Liverpool consignees. D. paid the reclamation, and on the same evidence it was refunded to him by the New York merchant, who was reimbursed on the same evidence by B. & M., who, in the meantime had fully accounted and settled with the planter for the proceeds of the cotton, and the planter himself had departed this life. B. & M. sued the representatives of the planter for the amount so paid by them on reclamation. Held, that the reclamation made on and paid by B. & M. constituted no valid demand against the planter's estate, unless there was proof establishing the fact that the cotton was falsely packed, and the amount of loss resulting therefrom; and that no custom of merchants to refund on a broker's certificate, or

other extra judicial evidence of the false packing and loss, would suffice to establish the liability of the defendants. *Battle v. Mack*, 33 Tex. 795.

Note for Money Loaned to Pay Judgment.—Deceased executed a note payable one year after date, with interest, and 10 per cent of the amount additional as attorney's fees if placed in the hands of an attorney for collection. The note was transferred to plaintiffs, it having indorsed thereon two renewals in proper form. On the death of deceased, administration was granted on his estate, and the note placed in the hands of attorneys for collection, duly verified as a claim against his estate, presented to the administratrix for allowance, rejected by her, and suit thereon seasonably brought. The note was given for money loaned deceased to pay a judgment against him, and was wholly due and unpaid; and there was no evidence as to whether or not the judgment was satisfied, or was transferred to remain as collateral security in the hands of the holder of the note. Held, that in an action on the note the verdict of the jury could not have been otherwise than in favor of plaintiffs for the amount of their claim against the estate. *George v. Ryon* (Civ. App.), 61 S. W. 138.

In Absence of Plea of Non Est Factum.—See ante, "Non Est Factum," VII, J, 11, b, (2), (b). See the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 1062, et seq.

14. Witnesses.

See the title **WITNESSES**.

15. Interrogatories.

"In any case where the administrator or executor believes the proof to be insufficient on presentation, whether the affidavit is made by the owner or his agent, he may, on suit being brought, file interrogatories, and compel the owner to answer, under oath, all questions which he deems necessary for the protection of the estate he

represents." *Keesee v. Beckwith*, 32 Tex. 731, 737.

16. Set-Off, Reconvention, etc.

The rules applying to set-offs by living persons apply to an administrator setting off claim of his intestate. *Walker v. Fearhake*, 22 Tex. Civ. App. 61, 62, 52 S. W. 629.

"The civil-law doctrine of the extinguishment of mutual debts does not apply, however, and the statute of limitations will run against the set-off, and may be pleaded as a defense thereto by the party against whom it is asserted. *Holliman v. Rogers*, 6 Tex. 91; *Howard v. Randolph*, 73 Tex. 454, 11 S. W. 495." *Walker v. Fearhake*, 22 Tex. Civ. App. 61, 62, 52 S. W. 629.

In a suit by the surviving wife on a liquidated demand against the executor of the last will of the husband, the wife can only be held liable for damages for the value of property alleged to have been illegally converted by the wife on an adjustment of the respective rights and equities of the parties growing out of a final settlement of the estate, if in such action she could be held liable at all. *Hall v. Hall*, 52 Tex. 294.

In a suit by the wife against the executor of her husband on a note executed by deceased, defendant will not be allowed to set up a claim for property alleged to have been illegally converted by her, where his answer fails to show that she would not, on a settlement of the estate, be entitled to the amount sued for after charging her with the value of such property. *Hall v. Hall*, 52 Tex. 294.

A proceeding to set off a claim for unliquidated damages against one member of a firm, in a suit by the firm, is not within the jurisdiction of the probate court. *Ball v. Hill*, 48 Tex. 634.

Hire of Negroes and Proceeds of Sale of Estate Property.—Where the plaintiff sued to recover money al-

leged to have been expended by him in payment of debts of an estate of which he was then the administrator, and the defendant (the administrator *de bonis non*) pleaded in reconvention, claiming of the plaintiff the hire of certain negroes and proceeds arising from the sale of property belonging to the estate, which he alleged the plaintiff had converted to his own use, held, that the matters thus pleaded by defendant did not come within the description of such as are prohibited from being pleaded in set-off by the 4th section of the act of 1840, "allowing discounts and set-offs." *Thomas v. Hill*, 3 Tex. 270.

An executor can not set off damages for harassment and attorney's fees paid against a claim prosecuted against the estate. *House & Co. v. Collins*, 42 Tex. 486, 493.

17. Judgment.

a. Confession of Judgment.

The administrator has it in his power, after being called into court, to acknowledge the justice of the claim and save further expense to the estate. *Boone v. Roberts*, 1 Tex. 147, 159.

b. Default Judgment.

Upon withdrawal of an answer in a suit against an estate upon a rejected claim, judgment by default final may be rendered, if the claim be liquidated and proved by an instrument in writing; the clerk computing damages as in other cases. *Heath v. Garrett*, 46 Tex. 23.

c. Rendition, Form and Requisites.

(1) In General.

Under Pasch. Dig. § 1371, which made it the duty of the clerk to issue an execution against the estate of defendant's testator when the judgment was against him as executor, it was not essential that the judgment should direct that execution should issue against the property of the estate. *Croom v. Winston*, 43 S. W. 1072, 18 Tex. Civ. App. 1.

Where an action was brought against an administrator in his official capacity to recover a money judgment against the estate, so that it was impossible, under the pleadings, for a judgment to have been rendered against him individually, or for him to have had a personal interest in the subject matter of the proceedings, a designation of himself in the pleadings, in the assignments of error, and in the record generally, as "defendant, G. C. A., administrator," etc., could not be deemed as a designation of himself in his personal right; nor would an appeal by him be dismissed as an appeal taken on his own behalf. *Altgelt v. Elmen-dorf* (Civ. App.), 84 S. W. 412.

Suit against Mrs. A. F. Johns upon moneyed claim, alleging that she is executrix and that she was in possession of an estate of \$30,000 value as executrix and as devisee of C. R. Johns, her husband. The cause of action was in breach of warranty made by her deceased husband. Held, that she could not so hold the estate, and that judgment against her "as executrix and devisee" is inconsistent and must be reversed on appeal. *Johns v. Hardin*, 81 Tex. 37, 16 S. W. 623.

(2) Funds Received by Testator as Trustee.

Judgment can not be rendered against executors personally for funds received by testator as trustee. *Kendall v. Calder*, 2 Posey 732.

(3) Judgment against Independent Executor.

Pas. Dig., art. 1371, making it the duty of the clerk to issue an execution against the estate when the judgment is against the independent executor, does not necessarily require that there be such recitation in the judgment. *Croom v. Winston*, 18 Tex. Civ. App. 1, 5, 43 S. W. 1072, affirmed in 93 Tex. 638, no op.

(4) Judgment against Heirs.

Judgment upon a money claim

against the ancestor should not be rendered against heirs unless they received assets from the ancestor, as in absence of assets no liability exists. *Schmidtke v. Milier*, 71 Tex. 103, 8 S. W. 638.

(5) Direction as to Payment in Due Course.

(a) In General.

Where, in a suit against an administrator, judgment is rendered, it is erroneous to award execution against the goods, chattels, lands, and tenements of the decedent in the hands of the administrator, to be administered; but the judgment should be, "to be paid in the due course of administration." *Mott v. Ruenbuhl*, 1 White & W. Civ. Cas. Ct. App. § 602. See to the same effect, *Warren v. Wallis & Co.*, 42 Tex. 472, 479; *Watson v. Blymer Mfg. Co.*, 66 Tex. 558, 2 S. W. 353; *McCown v. Foster*, 33 Tex. 241, 246. See, also, *Ross v. Drouilhet*, 80 S. W. 241, 34 Tex. Civ. App. 327, affirmed in 98 Tex. 630, no op.

A general judgment against an administrator is bad. It violates the statute requiring judgments "to be paid in due course of administration," and forbidding executions thereon. *Wilcox v. State*, 24 Tex. 544.

"The policy of the statute is, on administration, to subject the whole of the estate to the supervision and control of the county court for the payment of debts, the adjustment of the equities and preferences of creditors, and for the distribution of the property." *Cunningham v. Taylor*, 20 Tex. 126, 129. "This is the rule adopted in other cases. (*Robertson v. Paul*, 16 Tex. 472, 476; *Fortson v. Caldwell*, 17 Tex. 627, 629; *Boggess v. Lilly*, 18 Tex. 200; *Heath v. Garrett*, 46 Tex. 23, 25; *Cannon v. McDaniel*, 46 Tex. 303, 316.) This is an error, however, which can be corrected without remanding the case. (*Thorn v. State*, 10 Tex. 295; *Heath v. Garrett*, 46 Tex. 23, 25.)" *McCormick v. McNeel*, 53 Tex. 15, 23.

In a suit for money collected by a creditor of an estate and applied to the payment of his claim, the judgment of the court should be against the estate for the debt to be paid in the course of administration, and against the party who has so collected debts with execution. *Cook v. Jordan*, 21 Tex. 221.

A decree against an executor for rents and profits received by the testator ought expressly to direct that he pay the sum in question out of the assets in his hands to be administered; otherwise, it is to be understood as against him personally, and therefore erroneous. *Thorn v. State*, 10 Tex. 295.

So held as to a judgment in favor of state. *Thorn v. State*, 10 Tex. 295.

In an action against one alleged to be an administratrix duly appointed by the probate court, on a probated note made by deceased and rejected by defendant, a default judgment, ordering execution "against the estate," is error. The judgment should direct its payment in due course of administration. *Goff v. Hauser*, 33 Tex. 430.

(b) Judgment against Independent Executor.

Award of Execution.—Judgment against independent executrix for debt of testator ordering execution to issue against estate of deceased, is erroneous without allegations in pleadings authorizing same. *Goff v. Hauser*, 33 Tex. 430; *Lewis v. Nichols*, 38 Tex. 54, 60.

It was proper for a judgment against an independent executrix to contain an award of execution against the estate. *Hartz v. Hausser* (Civ. App.), 90 S. W. 63.

An execution may issue on a judgment without any reward of execution, and consequently such an award adds nothing to the judgment. *Hartz v. Hausser* (Civ. App.), 90 S. W. 63; *Roberts v. Connellee*, 71 Tex. 11, 8 S. W. 626.

(6) Classification and Filing.

Article 2029, Rev. Stat., regarding filing of judgments against administrators on rejected claims, applied only to rejected claims subsequently established by suit. *Manning v. Mayes*, 79 Tex. 653, 655, 15 S. W. 638.

Under 2 Pasch. Dig., art. 5667, declaring that when a judgment is rendered against a decedent's estate, the claim is thereby established, the validity of a claim against an estate is not affected by the provisions of the same act requiring the judgment to be filed and classified by the probate court, nor by Rev. St. art. 2029, requiring it to be filed with the county clerk within 30 days after its rendition entered on the claim docket and classed by the probate judge so as to give it the same effect as if allowed and proved. *Wygall v. Myers*, 76 Tex. 598, 13 S. W. 567; *Wygall v. Woodlief*, 76 Tex. 604, 13 S. W. 569.

A judgment under probate act of 1870 establishing claim is not affected as to limitation by probate act of 1876 requiring filing with county clerk. *Wygall v. Woodlief*, 76 Tex. 604, 605, 13 S. W. 569.

(7) Amendments.

Where a judgment, revived after the debtor's death, directs execution against his executors, instead of against his estate in their hands, and executions issue accordingly, and sales thereunder are made, it is too late to amend the judgment and executions. *McKay v. Paris Exch. Bank*, 75 Tex. 181, 12 S. W. 529.

d. Operation and Effect.**(1) Persons Concluded.**

An executor, one year before the limitation expired, indorsed, as payable in due course of administration, a mortgage note executed by his testator. Two years thereafter the creditor foreclosed the mortgage. Held, that the validity of the judgment of foreclosure is not impeachable, in an action for the mortgaged premises by a

devisee, on the ground that the suit was brought after the note was outlawed. *Howard v. Johnson*, 69 Tex. 655, 7 S. W. 522.

(2) Matters Concluded.

Judgment of District Court Establishing Mortgage Lien.—The decree of the district court in a suit to establish a debt and lien securing the same only goes to the extent of establishing the debt and the lien given to secure it, and does not undertake its classification as a claim against the estate, or its enforcement. It orders it to be certified to the county court for that purpose. *Albright v. Allday* (Civ. App.), 37 S. W. 646, 652.

(3) Lien of Judgment.

Property Bound.—A judgment against an executor, with power to administer without control of the courts of probate, binds only such assets as are in his hands. *McDonough v. Cross*, 40 Tex. 251.

Divestiture.—A judgment recovered in 1841 against an administrator operated, by the act of February 5th, 1840, as a lien upon a land certificate in the hands of the administrator; and this lien could not be divested or defeated by a survey subsequently made under the certificate and a patent issued thereon to the heirs of the grantee of the certificate. *Peevy v. Hurt*, 32 Tex. 146.

(4) Collateral Attack.

A judgment against an independent executor in a regular suit even if rendered upon a claim which appears to be barred, can not be attacked on that ground in a collateral action. *Howard v. Johnson*, 69 Tex. 655, 657, 7 S. W. 522.

(5) Suit to Set Aside and Enjoin.

Contention on Appeal That Judgment against Executor Personally.—A suit for taxes, resulting in a judgment for the city, was styled "City of G. against the Estate of B." B's executors were subsequently made parties. The judgment named the

executors as executors, and they were so named in the order of sale. No personal judgment was rendered against them, but the lien was foreclosed on the property on which the taxes accrued, and the sheriff was directed to proceed against that property and no other, no judgment over against the executors being awarded in case the proceeds of sale should be insufficient. In a subsequent suit to set aside the judgment, the petition showed that the tax suit was brought against plaintiffs (defendants in the former suit) in their capacity as executors, and that the taxes were claimed against the estate. The order of sale of the property was also alleged to have been issued against them as executors, and the levy made on the property of the estate. Held, that a contention on appeal, in the suit to set aside the judgment, that the judgment and order of sale were against the executors personally, was without merit. *Ross v. Drouilhet*, 80 S. W. 241, 34 Tex. Civ. App. 327.

Injunction.—Where the surviving wife is herself appointed administratrix of her husband's estate, on a proper showing she may obtain a perpetual injunction against execution of a judgment previously rendered against her as surviving partner of the community, with directions that the judgment be paid by her in due course of administration. *Tucker v. Brackett*, 28 Tex. 337, affirmed in *Moke & Bro. v. Brackett*, 28 Tex. 443.

e. Execution and Enforcement of Judgment.

(1) Award of Execution.

Execution can never issue against the estate of a deceased person, except when the estate is withdrawn by the will from the jurisdiction of the probate court. *Lewis v. Nichols*, 38 Tex. 54; *Roberts v. Connellee*, 71 Tex. 11, 18, 8 S. W. 626; *Lemmel v. Pauska*, 54 Tex. 505.

A judgment against the estate of one

deceased should be settled concurrently with other debts of the deceased by the probate court and execution should not issue from the district court. *Bason v. Hughart*, 2 Tex. 476.

Execution can not be issued on a judgment rendered against an administrator on a claim against decedent's estate; but such judgment must be settled concurrently with other debts in the probate court. *Bason v. Hughart*, 2 Tex. 476.

It is against the policy of the laws for the administration of estates to allow one unsecured creditor to sell under execution property to which all other creditors in like condition have equal claims. *Schmidtke v. Miller*, 71 Tex. 103, 107, 8 S. W. 638; *Webb v. Mallard*, 27 Tex. 80, 83; *McMiller v. Butler*, 20 Tex. 402, 405; *Chandler v. Burdett*, 20 Tex. 42, 44; *Conkrite v. Hart & Co.*, 10 Tex. 140.

Judgment against executor will not authorize levy of execution on property of estate that has passed from his hands as executor though he should have kept it for payment of debts. *McDonough v. Cross*, 40 Tex. 251, 282.

Where probate proceedings are not carried on in county court by direction of will, execution against executors must comply with statute and devisees must be cited. *Carroll v. Carroll*, 20 Tex. 731, 746.

"The law has not in any case authorized the issuance of an execution against the estate of a deceased party, and a sale of the property of the estate under such execution will not pass the title." *Emmons v. Williams*, 28 Tex. 776, 779.

There is no statute of this state authorizing the real estate of a decedent to be sold under execution issued against his legal representative, and such a sale will convey no title to the purchaser. The law provides the mode of sale through the county court. *Pas. Dig.*, arts. 1314, 1315, notes 488 to 490; *Conkrite v. Hart & Co.*, 10 Tex.

140; *Emmons v. Williams*, 28 Tex. 776, 777.

Persons Who May Object.—Devisees can not complain of an order, awarding execution against the executor of the devisor's will, made after he had distributed all the estate. *Devine v. United States Mortg. Co.* (Civ. App.), 48 S. W. 585.

(2) Certification to County Court and Proceedings Thereon.

Under the law of this state a judgment against an executor or administrator is certified to the county court to be paid in due course of administration and can not be enforced by executions. *Paxton v. Meyers*, 67 Tex. 96, 2 S. W. 817; *Ansley v. Baker*, 14 Tex. 607, 612; *Rogers v. Harrison*, 44 Tex. 169, 171; *Boguess v. Lilly*, 18 Tex. 200, 205; *Robertson v. Paul*, 16 Tex. 472; *Bradford v. Knowles*, 86 Tex. 505, 508, 25 S. W. 1117, reversing 24 S. W. 1095; *Chandler v. Burdett*, 20 Tex. 42; *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815.

A judgment entered against an administrator in Texas is required to be certified to the probate court for classification and payment, but that court has no authority, in the absence of claims against the estate entitled to priority of payment out of the assets, to reopen the litigation, or to adjudicate the questions of debt and lien, but simply, through its machinery, to enforce the judgment of the district court. *Paxton v. Meyer*, 67 Tex. 96, 2 S. W. 817.

Land belonging to a deceased person can not be sold by a sheriff on execution under a judgment against the regularly appointed administrator of the estate. *Meyers v. Evans*, 68 Tex. 466, 5 S. W. 66.

(3) Independent Executorship.

An executor under a will giving him control of the estate without being subject to the orders of the probate court may be sued and execution may be issued against the property of the es-

tate in his possession. *Weems v. Miles*, 1 White & Civ. Cas. Ct. App. §. 1208; *Bynum v. Govan*, 9 Tex. Civ. App. 559, 561, 29 S. W. 1119, affirmed in 93 Tex. 636, no op.; *Govan v. Bynum*, 17 Tex. Civ. App. 180, 182, 43 S. W. 319; *Ellis v. Mabry*, 25 Tex. Civ. App. 164, 60 S. W. 571; *Mayes v. Jones*, 62 Tex. 365; *Johns v. Hardin*, 81 Tex. 37, 16 S. W. 623; *Pleasants v. Davidson*, 34 Tex. 459, following *Rogers v. Harrison*, 44 Tex. 169; *Lewis v. Nichols*, 38 Tex. 54.

"The property of an estate in the hands of an independent executor is subject to seizure and forced sale at the suit of creditors. Rev. Stat., art. 1996; *Roberts v. Connellee*, 71 Tex. 11, 15, 8 S. W. 626. The heirs and devisees, though not parties to the suit, are bound by the judgment against the executor and the sale under the judgment. *Howard v. Johnson*, 69 Tex. 655, 7 S. W. 522." *Stevenson v. Roberts*, 25 Tex. Civ. App. 577, 64 S. W. 230, 235.

Where a judgment has been obtained against an independent executor, the statute authorizes the issuance of an execution against him to be levied on the property in his hands belonging to the estate of his testator; but where the judgment is against the testator, no such statutory provision exists. *Bynum v. Govan*, 9 Tex. Civ. App. 559, 29 S. W. 1119, affirmed in 93 Tex. 636, no op.

A judgment against an independent executrix held properly enforced by execution, instead of being certified to the probate court for payment in due course of administration. *Ellis v. Mabry*, 25 Tex. Civ. App. 164, 60 S. W. 571.

The constitution of 1848, and each subsequent constitution, has had a provision substantially similar to article 5, § 16, of the present constitution of 1876, giving the county court the general jurisdiction of a probate court, power to grant letters testamentary,

to settle accounts, and to partition and distribute the estates of decedents. In 1862 (1 Pasch. Dig. art. 1371) express provision was made for execution sales of property of estates in the hands of an independent executor, and since that time the courts have uniformly sustained sales so made. Held, that it must be presumed that the convention which adopted the constitution of 1876 readopted the clause above set out, with the construction that had been given it by the statute and the courts, so that Sayles' Rev. Civ. St. 1897, art. 1996, providing for suits by creditors against independent executors, could not be held repugnant to the constitution because authorizing the property of a decedent's estate to be disposed of through proceedings of courts having other than probate jurisdiction. *Epperson v. Reeves*, 79 S. W. 845, 35 Tex. Civ. App. 167.

Under Pasch. Dig. art. 1371, providing that execution can not issue against an estate unless it is withdrawn by the will from the jurisdiction of the probate court simply exempting the executor from giving bond will not authorize execution against the estate in his hands. *Lew's v. Nichols*, 38 Tex. 54; *Same v. Same*, Id.; *Same v. Woodson*, Id.

Under Rev. St. arts. 1942, 1943, providing that a person may so make his will that the probate, registration, and return of inventory, appraisement, and list of claims, shall be all the action to be had by the county court in reference to his estate, and an executor of such will may be sued for a debt against the estate, and execution shall run against the estate in the hands of the executor, the qualification and return of inventory by one of two executors of such a will withdraws the estate from administration by the court, and subjects property in the hands of such executor to levy and sale on execution. *Roberts v. Connelle*, 71 Tex. 11, 8 S. W. 626.

Property in the hands of an executor appointed under the provisions of the statute is liable to execution in the same manner as any other property administered under a power. *Lemmel v. Pauska*, 54 Tex. 505.

When a will dispenses with the action of the county court in reference to the estate, a judgment against the executor will be enforced against property of testator in his hands by execution as in other cases. *McKie v. Simpkins*, 1 White & W. Civ. Cas. Ct. App. § 282.

Where a petition, alleging that defendant qualified as executrix and was appointed independent executrix, was not excepted to, and proof was received that the estate was being administered under Rev. St. art. 1995, authorizing settlement of testator's estate independent of the probate court, it was proper to award execution against the defendant as executrix of the estate, as it would not have been proper to certify the judgment to the probate court for payment in due course of administration. *Ellis v. Mabry*, 60 S. W. 571, 25 Tex. Civ. App. 164.

Garnishment.—The assets of the estate in the hands of an independent executor are subject to garnishment. *Weems v. Miles*, 1 App. Civ. Cases, § 1208; *Stevenson v. Roberts*, 25 Tex. Civ. App. 577, 64 S. W. 230, 235.

Sufficiency of Judgment to Support.—A judgment against independent executors in their representative capacity will support an execution against the property of their testator, and the judgment need not direct that execution issue against the estate property. *Croom v. Winston*, 18 Tex. Civ. App. 1, 5, 43 S. W. 1072.

Estate Insolvent.—Rev. St. 1895, art. 1996, providing that, in case of independent executorships, creditors of the estate may enforce their claims by suits against the executor, and an execution on a judgment recovered against

the executor shall run against the estate of the testator in the hands of the executor that may be subject to such debt, applies where the estate is insolvent, as well as where it is solvent. *Hartz v. Hausser* (Civ. App.), 90 S. W. 63, distinguishing *Farmers, etc., Nat. Bank v. Bell*, 31 Tex. Civ. App. 124, 71 S. W. 510, affirmed in 97 Tex. 632, no op.

Rev. St. art. 1995, authorizes a testator to provide in his will that no other action shall be had in the probate court as to the settlement of his estate than the probating of his will and return of an inventory, appraisement, and list of claims; and article 1996 authorizes any creditor to thereupon sue the executor, obtain judgment, and have execution issue against the estate of the testator in the hands of the executor, subject to such debt. Article 1869 provides that when a person dies his estate shall remain liable for his debts, and upon the issue of letters testamentary or of administration it shall be the duty of the executor or administrator to recover possession of and hold the estate in trust to be disposed of in accordance with law. Held, that where an estate which is being administered under a will free from the control of the county court is insolvent, article 1996 does not apply, but in such case the independent executor holds the property in trust for all the creditors, and no one creditor can sell the property under execution, and apply it to his own debt, to the exclusion of others. *Farmers' & Merchants' Nat. Bank v. Bell*, 71 S. W. 570, 31 Tex. Civ. App. 124.

Levy and Sale.—A judgment in a suit brought for the sole purpose of fixing defendant's liability as executor and legatee under a will does not authorize the issuance of an execution for the sale of any property other than that received by defendant from the testator's estate. *Texas Savings-Loan*

Ass'n v. Banker, 61 S. W. 724, 26 Tex. Civ. App. 107.

Where a judgment warrants a writ of execution, it is contemplated that it will be levied on property subject to the debt only, and it will not be presumed that it will be levied on property which is exempt or otherwise not subject to the debt. *Hartz v. Hausser* (Civ. App.), 90 S. W. 63.

When Judgment against Executor Held Not a Personal Judgment.—A sale under execution of the property of an estate on a judgment rendered four years before the sale, describing the judgment defendants by name, with the addition of the words "executor" and "executrix," will not be set aside as illegal and void more than twenty-five years thereafter, on the ground that the judgment was rendered against the executor and executrix individually, unless it is clearly shown that the execution was issued without authority of law. *Croom v. Winston*, 18 Tex. Civ. App. 1, 43 S. W. 1072, affirmed in 93 Tex. 638, no op.

Construction of Judgment.—On the issue of title derived by execution sale under judgments for recovery of money against B., "independent executor and devisee," etc., or against B. in "capacity of independent executor of and legatee," etc., if the judgments were ambiguous (which it seems they were not) the records in the respective suits were properly admitted to show that such judgments were against the defendant only in a representative capacity. *Texas Savings-Loan Ass'n v. Banker*, 26 Tex. Civ. App. 107, 61 S. W. 724, affirmed in 94 Tex. 701, no op.

Pleading as Evidence.—The pleadings may be read in connection with a judgment which prima facie makes the defendant personally liable, to show that the suit was against defendants as executors, where a sale under such judgment was attacked more than twenty-five years after it was made. *Croom v. Winston*, 18 Tex. Civ. App.

1, 43 S. W. 1072, affirmed in 93 Tex. 638, no op.

Parol Evidence to Show Character of Judgment.—Evidence of an executor that a suit against him and his co-executor was to recover from the estate a debt due from their testator in his lifetime is admissible where a sale under execution issued on the judgment is attacked twenty-five years thereafter, although he states that he does not remember whether he had ever read the petition in the case or not, and he can not give its contents. *Croom v. Winston*, 18 Tex. Civ. App. 1, 43 S. W. 1072, affirmed in 93 Tex. 638, no op.

Rights of Purchaser.—Judgment against independent executor after he has parted with property of estate is valid though there be no assets on which to levy, and purchaser at execution sale under such judgment takes no title but is subrogated to rights of creditors in land sold. *McDonough v. Cross*, 40 Tex. 251, 285.

(4) Judgment against Administrator Personally.

A plaintiff in execution, who seizes property of the estate of a decedent under an execution upon a judgment against the administrator personally, is liable to the estate for the value thereof. *Pinkard v. Willis*, 57 S. W. 891, 24 Tex. Civ. App. 69.

In an action by a temporary administrator to try the right of property to goods levied on under execution against him personally, while the goods were in his possession, and before his qualification as temporary administrator, the burden is on the plaintiff to prove title in the estate. *Pinkard v. Willis*, 57 S. W. 891, 24 Tex. Civ. App. 69.

(5) Sales under Execution.

As a general rule, a sale of property of an estate under execution against an executor or administrator is void. *Bradford v. Knowles*, 86 Tex. 505, 508, 25 S. W. 1117, reversing 24 S. W. 1095;

Cunningham v. Taylor, 20 Tex. 126, 129, distinguishing and disapproving *obiter* in *Danzev v. Swinney*, 7 Tex. 617; *Chandler v. Burdett*, 20 Tex. 42, 44; *Farmers, etc., Nat. Bank v. Bell*, 31 Tex. Civ. App. 124, 126, 71 S. W. 510, affirmed in 97 Tex. 632, no op.; *Roy v. Whitaker*, 92 Tex. 346, 48 S. W. 892, 49 S. W. 367.

To sustain a sale of a decedent's property under execution issued from a district court against executors or administrators, it must be shown that the judgment and execution were obtained under one of the sections of the statute which authorizes the same in such cases. *Carroll v. Carroll*, 20 Tex. 731; *Hogue v. Sims*, 9 Tex. 546; *Madox v. Humphries*, 24 Tex. 195.

A sale, under a judgment against the administrator, of land which has been partitioned among the heirs prior to the suit in which the judgment is rendered, is void, and passes no title. *McDonough v. Cross*, 40 Tex. 251.

Collateral Attack.—A sale, under execution on a judgment against an executor, of land which was properly included in his inventory, can not be collaterally attacked because the inventory was not complete as to other property. *Connelle v. Roberts*, 1 Tex. Civ. App. 363, 23 S. W. 187.

Opening, Vacating and Setting Aside—Failure to Cite Devises on Evidence of Failure of Heirs to Give Bond.—Hart. Dig. art. 1219, providing a mode of procedure in establishing debts against estates where the testator has dispensed with the supervision of the county court, except in probate and registration of the will and return of inventory, must be complied with; hence a sale on a claim established without previous citation to the devisees, or evidence of their failure to give bond as required by the statute, will be set aside. *Carroll v. Carroll*, 20 Tex. 731.

Confirmation by Executor or Administrator.—A sale of decedent's real

estate on execution against the administrator, being void, can not be so confirmed by his electing to receive the proceeds as to entitle himself thereto. *Emmons v. Williams*, 28 Tex. 776.

Administrator can not maintain motion against sheriff and sureties, and recover surplus remaining after void execution sale. *Emmons v. Williams*, 28 Tex. 776, 779.

Reimbursement.—Where execution was issued on a valid judgment against the partners of a firm, and was levied on the real estate belonging to one of the partners after his decease, which was sold, the purchaser could not be compelled to restore the property, in an action against the decedent's administrator, until reimbursed for the amount paid by him, together with compensation for permanent improvements made, since he was a purchaser in good faith, without knowledge of the infirmity in the sale. *Bailey's Adm'r v. White*, 13 Tex. 114.

18. Appeal and Error.

Heirs of a decedent sued his executor on account of services of their slaves alleged to have been applied by the decedent to his own use. General creditors of decedent's estate intervened, and there was judgment below for plaintiffs against the executor. No appeal was prosecuted by the executor, but an intervener, administratrix of one of the general creditors, brought the judgment up. Held, that it was not such a judgment as the intervener's administratrix could bring up. *Shackleford v. Gates*, 35 Tex. 781.

Reversal for Error in Form of Judgment.—See ante, "In General," VII, J, 17, e, (1).

Right of Defendant to Dismiss Appeal.—See the title APPEAL AND ERROR, vol. 1, p. 1031.

19. Enforcement of Specific Liens.

a. In General.

The common law on the subject of enforcing liens against decedents' estate was abrogated by the probate law

of 1846. *Conkrite v. Hart & Co.*, 10 Tex. 140; *McMiller v. Butler*, 20 Tex. 402, 405.

The statute relating to the estates of deceased persons, requires all liens upon property of their estates to be enforced in the probate court. *Fortson v. Caldwell*, 17 Tex. 627; *Bogges v. Lilly*, 18 Tex. 200; *Chandler v. Burdett*, 20 Tex. 42; *Cunningham v. Taylor*, 20 Tex. 126; *Buchanan v. Monroe*, 22 Tex. 537, 542; *McMiller v. Butler*, 20 Tex. 402, 404.

"There is no provision of the probate law which reaches a creditor who has, in his own hands, that which may be treated as so much money, and appropriated as such to the payment of his claims." *Huyler v. Dahoney*, 48 Tex. 234, 240.

b. Jurisdiction.

Where a claim for money against an estate, secured by a lien on land of the estate, has been rejected by the administrator and the claimant forced to sue for its establishment, he may secure in the district court judgment not only for the debt but for the establishment of his lien. *George v. Ryon*, 94 Tex. 317, 60 S. W. 427; *Jenkins v. Cain* (Sup.), 12 S. W. 1114; *Cunningham v. Taylor*, 20 Tex. 126; *Perkins v. Sterne*, 23 Tex. 561, 564.

Liens on estate existing at death of debtor must be enforced in county court. *Giddings v. Crosby*, 24 Tex. 295, 299.

c. Parties.

In General.—Heirs are not necessary parties to suit by lien creditor against independent executor to enforce lien against land of the estate. *Howard v. Johnson*, 69 Tex. 655, 7 S. W. 522.

d. Decree.

A judgment of the district court establishing a lien in suit against estate should be certified to the probate court for allowance in due course of administration. *Fortson v. Caldwell*, 17 Tex. 627, 629.

e. Particular Liens.**(1) Mortgages or Deeds of Trust.****(a) In General.**

A mortgagee is not left to foreclose his mortgage and enforce the specific lien under the act authorizing the foreclosure of mortgages on real estate. *Graham v. Vining*, 2 Tex. 433, 441.

"That plaintiff, being the assignee of two notes secured by a mortgage, can proceed to enforce his lien in the county court, is well established by numerous decisions of this court; and that he must do so, unless there is some good ground for bringing the suit in the district court, is equally well established, by a continuous line of decisions from the case of *Robertson v. Paul*, 16 Tex. 472, down to the present time. (*Fortson v. Caldwell*, 17 Tex. 627; *Cunningham v. Taylor*, 20 Tex. 126; *Wheeler v. Love*, 21 Tex. 583, 584; *Perkins v. Sterne*, 23 Tex. 561; *Emmons v. Williams*, 28 Tex. 776.) The case of *Danzey v. Swinney*, 7 Tex. 617 which is sometimes cited for a contrary doctrine, does not decide the contrary; but in the opinion upon another matter, by way of argument or illustration, it is stated that such a rejected claim of lien may be prosecuted in the district court to judgment, execution, and sale by the sheriff; whereas the point decided was, that a claim not presented to the administrator for allowance, could not be prosecuted to enforce a lien in the county court." *Cannon v. McDaniel*, 46 Tex. 303, 310.

(b) Execution of Power of Sale.**aa. In General.**

The rule, broadly stated, is that all claims for money, including those secured by liens, must be probated and enforced through the probate court, and that the existence of a power of sale does not alter the case. *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815.

A power to sell, contained in a mortgage or deed of trust given to se-

cure the payment of a debt, although not revoked on general principles, by the death of the constituent, is inconsistent with our statutes respecting the settlement of estates of deceased persons, and therefore can not be executed after the death of the constituent. The mortgagee must resort to the probate court for the enforcement of his liens upon the property. Hence a sale made by a trustee, after the death of the maker of the trust deed and pending an administration upon his estate, or, if no administration has been had, within four years after the death of the maker, is void and ineffectual to give title to the purchaser at the sale. *Robertson v. Paul*, 16 Tex. 472; *Rogers v. Watson*, 81 Tex. 400, 17 S. W. 29; *Markham v. Wortham* (Civ. App.), 67 S. W. 341, affirmed in 95 Tex. 682, no op.; *Tiboldi v. Palms*, 34 Tex. Civ. App. 318, 320, 78 S. W. 726, affirmed in 97 Tex. 414; *Black v. Rockmore*, 50 Tex. 88; *Texas Loan Agency v. Dingee*, 33 Tex. Civ. App. 118, 75 S. W. 866, affirmed in 97 Tex. 649, no op.; *Abney v. Pope*, 52 Tex. 288; *Blair & Co. v. Thorp*, 33 Tex. 38, 49; *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815; *Reeves v. Petty*, 44 Tex. 249, 254; *McLane v. Paschal*, 47 Tex. 365; *Buchanan v. Monroe*, 22 Tex. 537; *Whitmire v. May*, 96 Tex. 317, 72 S. W. 375, affirming 69 S. W. 100; *Cunningham v. Taylor*, 20 Tex. 126, 129; *Webb v. Mallard*, 27 Tex. 80; *Huyler v. Dahoney*, 48 Tex. 234, 240; *Dwight v. Overton*, 35 Tex. 390, 409. See, also, *Swearinger v. Williams*, 28 Tex. Civ. App. 559, 67 S. W. 1061.

Whatever rights are secured to a creditor by a trust deed, can only be enforced after the death of the debtor, through the courts. *McLane v. Paschal*, 47 Tex. 365.

This rule has become a rule of property, to an extent that it would be a great shock to society to disturb it. *Reeves v. Petty*, 44 Tex. 249, 254.

One of the propositions in *Robert-*

son *v. Paul*, 16 Tex. 472, is that the power of sale, in such an instrument, is coupled with an interest, and upon general principles is not revoked by death. *Rogers v. Watson*, 81 Tex. 400, 17 S. W. 29; *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815; *Dwight v. Overton*, 35 Tex. 390, 409.

There is no general rule of law, by force of which death of the mortgagor is made to extinguish the power of sale in a deed of trust, therefore before a court can be justified in holding that it has been lost in a particular case as a consequence of death, it must find warrant for its judgment in the laws regulating the administration and settlement of estates. *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815, 816.

Where a deed of trust to secure purchase money due on land gave the trustee power to sell upon default, and provided that such power should not be revoked by the death of the grantor, and that the holder of the note secured should not be obliged to resort to the probate court to enforce his claim, a sale by the trustee after the grantor's death and pending administration on his estate was void, since the method prescribed by the statute for the collection of claims against decedents' estates is exclusive of all others. *Texas Loan Agency v. Dingee*, 33 Tex. Civ. App. 118, 75 S. W. 866, affirmed in 97 Tex. 649, no op.

He who takes a deed of trust from the husband and wife takes it with the contingency, that should the husband die before the execution of the trust his remedy, if any he has, must be in the probate court, and not through the acts of the trustee. *Smith v. Elliott*, 39 Tex. 201, following *Robertson v. Paul*, 16 Tex. 472.

Where, after the death of the grantor in a deed of trust, the county court, in administration proceedings, set apart the land described therein to the grantor's minor children as a homestead, and the holder of the debt se-

cured made no effort to enforce his lien in such proceedings, he could not thereafter enforce his lien against the land. *Tiboldi v. Palms*, 97 Tex. 414, 79 S. W. 23.

"The question, whether or not property so incumbered could be sold by the trustee after the close of an administration in which no action was taken by the probate court affecting the property, except to turn it over to the heirs as their inheritance, is not involved and no opinion is intimated upon it. *Blinn v. McDonald*, 92 Tex. 604, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931. Nor is the further question involved as to the right of the holder of such a claim as that of plaintiff in error to reopen the administration in a proper case for the purpose of enforcing it. * * * To give such a claim precedence over the homestead right adjudged by the probate court to the claimants thereof, such lien is required by the probate law to be enforced in the administration proceedings. *Fossett v. McMahan*, 86 Tex. 652, 26 S. W. 979; *Hensel v. International, etc., Loan Ass'n*, 85 Tex. 215, 20 S. W. 116; *Abney v. Pope*, 52 Tex. 288, 292; *Black v. Rockmore*, 50 Tex. 88; *Buchanan v. Wagnon*, 62 Tex. 375. * * * It is deducible from these authorities that, where there is an administration, the determination of such questions between the claimants of the homestead and those asserting liens on it belongs to the probate court, and after it has set aside the property as homestead it can not be sold under powers of sale such as that relied on by plaintiff in error, although the administration has been closed." *Tiboldi v. Palms*, 97 Tex. 414, 79 S. W. 23, affirming 78 S. W. 726.

Where the deed of trust is to secure payment of the purchase money for the land, this rule applies. *Whitmire v. May*, 96 Tex. 317, 319, 72 S. W. 375, affirming 69 S. W. 100; *Robertson v. Paul*, 16 Tex. 472.

Where there has been no administration upon the estate of the maker of the deed of trust, and the time within which such administration might have been taken out has expired, the power of the trustee, which had been in abeyance the four years which followed the death of the maker, becomes again effective, and a sale made by him under said power passes the title to the property sold. *Tiboldi v. Palms*, 97 Tex. 414, 79 S. W. 23; *Rogers v. Watson*, 81 Tex. 400, 17 S. W. 29; *Tiboldi v. Palms*, 34 Tex. Civ. App. 318, 78 S. W. 726, affirmed in 97 Tex. 414; *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815; *Markham v. Wortham* (Civ. App.), 67 S. W. 341, affirmed in 95 Tex. 682, no op.; *Swearingen v. Williams*, 28 Tex. Civ. App. 559, 67 S. W. 1061; *Texas Loan Agency v. Dingee*, 33 Tex. Civ. App. 118, 75 S. W. 866, affirmed in 97 Tex. 649, no op.

This rule can not be extended so as to cover cases in which there has been an administration upon the estate of the maker of the trust deed. *Tiboldi v. Palms*, 34 Tex. Civ. App. 318, 78 S. W. 726, affirmed in 97 Tex. 414.

"It is true that in some instances sales made by the trustee after the death of the mortgagor have been upheld, but this has been the decision only in those cases where there had been, and by reason of lapse of time could be, no administration. *Rogers v. Watson*, 81 Tex. 400, 17 S. W. 29; *Swearingen v. Williams*, 28 Tex. Civ. App. 559, 67 S. W. 1061." *Texas Loan Agency v. Dingee*, 33 Tex. Civ. App. 118, 120, 75 S. W. 866, affirmed in 97 Tex. 649, no op.

In no case where the power of the trustee to sell has been recognized was the sale made, while an administration upon the mortgagor's estate was yet pending. *Texas Loan Agency v. Dingee*, 33 Tex. Civ. App. 118, 75 S. W. 866, affirmed in 97 Tex. 649, no op.

Administration Free from Control of

Court.—Where the purchaser of property, subject to a trust deed containing a power of sale, died, and an executor qualified, and acted under the will, freed from the control of the probate court, and paid all the debts of the estate, and the time for administration of the estate had lapsed, the power remained unrevoked, and the trustee was entitled to sell thereunder. *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815, overruling *Swearingen v. Williams*, 28 Tex. Civ. App. 559, 67 S. W. 1061, and distinguishing *Roy v. Whitaker*, 92 Tex. 346, 48 S. W. 892, 49 S. W. 367; *Black v. Rockmore*, 50 Tex. 88.

"So the lien of a creditor in an estate independently administered may have to yield to the prior rights of others; but the statute does not require him, as it does creditors in the ordinary administrations, to pursue and establish his right and to have questions of priority settled in any prescribed way. It leaves him to pursue the remedies given to him other rules of law. He can not go into the probate court to establish and enforce his lien. He is permitted by the statute to sue in other courts, but is not required to do so when he can secure his rights in another lawful method without resort to the courts. He can not, of course, by a sale under the power destroy superior rights of others, but the courts administering law and equity are open to all who have rights conflicting with his for their enforcement, and when they are set up the question becomes one as to priority of right, and not merely as to the revocation of the power of sale." *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815. 818.

Deed of Trust on Homestead by Husband and Wife—Sale after Death of Husband.—*Black v. Rockmore*, 50 Tex. 88, "involved a sale, by a trustee, in a deed of trust on the homestead of the husband and wife, made after the husband had died, and the wife had qualified as the survivor of the com-

munity estate, and when the estate of the husband was insolvent. All the rights of the parties vested, and the proceedings were had while the probate law of 1870 was in force. It would be difficult to make a distinction respecting the question before us, based only on a difference between the kind of administration there in question and that of an independent executor; and, if we should accept as the decision of the court all that is said in the opinion, it would go far towards sustaining the contention of defendant in error. But to properly understand that decision we must read it in connection with such others as *Blair & Co. v. Thorp*, 33 Tex. 38; *Reeves v. Petty*, 44 Tex. 249; *McLane v. Paschal*, 47 Tex. 365; *Abney v. Pope*, 52 Tex. 288, 293, and *Armstrong v. Moore*, 59 Tex. 646. These cases establish the doctrine that, while a mortgage or deed of trust with power of sale given by the husband and wife on the homestead, under the laws in existence prior to the adoption of the present constitution, was valid and enforceable by the exercise of the power during the life of the husband, yet the right to the homestead, given by the law to the wife after the husband's death, and when his estate was insolvent, was superior to the lien of the creditor. The power of sale in those cases was important only because it was the only means through which a lien on the homestead could ever have been enforced. The point was that it could not be enforced against the widow's homestead right after the death of the husband; and this would have been true even if there had been no administration, as her right was not dependent on administration." *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815, 818.

"This explains the following significant and unusual statement with which Judge Bonner begins his opinion in *Black v. Rockmore*: 'This case decides

that the sale of a community homestead of an insolvent estate, after the death of the husband, and after the surviving wife had filed the bond, inventory, and appraisal required by the probate act of August 15th, 1870 (Pasch. Dig., arts. 5494-5497), made under a deed of trust, with power of sale, previously executed by the husband and wife, did not vest title in the purchaser over the homestead right of the wife.' That is precisely what that case decided, and all that it decided." *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815, 818.

Where Property Conveyed by Mortgagor to Third Persons.—A power of sale in a deed of trust is not revoked by the death of the mortgagor after his conveyance of the property to a third person. *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815. See, also, *Phillips v. Walkin's Land Mortg. Co.*, 90 Tex. 155, 38 S. W. 270, 470; *Buchanan v. Monroe*, 22 Tex. 537, affirming 38 S. W. 270; *Whitmire v. May*, 96 Tex. 317, 72 S. W. 375, affirming 69 S. W. 100.

The death of an assignee of the equity of redemption or purchaser of the mortgaged property takes away the right to enforce the mortgage by executing a power of sale therein, and compels the mortgagee to resort to the probate court for foreclosure. *Buchanan v. Monroe*, 22 Tex. 537; *Whitmire v. May*, 96 Tex. 317, 72 S. W. 375, affirming 69 S. W. 100; *Texas Loan Agency v. Dingee*, 33 Tex. Civ. App. 118, 120, 75 S. W. 866, affirmed in 97 Tex. 649, no op.; *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815, 818.

The doctrine that a power of sale can not be exercised after the death of the assignee of the equity of redemption, is a rule of property which it is too late to disturb. *Whitmire v. May*, 96 Tex. 317, 72 S. W. 375, affirming 69 S. W. 100, questioning the correctness of the decision in *Buchanan v. Monroe*, 22 Tex. 537.

bb. Injunction.

Petition.—General allegation that administrator at public sale represented that estate had good title to property is insufficient to enjoin sale of land under trust deed to satisfy purchase money notes. *Walker v. Burks*, 48 Tex. 206, 208.

In suit to restrain sale under trust deed to satisfy note, where petition describes note and defendant prays judgment on note it is unnecessary to plead the note in the answer. *Walker v. Burks*, 48 Tex. 206, 209.

Allegation of Capacity.—In a suit to enjoin a sale under a trust deed brought by an executor, a petition which alleges that plaintiff is the qualified independent executor of the will of decedent, that the will has been duly probated in the probate court of a designated county, and that independent administration by the executor has been continuously and is still open and pending, and that there has been no distribution of the estate, sufficiently shows the executor's authority to prosecute the suit, without alleging the condition of the estate, the time of his qualification, the terms of the will, what act he is performing, and sufficiently shows why the heirs do not prosecute. (Civ. App.), *Taylor v. Williams*, 105 S. W. 837, judgment reversed, 101 Tex. 388, 108 S. W. 815.

(c) Actions.**aa. Jurisdiction.**

Mortgage Allowed and Approved.—After a mortgage or deed of trust has been allowed and approved by the administrator and chief justice, it must be enforced in the county court. *Robertson v. Paul*, 16 Tex. 472; *Cunningham v. Taylor*, 20 Tex. 126, 129; *Conkrite v. Hart & Co.*, 10 Tex. 140, 141; *Graham v. Vining*, 1 Tex. 639; *Martin v. Harrison*, 2 Tex. 456.

Under Rev. St. art. 2067, which provides that "any creditor of a deceased person holding a claim secured by a mortgage, * * * which claim has

been allowed and approved, * * * may obtain from the county court * * * an order for the sale of the property upon which he has such mortgage," where an administrator has allowed a claim, but rejected in part the lien of the mortgage securing it, he can only enforce his lien in the county court, and no jurisdiction for that purpose is conferred on the district court by article 2028, which provides that "when a claim for money against an estate has been rejected by an * * * administrator in whole or in part the owner may bring suit to establish it in any court having jurisdiction." *Western Mortg. & Inv. Co. v. Jackman*, 77 Tex. 622, 14 S. W. 305.

Notes and equitable mortgages of one deceased, approved by the county court (of probate jurisdiction), can only be enforced by the process of that court. *Cunningham v. Taylor*, 20 Tex. 126. See, also, *Gaham v. Vining*, 1 Tex. 639; *Graham v. Vining*, 2 Tex. 433; *Robertson v. Paul*, 16 Tex. 472.

Assignee of notes secured by mortgage on property of estate may enforce lien in county court unless good ground for bringing suit in district court is shown. *Cannon v. McDaniel*, 46 Tex. 303, 310.

Claim Rejected.—Where a claim on a mortgage or deed of trust is rejected, the mortgagee may sue in the district court to establish the same. *Cunningham v. Taylor*, 20 Tex. 126, 129; *Robertson v. Paul*, 16 Tex. 472; *Fortson v. Caldwell*, 17 Tex. 627; *McCormick v. McNeel*, 53 Tex. 15, 23; *Meyers v. Evans*, 68 Tex. 466, 5 S. W. 66; *Danzey v. Swinney*, 7 Tex. 617, 626.

In suit against an administratrix to establish a rejected claim secured by trust deed, the defendant can put in issue both the debt and the lien, and the district court could determine both issues, regardless of whether plaintiff prayed for judgment fixing the lien. *George v. Ryon*, 94 Tex. 317, 321, 60 S. W. 427.

In foreclosure of joint mortgage where the mortgagor is dead, the interest of survivor can only be attacked in the district court, while the deceased's interest must be reached through probate court. *Martin v. Harrison*, 2 Tex. 456, 459.

A note secured by mortgage was presented to the administrator of the maker for allowance, but was rejected. Action was thereupon brought in the district court to establish the debt and lien. Held that, the mortgage being incident to the debt, the district court had jurisdiction to establish the lien, and to determine the conflicting claims arising thereunder. *Albright v. Allday* (Civ. App.), 37 S. W. 646; *Jenkins v. Cain* (Sup.), 12 S. W. 1114, 1115.

Mortgaged Property Afterward Sold.—Where a mortgagor conveys his interest in the mortgaged land before his death, the probate court has no power to foreclose the mortgage after his death. *Hanrick v. Gurley* (Civ. App.), 48 S. W. 994, modified in 54 S. W. 347, 93 Tex. 458, and 56 S. W. 330, 93 Tex. 458.

Where a person executed a mortgage on real estate which he afterwards sold, neither the district nor county court has jurisdiction to order a sale thereof in a suit against his administrator to foreclose the mortgage, his estate having neither the legal nor equitable title thereto. *Bradford v. Knowles*, 86 Tex. 505, 25 S. W. 1117.

bb. Parties.

Where a suit was brought to establish a note as a claim against the estate of the maker, the note having been secured by a trust deed on land, and duly verified as a claim against the estate, it was not necessary to make the heirs parties, even though plaintiffs had sought to establish their lien. *George v. Ryon* (Civ. App.), 61 S. W. 138.

Under Rev. St. art. 1202, providing that, "in every suit against the estate of a decedent involving title to real estate, the executor and the heirs shall

be made parties," and article 1943, that any person having a claim against the estate may enforce payment against the executor, a mortgage creditor may sue the executor for foreclosure, without making the heirs parties. *Howard v. Johnson*, 69 Tex. 655, 7 S. W. 522.

Where his entire interest in the mortgaged premises passed from the mortgagor prior to his death, his administrator is not a proper party to the action for foreclosure, if no personal judgment is sought thereby. *Puckett v. Reed*, 3 Tex. Civ. App. 350, 22 S. W. 515.

Trustee in Deed of Trust.—In a suit to establish a rejected claim against a decedent's estate, and to determine the validity of a trust deed given to secure it, the trustee is not a necessary party. *Ryon v. George*, 75 S. W. 48, 32 Tex. Civ. App. 504.

Administrator and Cognantor in Trust Deed or Mortgage.—Where a trust deed was given to secure payment of notes executed by one of the grantors, his administrators, after his death, were properly joined as parties defendant for the purpose of establishing plaintiffs' claims on the notes in an action thereon against the other grantors, wherein the enforcement of the trust-deed lien was also sought. *Planters' & Mechanics' Nat. Bank v. Robertson* (Civ. App.), 86 S. W. 643.

It is not proper to join representatives of deceased joint mortgagor with survivor in foreclosure proceedings. *Martin v. Harrison*, 2 Tex. 456, 459.

Notice by Publication to Nonresident Heirs.—Where nonresident heirs of a deceased mortgagor were not necessary parties to a suit to foreclose against the mortgagor's administrator, it was no objection to a foreclosure decree that such heirs were attempted to be made parties by publication of citation without any statutory authority therefor. *Flack v. Bremen*, 45 Tex. Civ. App. 473, 101 S. W. 537, affirmed in 102 Tex. 582, no op.

cc. Decree.**(aa) Form and Requisites.****aaa. In General.**

Proper Parties.—Decree of sale of mortgaged property of deceased, when judgment not had against heirs or personal representatives, is improper. *Graham v. Vining*, 2 Tex. 433, 447.

bbb. Certification to County Court.

The judgment of the district court should merely establish the mortgage, remitting the creditor to the county court for satisfaction of his claim. *Cunningham v. Taylor*, 20 Tex. 126, 129; *McCormick v. McNeel*, 53 Tex. 15, 23; *Robertson v. Paul*, 16 Tex. 472; *Bogges v. Lilly*, 18 Tex. 200; *Cannon v. McDaniel*, 46 Tex. 303, 316.

A judgment of a district court establishing a mortgage should be certified to the county court and the mortgaged property sold by the administrator under proper order from that court. *Meyers v. Evans*, 68 Tex. 466, 5 S. W. 66.

A decree of the district court, ordering the sheriff to make sale of mortgaged property of an estate in process of settlement, is irregular. After the court has established the mortgage, the creditor should be remitted to the county court for satisfaction of his claim in due course of administration. *McCormick v. McNeel*, 53 Tex. 15.

In an action to foreclose a chattel mortgage, and for judgment against the mortgagors, where one of the mortgagors has died during the suit, and his administratrix has been made a party, the judgment against the administratrix, both as to the debt and lien, ought to be certified to the county court for observance in the administration of the decedent's estate. *Watson v. Blymer Mfg. Co.*, 66 Tex. 558, 2 S. W. 353.

In giving judgment against two mortgagors, the estate of one of whom was then in probate, all property named in the mortgage was ordered to be sold. Held, unless it appeared that the mortgage was a partnership transac-

tion and covered partnership property, only the interest of the mortgagor living should have been ordered sold, and the judgment should have been certified to the county court for observance. *Watson v. Blymer Mfg. Co.*, 66 Tex. 558, 2 S. W. 353.

B purchased land from C, from whom he received a deed, and to whom he gave three notes, with D and E as sureties for the purchase money, and executed a mortgage to secure the same; afterwards C assigned to X two of the notes only, and, in conjunction with his wife, guaranteed their payment; X held the notes so assigned for the use of Y, and, as his trustee, had the same allowed, after B's death, by his administrator and approved by the county court; afterwards X, for the use of Y, recovered a judgment against D and E, the sureties, and C and his wife, as guarantors, having alleged the insolvency of B's estate. In entering the judgment, the clerk failed to show that it was for the use of Y. X failed to collect the judgment. In a suit afterwards brought by Y to correct the judgment, so as to show his interest, and as subrogated to the rights of C and wife, to recover judgment against B's administrator foreclosing the mortgage, held that the case, as stated, presents equities which the county court had no power to adjudicate. That the judgment in the suit by Y, to correct the judgment procured by X, should have been for the principal and interest due on the notes, subjecting the land to sale for its satisfaction, with an order directing its execution by the administrator in the administration of the estate. *Cannon v. McDaniel*, 46 Tex. 303.

Decree of foreclosure in suit against survivor of two joint mortgagors should only direct sale of the interest of the party sued. *Martin v. Harrison*, 2 Tex. 456, 459.

Judgment Rendered on Appeal.—Where defendant died, pending appeal

from judgment enjoining sale of the land to satisfy note secured by a deed of trust, held that on case being reversed, and judgment given for plaintiff, the land would not be ordered sold owing to defendant's decease, but the claim would be ordered certified to probate court. *Boggess v. Lilly*, 18 Tex. 200, 205, following *Robertson v. Paul*, 16 Tex. 472.

Mortgage Held as Collateral for Debt of Payee—Foreclosure against Administrator of Payee.—Where holder of mortgage as collateral for debt of payee forecloses the same against the administrator of the payee the court can order the proceeds of the sale found to be due paid over to the creditor without requiring him to establish his claim in the administration. *Williams v. Lumpkin*, 74 Tex. 601, 604, 12 S. W. 488; *Huyler v. Dahoney*, 48 Tex. 234, 235.

The holder of a note and mortgage as collateral for debt of payee, can maintain action thereon against the administrator of the payee, and the decree may require the holder to retain proceeds of sale under the mortgage in trust, subject to establishment of his claim. *Williams v. Lumpkin*, 74 Tex. 601, 604, 12 S. W. 488.

(bb) Operation and Effect.

A foreclosure decree against the mortgagor's administrator was sufficient to bind the property of the estate against which the foreclosure was had. *Flack v. Bremen*, 45 Tex. Civ. App. 473, 101 S. W. 537, affirmed in 102 Tex. 582, no op.

Persons Concluded.—A grantee of a mortgagor is not bound by probate proceedings, to which he is not a party, instituted after the mortgagor's death, to foreclose the mortgage, in order to pay the mortgage debt from the proceeds. (Civ. App.), *Hanrick v. Gurley*, 48 S. W. 994, modified 54 S. W. 347, 93 Tex. 458; *Id.*, 55 S. W. 119, 56 S. W. 330, 93 Tex. 458.

Judgment against defendant foreclos-

ing mortgage is not binding on his widow, heir or administrator who were not made parties. *Beer v. Thomas*, 13 Tex. Civ. App. 30, 35, 34 S. W. 1010, affirmed in 93 Tex. 679, no op., citing *Thompson v. Cragg*, 24 Tex. 582; *Caruth v. Grigsby*, 57 Tex. 259; *Downing v. Diaz*, 80 Tex. 436, 438, 16 S. W. 49.

Collateral Attack.—Where a petition to foreclose a mortgage prayed that the mortgagor's administrator be cited to appear and answer, and that notice be given according to law to the other defendants, it would be presumed as against a collateral attack on the foreclosure decree that the administrator was properly served as prayed, though the decree contained no recitals of service. *Flack v. Bremen*, 45 Tex. Civ. App. 473, 101 S. W. 537, affirmed in 102 Tex. 582, no op.

(cc) Enforcement.

aaa. In General.

Hart. Dig. art. 1168, provides that any creditor of the estate of a deceased person, holding a claim secured by a mortgage which has been allowed, may obtain, at a regular term of the court, from the chief justice of the county where the letters were granted, an order for the sale of the property upon which he has such mortgage, by making his application in writing, etc. Held, that said article applied to the proceedings of the county court, and did not affect article 772, which provides that, where judgment is recovered in the district court in a suit against an estate to enforce a specific lien on personal property, the sheriff shall seize and sell the property subject to such lien, if it can be found. *Givens' Adm'r v. Davenport*, 8 Tex. 451.

bbb. Certification to County Court and Proceedings Thereon.

Where a judgment of the district court is rendered against an administrator foreclosing a mortgage on land

given by his intestate, the judgment should be certified to the county court and the estate sold by the administrator under a proper order from that court. *Meyers v. Evans*, 68 Tex. 496, 5 S. W. 66; *Emmons v. Williams*, 28 Tex. 776, 779; *Conkrite v. Hart & Co.*, 10 Tex. 140; *Cunningham v. Taylor*, 20 Tex. 126, 129, overruling *Danzev v. Swinney*, 7 Tex. 617, 626; *Fortson v. Caldwell*, 17 Tex. 627, 629; *McMiller v. Butler*, 20 Tex. 402, 406. See, also, *Boggess v. Lilly*, 18 Tex. 200, 205, and *Chandler v. Burdett*, 20 Tex. 42, 45. See, also, *Buchanan v. Monroe*, 22 Tex. 537, 543; *Heath v. Garrett*, 46 Tex. 23, 25; *Patterson v. Allen*, 50 Tex. 23, 25; *Ansley v. Baker*, 14 Tex. 607; *McCormick v. McNeel*, 53 Tex. 15, 23; *Robertson v. Paul*, 16 Tex. 472, 476; *Cannon v. McDaniel*, 46 Tex. 303, 316.

Rev. St. art. 2029, which provides that no execution shall be issued in a suit to establish a claim against a decedent, but that a certified copy of the judgment shall be filed in the county court, with the same effect as if it had been an allowed claim against the estate, includes a decree of foreclosure against mortgaged property of decedent, since any process under which property may be sold is an execution, within the meaning of said act. *Smithwick v. Kelly*, 79 Tex. 564, 15 S. W. 486.

ccc. Foreclosure Decree.

Under Probate Act 1840 (Sayles' Early Laws, art. 736) a foreclosure decree against an administrator of an estate in process of administration could not be enforced by execution issued out of the district court but only through the probate court. *Flack v. Braman*, 45 Tex. Civ. App. 473, 101 S. W. 537.

Under probate act of March 20, 1848, district court had no power to order foreclosure sale to satisfy mortgage of estate of decedent, but must certify its judgment to county court for observance. *Bradford v. Knowles*, 86

Tex. 505, 508, 25 S. W. 1117; *Meyers v. Evans*, 68 Tex. 466, 5 S. W. 66.

"It was proper for the district court to give judgment establishing the lien. But instead of awarding execution, the judgment should have been ordered to be certified to the probate court to be settled in the due course of administration; and the order of sale would be there obtained under the provision of the law to which we have reference. Such was the judgment of this court in case of *Robertson v. Paul*, 16 Tex. 472, and it is believed to be the better practice." *Fortson v. Caldwell*, 17 Tex. 627, 629.

Rights of Purchaser.—A purchaser at a sale made under a judgment of the district court rendered against an administrator, foreclosing a mortgage on land, given by his intestate, acquires no title when the sale is made by the sheriff under order of the district court requiring the land to be sold under execution. *Meyers v. Evans*, 68 Tex. 466, 5 S. W. 66.

A purchaser at a sale in proceedings illegally instituted in the probate court, to foreclose a mortgage executed by a deceased mortgagor, who had conveyed all his interest in the mortgaged land in his lifetime, is an equitable assignee of the mortgage. (Civ. App.) *Hanrick v. Gurley*, 48 S. W. 994, modified 54 S. W. 347, 93 Tex. 458; *Id.*, 55 S. W. 119, 56 S. W. 330, 93 Tex. 458.

Estoppel to Dispute Title of Purchaser.—Where an administrator holding a purchase-money mortgage procured a foreclosure decree against the mortgagor's administrator, and then improperly secured a sale of the land by the sheriff in satisfaction of such decree, instead of compelling payment through the probate court having charge of the mortgagor's estate, such administrator was estopped to thereafter claim that the proceedings were ineffectual to pass title to the purchaser at the sale. *Flack v. Bremen*, 45 Tex. Civ. App. 473, 101 S. W. 537, affirmed in

102 Tex. 582, no op., citing *Thompson v. Robinson*, 93 Tex. 165, 54 S. W. 243.

Vacating and Setting Aside—Refunding Purchase Price.—Though, under Rev. St. art. 2029, which forbids the issue of execution in a suit to establish a claim against a decedent, a sale of mortgaged property belonging to decedent can not be had under a decree of foreclosure, where such sale has been made, the land sold can not be recovered by the heirs of the decedent without refunding the purchase price. *Smithwick v. Kelly*, 79 Tex. 564, 15 S. W. 486.

(2) Vendor's Lien.

(a) Conditions Precedent.

Where a vendor's lien is retained in a trust deed and the purchase-money notes, and the vendee dies insolvent, an action to recover the property may be maintained on default in payment of interest, without first filing a claim therefor against the vendee's estate. *Curran v. Texas Land & Mortgage Co.*, 60 S. W. 466, 24 Tex. Civ. App. 499.

A vendor's lien may be foreclosed, and the land sold, though a subsequent purchaser is dead; the judgment of foreclosure not being one which must be certified to the probate court, and be paid in due course of administration. *Ferguson v. McCrary*, 50 S. W. 472, 20 Tex. Civ. App. 529.

(b) Jurisdiction.

Where a claim on the vendor's lien note is allowed by the administrator of the deceased vendee, the remedy of the holder of the note, on rejection of the lien, is in the probate court, and not in the district court, as the latter has no jurisdiction over the management of an estate in administration. *Moore v. Glass*, 6 Tex. Civ. App. 368, 25 S. W. 128; *Western Mortg., etc., Co. v. Jackman*, 77 Tex. 622, 14 S. W. 305.

A complaint by the holder of a vendor's lien note alleged that a mortgagee, in collusion with the deceased vendee's widow, had applied to the probate

court for an order to sell the land, had made plaintiff a party, and had prayed that the mortgage lien take precedence over the vendor's lien, though knowing that the widow's allowance would consume the proceeds of sale of the land, and asked damages. Held that, as the facts alleged did not amount to fraud, the matters complained of were primarily cognizable only by the probate court. *Moore v. Glass*, 6 Tex. Civ. App. 368, 25 S. W. 128.

Under Hart. Dig. art. 1168, providing that a creditor of the estate of a deceased person, whose claim is a lien on any of decedent's property, may obtain an order for the sale of the property covered by the lien, the county court has jurisdiction of proceedings to enforce a vendor's lien, after the decease of the vendee, after the granting of letters of administration of his estate by the county court. *Wheeler v. Love*, 21 Tex. 583.

A deed under order of probate court to settle an unauthenticated judgment enforcing a vendor's lien passes no title, since the settlement of the claim is invalid. *Converse & Co. v. Sorley*, 39 Tex. 515.

Where the vendor who had given bond for title, presented to the administrator of the vendee and to the chief justice the notes given for the purchase money, duly authenticated, and they were allowed and proved, and then sued the administrator in the district court, making the heirs parties, and procured a judgment and order to sell the land, on petition of the administrator and heirs the sale was enjoined upon the ground that the proper remedy of the vendor was in the county court, and that the district court had no jurisdiction. *Cunningham v. Taylor*, 20 Tex. 126.

Where the vendor gives a bond for title, and takes notes for the purchase money, on the death of the vendee, the payment of the notes, as such, can be enforced only through the process of

the county court; as equitable mortgages, they are claims for money, within the meaning of the statute (Hart. Dig., art. 156); and on acceptance and approval, the mode of proceeding to enforce them in the county court is prescribed by statute. *Cunningham v. Taylor*, 20 Tex. 126.

Judgment against Decedent and Vendor's Lien.—Where the claim presented against an intestate's estate, and rejected by the administratrix, consists of a judgment against decedent, and a vendor's lien on real estate, the district court has jurisdiction of the action to establish the claim by reason of the lien claimed, though the amount of the claim is less than \$500. *Jenkins v. Cain* (Sup.), 12 S. W. 1114. See *George v. Ryon* (Civ. App.), 59 S. W. 825.

(c) Parties.

A suit to enforce a vendor's lien for the purchase money of land, where the vendee is dead, must be brought against his heirs and not against his administrator. *Jackson v. Hill*, 39 Tex. 493.

Where a suit is commenced to foreclose a vendor's lien against the heirs of the vendee, and administration of the vendee's estate is granted after the commencement of the action, the administrator must be made a party. *Willard v. Cleveland*, 38 S. W. 222, 14 Tex. Civ. App. 557; *Solomon v. Skinner*, 82 Tex. 345, 18 S. W. 698.

Where one of three owners of land covered by a vendor's lien died, and his heirs conveyed their interest in the land to the other two owners, in proceedings against the surviving owners to foreclose the liens instituted after all of the decedent's debts had been paid, the decedent's administrator was not a necessary party, though he had never been formally discharged. *Henry v. McNew*, 69 S. W. 213, 29 Tex. Civ. App. 288.

(d) Decree.

aa. Form and Requisites.

In an action to enforce a vendor's

lien against the estate of a decedent, a judgment rendered by the district court, establishing the lien, should be certified to the probate court, to be settled in the due course of administration. *Fortson's Adm'r v. Caldwell*, 17 Tex. 627.

Sayles' Ann. Civ. St. 1897, art. 2121, relative to estates of decedents, provides for a sale of real estate for the payment of debts, and declares that on the filing of an application a citation shall be issued to all persons interested, requiring them to appear and show cause, etc. Held, that a vendor's lien when established in the district court as against the estate of a decedent must be collected through the probate court, and a failure to pursue such remedy results in a loss of the debt. (Civ. App.) *Wall v. Club Land & Cattle Co.*, 88 S. W. 534, reversed *Club Land & Cattle Co. v. Wall* (Sup.), 92 S. W. 984.

Judgment of district court awarding execution on vendor's lien against estate through administrator and directing order of sale to issue to sheriff, held void. *Heath v. Garrett*, 46 Tex. 23, 25; *Cunningham v. Taylor*, 20 Tex. 126.

Vendor's Lien Enforced against Purchaser at Execution Sale.—St. Clair bought a tract of land at administrators' sale, and executed his note, with Dibrell and Erskine as sureties, and also executed a mortgage on the land, to secure the purchase money. St. Clair was unable to pay, and, by agreement among the parties, St. Clair deeded the land to his sureties, and the vendor released the mortgage, Dibrell paying half the purchase money, and Erskine executing his note for the remaining half. Suit was brought on Erskine's note, and against him and Dibrell, seeking to enforce the vendor's lien against Erskine's half interest in the land. Pending the suit, Dibrell bought at execution sale Erskine's half, and set up his purchase as against

the plaintiff. Before the decree, Erskine died, and his administrator was made a party. Held: 1. The vendor's lien was properly enforced as against Erskine's interest, and against Dibrell's claim under the execution sale. 2. That it was error to direct that the foreclosure sale be made by the administrator of Erskine. 3. The decree should have ordered the sale by the sheriff, and established the deficit as a claim against the estate. *Dibrell v. Smith*, 49 Tex. 474.

"Until the purchase money was paid, Erskine's interest in the land was in the nature of an equity of redemption. This interest however, was subject to sale under an execution. All his title and interest in the land was consequently divested out of him by the sheriff's sale, and passed to and vested in Dibrell. Hence there was at the time of his (Erskine's) death no title or estate in the land remaining in him which could descend to his heirs, or vest in his estate for purposes of administration. The court, therefore, erred in decreeing a sale of the land for the satisfaction of the vendor's lien by Erskine's administrator. The judgment should have ordered its sale by the sheriff of the county in which it is situated (Pas. Dig., art. 1480), with direction to apply the proceeds to the payment of the judgment, and if there should be an overplus to pay the same to appellant; but should the amount realized from the sale prove to be insufficient to discharge the judgment, then that the remainder should be certified to the county court, to be paid by the estate of Erskine in due course of administration." *Dibrell v. Smith*, 49 Tex. 474, 480.

bb. Enforcement.

Sale.—The sale to be made in proceedings against an administrator to enforce the vendor's lien should properly be made by the administrator or executor. *Converse v. Sorley*, 39 Tex. 515.

(3) Express Lien on Rents.

Express lien on rents may be enforced on the rents after the death of the party creating such lien. *Mabry v. Harrison*, 44 Tex. 286.

(4) Execution Lien.

It would seem that the levy of an execution on land in a county other than that in which the judgment is rendered, during the lifetime of the defendant in execution, creates a lien which, if not lost by laches, will be enforced in the probate court, under the act of 1848, after the defendant's decease. *McMiller v. Butler*, 20 Tex. 402; *Green v. Rugely*, 23 Tex. 539.

(5) Judgment Lien.

(a) In General.

Where defendant dies before satisfaction of judgment, it must be enforced through probate court, and not by means of an execution sale. *Taylor v. Snow*, 47 Tex. 462, 466; *McMiller v. Butler*, 20 Tex. 402, 404; *Martin v. Harrison*, 2 Tex. 456, 458; *Taylor v. Williams*, 101 Tex. 388, 108 S. W. 815; *Fortson v. Caldwell*, 17 Tex. 627, 629; *Robert v. Paul*, 16 Tex. 472; *Emmons v. Williams*, 28 Tex. 776; *Conkrite v. Hart & Co.*, 10 Tex. 140; *Paxton v. Meyers*, 67 Tex. 96, 2 S. W. 817; *Rogers v. Harrison*, 44 Tex. 169, 171; *Ansley v. Baker*, 14 Tex. 607, 612; *Lewis v. Nichols*, 38 Tex. 54, 60; *Goff v. Hauser*, 33 Tex. 430; *Ellis v. Mabry*, 25 Tex. Civ. App. 164, 60 S. W. 571.

The probate court has no jurisdiction over a purchaser from an intestate in proceeding to enforce a judgment lien. *Schmeltz v. Garey*, 49 Tex. 49.

Revival of Judgment.—Upon a defendant dying in a proceeding to revive a money judgment, the legal representatives are necessary parties, and the heirs are only proper parties in such suit where there is shown to be no administration nor need of one. *Schmidtke v. Miller*, 71 Tex. 103, 8 S. W. 638. See the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 41, et seq.

(b) Sale under Execution.**aa. Validity.**

An execution issued after the death of the judgment debtor, is void. *Northcraft v. Oliver*, 74 Tex. 162, 11 S. W. 1121; *Emmons v. Williams*, 28 Tex. 776; *Bynum v. Govan*, 9 Tex. Civ. App. 559, 29 S. W. 1119, affirmed in 93 Tex. 636, no op.; *Taylor v. Snow*, 47 Tex. 462, 466; *Conkrite v. Hart & Co.*, 10 Tex. 140; *McMiller v. Butler*, 20 Tex. 402.

A sale under an execution, issued and levied upon land after the death of the execution defendant, upon a judgment awarded against him in his life time, is not void but voidable. *Cain v. Woodward*, 74 Tex. 549, 12 S. W. 319.

"In the case of *Conkrite v. Hart & Co.*, 10 Tex. 140, it was held that a sale of land, made after the death of a defendant, under an execution issued before his death, was void, and that no title was acquired thereby. That decision was affirmed in *Robertson v. Paul*, 16 Tex. 472; *Bogges v. Lilly*, 18 Tex. 200; *Chandler v. Burdett*, 20 Tex. 42; *McMiller v. Butler*, 20 Tex. 402; *Emmons v. Williams*, 28 Tex. 776; *Cook v. Sparks*, 47 Tex. 28; *Meyers v. Evans*, 68 Tex. 466, 5 S. W. 66; *Schmidtke v. Miller*, 71 Tex. 103, 8 S. W. 638; *Northcraft v. Oliver*, 74 Tex. 162, 11 S. W. 1121; *Hooper v. Caruthers*, 78 Tex. 432, 15 S. W. 98." *Fleming v. Ball*, 25 Tex. Civ. App. 209, 60 S. W. 985, affirmed in 94 Tex. 704, no op. See to the same effect *Taylor v. Snow*, 47 Tex. 462, 467; *Bynum v. Govan*, 9 Tex. Civ. App. 559, 561, 29 S. W. 1119, affirmed in 93 Tex. 636, no op.

"The decision in *Conkrite v. Hart* was first questioned in *Webb v. Mallard*, 27 Tex. 80, where Justice Moore expressed a doubt as to its correctness. In *Taylor v. Snow*, 47 Tex. 462, the decision in *Conkrite v. Hart* is attacked and overruled, through a decision rendered by the same judge who wrote the opinion in *Webb v. Mallard*. In

Cain v. Woodward, 74 Tex. 549, 12 S. W. 319, it was held that *Taylor v. Snow* had overruled the previous decisions on the subject, and it was concluded that a sale of land made under an execution issued after the death of a sole defendant was merely voidable. The opinion was delivered by the commission of appeals, and adopted by the supreme court. It is interesting to note that in the same volume page 162, in the case of *Northcraft v. Oliver*, it is said by the supreme court: 'The evidence in this case shows that the execution under which defendants hold was issued after A. T. Oliver's death, and for that reason was void.' The last decision on the subject is found in *Hooper v. Caruthers*, 78 Tex. 432, 15 S. W. 98, where, after reviewing the Texas authorities; it is said: 'Giving technical effect to a judgment, the case of *Taylor v. Snow* was probably correctly decided on its facts; but we are of the opinion that the law is correctly stated in the other cases referred to, and that a sale made under execution against a deceased person after his death, he being alive at the time judgment was rendered, is void in the sense that it is wholly inoperative to pass title to or against any one, and therefore may be attacked directly and collaterally.'" *Fleming v. Ball*, 25 Tex. Civ. App. 209, 60 S. W. 985, affirmed in 94 Tex. 704, no op.

"The case of *Conkrite v. Hart & Co.*, 10 Tex. 140, is too meagerly stated by the reporter to justify any very positive conclusion as to the sense in which 'the ambiguous word void' was used, or intended to be understood by the court." *Taylor v. Snow*, 47 Tex. 462, 467.

In *Webb v. Mallard*, 27 Tex. 80, 83, speaking of the cases of *Conkrite v. Hart & Co.*, 10 Tex. 140; *Robertson v. Paul*, 16 Tex. 472; *Bogges v. Lilly*, 18 Tex. 200, it is said: "All of these cases, however, except that of *Conkrite v. Hart & Co.*, can be well maintained

without holding that the execution, if issued after the defendant's death, is an absolute nullity."

Under Prob. Law 1848, land levied on before the decease of the owner can not be sold afterwards, except by order from the county court having probate jurisdiction. *Chandler v. Burdett*, 20 Tex. 42; *McMiller v. Butler*, 20 Tex. 402.

In *Chandler v. Burdett*, 20 Tex. 42, "the levy was before the death of the defendant, and application for a writ of venditioni exponas after his death was refused by the district court, and the judgment was affirmed by this court." *McMiller v. Butler*, 20 Tex. 402, 406. See, also, *Taylor v. Snow*, 47 Tex. 462, 467.

At common law, an execution which had issued prior to the death of the defendant might have been enforced by levy and sale after his death. This proceeded on the theory and fiction that an execution when issued, was a perfect thing, with certain functions; and, being complete in itself, could not be superseded by the death of plaintiff or defendant, or both, must be performed according to its mandate. *Bennett v. Gamble*, 1 Tex. 124, 133; *McMiller v. Butler*, 20 Tex. 402, 404. See, also, *Webb v. Mallard*, 27 Tex. 80. But see *Bynum v. Govan*, 9 Tex. 559, 29 S. W. 1119, affirmed in 93 Tex. 636, no op.

Authority of Clerk to Issue.—Clerk can not issue execution on judgment after judgment debtor's death, although alive when judgment was rendered. *Govan v. Bynum*, 17 Tex. Civ. App. 180, 181, 43 S. W. 319.

The statutes of Texas do not authorize the issuance of an execution upon a judgment for money, after the death of the defendant, against the independent executor of his will and the property of his estate in possession of the executor. *Bynum v. Govan*, 9 Tex. Civ. App. 599, 561, 29 S. W. 1119 affirmed in 93 Tex. 636, no op.

Production of judgment revived against defendant's executors is insufficient to authorize issuance of execution against property of defendant's estate in hands of said executors, unless it be further shown that this was authorized by judgment of revivor, or that executors were, by defendant's will, empowered to administer independent of control of probate court. *Hart v. McDade*, 61 Tex. 208, 212; *Kendrick v. Rice*, 16 Tex. 254, 260.

Necessity for Reviving Judgment.—

The writ of venditioni exponas having been issued after the death of the judgment debtor, and the property having been bought under it by the judgment creditor, the judgment not having been revived against the executrix, there was no error in setting aside the writ and return of sale, nor is this conclusion affected by the fact that the executrix was administering the estate without control of the probate court. *Cook v. Sparks*, 47 Tex. 28.

bb. Vacating and Setting Aside Sale.

A sale of property under execution, after the death of the defendant, is only relatively void. The title acquired by such sale can not be maintained against the administrator or parties acquiring title under and through the administration. *Taylor v. Snow*, 47 Tex. 462.

Such sale may be avoided by any party having an interest in the property, if he should seek to do so in the proper time and manner. *Taylor v. Snow*, 47 Tex. 462.

If it be admitted that the validity of an execution issued after the death of the judgment debtor can be questioned in a trial of the right of property, it is error to confine the inquiry of the jury to the issue of the validity of the execution by virtue of which the property was levied upon. In such a case the issue of the right of property should also be submitted. *Webb v. Mallard*, 27 Tex. 80.

A sale of land, under execution,

made after the death of the defendant in execution, will be set aside at the suit of the legal representative of the defendant in execution, commenced nearly five years after the sale, the plaintiff offering to restore the price with interest. *McMiller v. Butler*, 20 Tex. 402.

The land of one against whom judgment had been rendered, was levied on in 1865, and sold under a writ of venditioni exponas, in 1874, which issued about nine years after the return of execution on which the original levy was made; but the judgment debtor died in 1868, and his widow was administering on his estate, independent of the control of the probate court, under a will probated before and at the time the writ issued; the judgment creditor became the purchaser at the sheriff's sale. On a motion made by the widow to set aside the writ of venditioni exponas, and levy and sale of the land thereunder, after the return of the writ: Held, that though a motion to set aside the writ may not be entertained after his return, for a defect merely formal, yet on a motion to set aside a levy and sale, the execution, and the circumstances under which it was issued, and the judgment on which it was based, as well as extraneous facts affecting their validity, could be inquired into by the court. The writ and the return of sale were voidable as between the parties to the motion. From a judgment rendered on a motion to set aside a writ of venditioni exponas and levy and sale of the land thereunder, an appeal will be allowed as on other final judgments. *Cook v. Sparks*, 47 Tex. 28.

cc. Collateral Attack.

A sale of property under execution, after the death of the defendant, is only relatively void. It can not be set aside where there has not been and can not be an administration upon the estate, in a collateral proceeding, upon

grounds going to the validity of the judgment, rather than of the execution. *Taylor v. Snow*, 47 Tex. 462; *Webb v. Mallard*, 27 Tex. 80.

The fact that the defendant died before the rendition of the judgment under which the execution sale was made, is a matter attacking the judgment; and in a collateral proceeding, when interposed to defeat an action of trespass to try title for land sold on such execution, will not defeat the action. *Taylor v. Snow*, 47 Tex. 462.

Old. & W. Dig., art. 541, provides that, where a sole defendant dies after judgment, plaintiff may establish his claim against the estate by presenting to the administrator a certified copy of the judgment, and that, where one of several defendants dies, plaintiff may have execution against the survivor, and may proceed to establish his claim against the estate of the deceased in the mode prescribed by law. Held, that a sale may be attacked directly or collaterally when the judgment shows on its face that it was against one who was dead at the time of its rendition, or when it is shown that he died after the judgment was rendered. *Hooper v. Caruthers*, 78 Tex. 432, 15 S. W. 98.

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20. Actions against Heirs or Distributees.

a. Nature and Form of Action.

A proceeding against the heir to subject inherited assets to the payment of a debt is a proceeding in personam, and specific land inherited can not be ordered sold to satisfy a judgment rendered in such suit. *Mayes v. Jones*, 62 Tex. 365; *State v. Lewellyn*, 25 Tex. 797; *Yancy v. Batte*, 48 Tex. 46, 59; *Montgomery v. Culton*, 18 Tex. 736, 749; *Holman v. Criswell*, 15 Tex. 394, 399; *Ansley v. Baker*, 14 Tex. 607; *Webster v. Willis*, 56 Tex. 468, 472; *Turman v. Robertson*, 3 App. Civ. Cases, §§ 215, 217.

A proceeding against the heir to subject assets inherited to the payment of a debt due from the ancestor is a proceeding in personam, and, to the extent of the property inherited, the heir is liable. *Turman v. Robertson*, 3 Willson, Civ. Cas. Ct. App. § 217.

Heirs, devisees, or legatees, who receive property belonging to an estate against which unpaid claims exist, do not thereby become personally liable to the claimants for the value of property so received, the remedy being to enforce a lien against the property in their hands. *Blinn v. McDonald*, 92 Tex. 604, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931, reversing 38 S. W. 384; *Mayes v. Jones*, 62 Tex. 365, and *Kauffman v. Wooters*, 79 Tex. 205, 13 S. W. 549, overruled; *Webster v. Willis*, 56 Tex. 468; *McC Campbell v. Henderson*, 50 Tex. 601; *Low v. Felton*, 84 Tex. 378, 19 S. W. 693, distinguished.

Suit on Judgment.—Under Sayles' Civ. St., art. 2332, providing that, on the death of a sole defendant after judgment, execution shall not issue thereon, but the judgment may be proved and paid in course of administration, holders of the judgment, after the sole defendant's death, should sue the heirs for their debt or to revive

the judgment, where the time in which administration could be had has elapsed. *Fleming v. Ball*, 60 S. W. 985, 25 Tex. Civ. App. 209; *McC Campbell v. Henderson*, 50 Tex. 601, 610; *Low v. Felton*, 84 Tex. 378, 19 S. W. 693.

b. Condition Precedent.

Heirs can not be charged with damages for ancestor's breach of contract without proof that estate is not in process of administration, and that heirs received assets. *Taylor v. Rowland*, 26 Tex. 293, 295. See *Webster v. Willis*, 56 Tex. 468; *Bush v. Kellogg Co.* (Civ. App.), 34 S. W. 1056, 1057.

A debt due from decedent can not be recovered of the heirs, who have taken possession of decedent's property, unless it is shown that administration can not be had upon decedent's estate. *Turman v. Robertson*, 3 Willson, Civ. Cas. Ct. App. § 216; *Webster v. Willis*, 56 Tex. 468.

Party suing heirs for claim against estate must show lapse of period for administration without administration, or close of administration. *Webster v. Willis*, 56 Tex. 468, 474.

Presentation to Guardian of Minor Heir.—It is not always necessary that a claim against a minor heir for liability for the debts of his ancestor be presented to the guardian of such ward for his allowance against the estate of the minor inherited from such ancestor. *Low v. Felton*, 84 Tex. 378, 19 S. W. 693.

c. Limitations.

See, generally, the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

Two Years from Receipt of Property.—In an action against a defendant to subject property received by him to the debts of an estate from which it was received, or to make him liable from having received it, limitation will run from the time the property was received until the filing of

the petition. An amendment containing substantially the same cause of action will have no effect upon the statute. It will be estopped by the filing of the original petition, and right of action would be barred in two years after the property was received, subject to the statutory exceptions. *Kauffman v. Wooters*, 79 Tex. 205, 13 S. W. 549.

Where Claim Allowed and Approved—Ten Years.—Where an executor, after a partial administration, is discharged, and without order of the court transfers the estate to the heir, taking an obligation from the latter to save him harmless from all claims, a creditor whose claim has been allowed and approved may recover of the heir at any time within ten years from the date of the approval of his claim, that being the period of limitation on a judgment. *Montgomery v. Culton*, 18 Tex. 736; *Blinn v. McDonald* (Civ. App.), 38 S. W. 384, reversed on another point in 92 Tex. 604.

Judgment Establishing Claims Runs Only from Close of Administration.—Since a mortgage subsists so long as the debt is not barred, and such debt is merged in a judgment establishing it as a claim against the estate of the debtor, and against such judgment no limitation runs so long as the administration remains open, limitation as to its enforcement against the heirs after close of the administration will run only from the date when it was closed. *Hanrick v. Gurley*, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330, affirming in part and reversing in part 48 S. W. 994.

Period for Personal Judgment Not Applicable to Lien.—The limitations against an action by a decedent's creditor for a personal judgment against a distributee for the value of property received by the distributee do not apply to an action brought after distribution to foreclose a lien on decedent's land. *Devine v. United States*

Mortg. Co. (Civ. App.), 48 S. W. 585.
d. Jurisdiction.

Where there were no other debts of deceased's estate, and hence no necessity for administration, a court had jurisdiction to foreclose a mortgage against her heirs, though her will had been established in probate court, and the time allowed for the issuance of letters of administration had not elapsed. *Floyd v. Watkins*, 79 S. W. 612, 34 Tex. Civ. App. 3.

Where administration can not be had because of lapse of four years from decedent's death, creditor may sue heirs in district court. *Patterson v. Allen*, 50 Tex. 23, 25; *State v. Lewellyn*, 25 Tex. 797; *Willis & Bro. v. Smith*, 65 Tex. 656.

Suit was brought upon a vendor's lien note to enforce the lien. Pending suit the defendant died and his widow and children were made parties. By amended petition it was alleged that there was no administration nor need of one, and that the estate was insolvent. Prayer was for foreclosure only. Held, that the district court had jurisdiction, and that the probate law interposed no obstacles. *Solomon v. Skinner*, 82 Tex. 345, 18 S. W. 698.

e. Process.

Unknown heirs, when so sued, may be cited by publication. *Webster v. Willis*, 56 Tex. 468. See *McCampbell v. Henderson*, 50 Tex. 601, 611.

f. Parties.

Failure to Make Administrator Party.—Suit against widow and children (some minors represented by their guardian) upon a judgment against the husband before his death.

The widow and children received assets from which liability existed. Pending suit the widow died intestate. The heirs of her husband and of herself were the same. After her death plaintiffs amended, stating these facts, and that there was no administration upon her estate. It was not alleged that administration was unnecessary. Trial

was had a few months after her death. Held, upon objection that proper parties were not made, and allegations showing that administration was necessary, the suit could not proceed in absence of administration upon the estate of the widow. Judgment was erroneous without such parties. *Low v. Felton*, 84 Tex. 378, 19 S. W. 693.

Where One Heir Assumes Debts Others Not Necessary Parties.—Where there is an agreement of partition among several heirs or devisees, whereby one or more contract to hold the others harmless against all demands against the estate, the latter are not necessary parties to a suit against the former on a claim against the estate. *Montgomery v. Culton*, 18 Tex. 736.

g. Pleading.

(1) Petition.

Averment That Ancestor Left Heirs.

—In a suit instituted by publication under act November 9, 1866 (Pasch. Dig., art. 5460), against heirs whose names and residences are unknown, if recovery is sought on account of the liability of the ancestor, it is necessary that the petition allege that an estate descended, and that such ancestor left heirs or other representatives to inherit the property. *Love v. Henderson*, 42 Tex. 520.

Averment as to Descent of Property.

—A suit by a creditor to enforce the payment of a debt against the estate of a deceased person, upon which there has been no administration, can not be maintained against the heirs unless it be averred and proved that estate has descended to the heir against whom the suit was instituted. If the petition does not make such averment, it is insufficient, and a demurrer to it will be sustained. *State v. Lewellyn*, 25 Tex. 797; *Taylor v. Rowland*, 26 Tex. 293; *Love v. Henderson*, 42 Tex. 520.

Description of Property Received by Heir.—A petition by a creditor of an

estate to recover against heirs, etc., who have received property of decedent, should show what specific property came into the hands of each, the plaintiff's right being to enforce a lien thereon, and not to have a personal judgment. *Blinn v. McDonald*, 92 Tex. 604, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931, reversing 38 S. W. 384.

It is not necessary that property received by an heir and acquired by the widow from the community estate of herself and her deceased husband be particularly described in an action against the heirs and the widow of a judgment debtor to revive and enforce the judgment, where the object of the allegation is to give notice of the ground on which liability is sought to be fixed by the suit. *Low v. Felton*, 84 Tex. 378, 19 S. W. 693.

Averment of Amount of Estate Received by Each Heir.

—The petition in an action against the heirs of one who died owing plaintiff is not subject to general demurrer because it does not specifically allege the amount of the estate received by each heir, where it alleges that decedent's property exceeded his debts, and that his heirs took his property, and divided it among themselves, without any administration on his estate. *Byrd v. Ellis* (Civ. App.), 35 S. W. 1070.

Averment as to Absence of Administration.

—To charge heirs in damages for a breach of contract by their ancestor, the plaintiff should aver and prove that the estate of the ancestor is not in process of administration, and that assets had come into the hands of the heirs. *Taylor v. Rowland*, 26 Tex. 293.

Failure to Allege No Necessity for Administration.

—In an action on a judgment against an ancestor who died pending litigation, an amended petition suggested the death, and alleged that there was no administration on the estate, but did not allege that administration was unnecessary. Held that,

where the answer of the heirs showed the necessity for administration, an exception to the amended petition should have been sustained. *Low v. Felton*, 84 Tex. 378, 19 S. W. 693.

Prayer for Personal Judgment Not Demurrable Where Petition Otherwise Sufficient.—In action against the heirs of a deceased debtor, where the petition alleges that plaintiff's debt is the only claim against the estate; that the land in possession of the heirs is the only property of the estate subject to debts; that no administration has been had, and none is necessary; and prays that such land be subjected to plaintiff's claim,—the fact that the petition further prays for a personal judgment against the heirs (a relief to which plaintiff is not entitled) is no ground for general demurrer. *Frost v. Smith's Heirs* (Civ. App.), 24 S. W. 40, citing *Patterson v. Allen*, 50 Tex. 23; *Buchanan v. Thompson*, 4 Tex. Civ. App. 236, 23 S. W. 328.

Sufficiency of Amended Petition.—An amendment setting up against the heirs a cause of action consisting of the conversion by them of the property belonging to the estate which was subject to execution might be admissible. But this case, by the allegations of the amended petition, was not brought within any of the exceptions to the general rule that a creditor must proceed against the administrator of the estate, and not against the heirs, for the collection of his debt. *Tucker v. Bryan*, 1 App. Civ. Cases, § 1157.

Sufficiency of Petition to Set Aside Judgment against Heirs.—There are certain cases in which suit may be maintained against the heirs of a deceased person to recover on a debt of decedent, and an action by the heirs of such decedent to set aside a judgment against the unknown heirs of such decedent to foreclose a lien on the land on the ground that the probate court had exclusive jurisdiction of the administration of the estate.

was subject to demurrer since it failed to show that the proceeding sought to be set aside did not come within one of such recognized exceptions. *Heidenheimer v. Loring*, 6 Tex. Civ. App. 560, 26 S. W. 99.

(2) Answer.

Averments That Plaintiff Sole Creditor Put in Issue by General Denial.—Where a creditor brings an action under a statute permitting actions to be brought for the debts of the decedent against his heirs, where there is only a single creditor, an allegation of the plaintiff that he is the sole creditor of the estate is put in issue by a general denial. *Zwerner v. Rosenberg* (Sup.), 11 S. W. 150.

h. Evidence.

(1) Admissibility.

A deed of partition between an executor and the heirs of his testator is admissible to show a distribution of the estate. *Devine v. United States Mortg. Co.* (Civ. App.), 48 S. W. 585.

Evidence Held Admissible under Allegations.—In a suit by a creditor against heirs and legatees, after the administration is closed, to recover on a judgment against the administrator, which had been duly allowed as a claim, evidence that the claim was a debt incurred by deceased in his lifetime, and during the life of his first wife, is admissible, under an allegation that plaintiff recovered the judgment sued on against the administrator. (Civ. App.), *Blinn v. McDonald*, 38 S. W. 384, reversed 46 S. W. 787, 48 S. W. 571, 92 Tex. 604, rehearing denied 50 S. W. 931, 92 Tex. 604.

(2) Presumptions and Burden of Proof.

In suit to subject assets inherited to payment of debt due from ancestor, creditor must prove receipt of assets by heir. *Mayes v. Jones*, 62 Tex. 365, 367. See *State v. Lewellyn*, 25 Tex. 797.

Presumptions That Heirs Did Not Receive Estate before Close of Administration.—A petition to subject property in the hands of heirs and devisees to the payment of decedent's debts alleged the qualification of executors, their removal, and the appointment of an administrator. Held, that it would be presumed that defendants did not receive the estate until the close of the administration. Judgment (Civ. App.), 38 S. W. 384, reversed; *Blinn v. McDonald*, 46 S. W. 787, 48 S. W. 571, 92 Tex. 604, rehearing denied. 50 S. W. 931, 92 Tex. 604; *Yancy v. Batte*, 48 Tex. 46, 59.

That Division Made in Accordance with Statute.—In action against heirs by creditor of decedent whose estate has been divided among them without administration, presumption is that division was made in proportions named in the statute. *Byrd v. Ellis* (Civ. App.), 35 S. W. 1070, 1071.

That Judgment against Heirs without Administration Proper.—Though a judgment against heirs in the district court was obtained during the time allowed for taking out administration, and without it, the presumption, in favor of such judgment upon collateral attack, would be indulged that the court could entertain the suit because no other debts nor necessity for administration existed. *Floyd v. Watkins*, 34 Tex. Civ. App. 3, 79 S. W. 612, affirmed in 98 Tex. 616, no op.

i. Judgment and Execution.

Personal Judgment—Under Former Statute.—A judgment in a suit against heirs of an intestate should be in personam and not in rem and there is no specific lien on the debtor's property. *Webster v. Willis*, 56 Tex. 468. See, also, *Mayes v. Jones*, 62 Tex. 365, 366; *Moore & Son v. Moore*, 89 Tex. 29, 35, 33 S. W. 217, affirming 31 S. W. 532.

Creditor whose debt has remained unpaid after distribution, may sue heir and recover personal judgment, but lien can not be foreclosed upon prop-

erty. *Moore & Son v. Moore*, 89 Tex. 29, 33, 33 S. W. 217, affirming 31 S. W. 532.

Judgment in Rem—Present Rule.—Under Rev. St. 1895, art. 1869, providing that property received by heirs and devisees shall be liable in their hands to the payment of decedent's debts, a creditor can not have a personal judgment against such heirs and devisees. Judgment (Civ. App.), 38 S. W. 384, reversed. *Blinn v. McDonald*, 46 S. W. 787, 48 S. W. 571, 92 Tex. 604, rehearing denied, 50 S. W. 931, 92 Tex. 604; *Mayes v. Jones*, 62 Tex. 365, and *Kauffman v. Wooters*, 79 Tex. 205, 13 S. W. 549, overruled; *Webster v. Willis*, 56 Tex. 468; *McCampbell v. Henderson*, 50 Tex. 601; *Low v. Felton*, 84 Tex. 378, 19 S. W. 693, distinguished.

Act March 20, 1848, § 88, providing that the holder of a claim against an estate "shall have his action thereon against the heirs," etc., and that "they shall not be bound beyond the value of the property," etc., does not entitle a claimant to a personal judgment against the heirs who may lawfully take possession of the estate subject to the payment of debts. *Blinn v. McDonald*, 50 S. W. 931, 92 Tex. 604, denying rehearing 46 S. W. 787, 48 S. W. 571, 92 Tex. 604.

In Proportion to Shares Received Proper.—In an action by a creditor of decedent against his heirs, the petition alleging that the heirs took his property, and divided it among themselves, though not specifying the proportions; the evidence showing that the property was community property; there being no evidence that it was divided other than the law would divide it; and the court having charged how the law would divide it; and the jury having returned a general verdict for plaintiff,—a several judgment against defendants, in proportion to the shares the law would give them, is warranted. *Byrd v. Ellis* (Civ. App.), 35 S. W.

1070; *Crosson v. Dwyer*, 9 Tex. Civ. App. 482, 30 S. W. 929, affirmed in 93 Tex. 703, no op.

Judgment against each heir, individually, for full amount of debt in action against heirs to recover debt due by their testator, is error. *Turman v. Robertson*, 3 App. Civ. Cases, §§ 215, 217; *Webster v. Willis*, 56 Tex. 468, 469.

Where Joint Judgment Proper.—In suit against heirs for estate, where one of defendants had taken possession of the entire estate and disposed of it by agreement with the others, a judgment against the defendants jointly was proper. *Peters v. Hood*, 2 App. Civ. Cases, §§ 376, 378.

Judgment against Heirs Erroneous in Suit against Decedent.—In action against firm of B. & M. pending which B. died, and his heirs were made parties, where the heirs were in possession of community property of B. and wife and no administration had been taken out on B.'s estate, judgment against the heirs was erroneous. *Bush v. Chas. P. Kellogg Co. (Civ. App.)*, 34 S. W. 1056, 1057.

Amount of Judgment.—A judgment against an heir, upon an indebtedness due from his ancestor, should be limited, by unequivocal and well-defined expressions in its recitals, to the extent of the assets inherited by him from his ancestor. *Ker v. Paschal*, 1 Posey Unrep. Cas. 692.

Judgment to Be Satisfied from Assets Subject to Execution.—In a suit against the heirs of a deceased surety on an official bond who merely demurs to the petition, which alleges assets and no administration, judgment may be rendered against the heirs to be satisfied from assets subject to execution. *Finch v. State*, 71 Tex. 52, 58, 9 S. W. 85.

Execution.—Where a person is in possession as devisee under the will the execution would not run against the specific property received by her, but

against her personally for the value of the property so received, not including property exempt from execution at his death. *Johns v. Hardin*, 81 Tex. 37, 42, 16 S. W. 623; *Mayes v. Jones*, 62 Tex. 365.

j. Appeal.

The objection that a recovery on a claim against a decedent's estate could be had only by virtue of an administration is not available when raised for the first time on appeal from a judgment against the heirs. *Stelle v. Shannon*, 62 Tex. 198.

21. Specific Performance of Ancestor's Contracts to Buy or Sell Land.

See the titles COURTS, vol. 5, p. 161; SPECIFIC PERFORMANCE.

22. Costs and Attorney's Fees.

Where certain notes, filed as a claim against intestate's estate, provided for 10 per cent of principal and interest unpaid as an attorney's fee, if the notes were placed in the hands of an attorney for collection, and the notes, with the deed of trust securing them, having been twice presented to the maker's administrator, were rejected in toto, the holders, having previously placed them in the hands of an attorney for collection, were entitled to recover 10 per cent for attorney's fees, without proving affirmatively that they had agreed to pay such amount for attorney's fees, or that such sum was reasonable. *Dashiell v. W. L. Moody & Co.*, 44 Tex. Civ. App. 87, 97 S. W. 843.

VIII. Actions.

A. IN GENERAL.

Our probate laws were intended to form a complete system and as such, to afford a mode of proceeding applicable to all cases. *Ansley v. Baker*, 14 Tex. 607, 612.

The ordinance of January 22d, 1836, (Hart. Dig. Art. 983), introduced the Louisiana law, merely as the law of procedure in the settlement of succes-

sions; it did not furnish the rule of decision or practice in suits between the estate and third parties in the district court. *Kegans v. Allcorn*, 9 Tex. 25.

B. RIGHT OF ACTION.

1. In General.

Probate laws, as they existed in Texas up to 1870, have been uniformly construed as conferring upon administrator right to bring and defend all suits concerning property of estate. *Lawson v. Kelley*, 82 Tex. 457, 462, 17 S. W. 717.

2. Actions by Executor or Administrator.

An administrator can only bring such suits as his intestate could have brought. *Wilson v. Demander*, 71 Tex. 603, 606, 9 S. W. 678; *Avery v. Avery*, 12 Tex. 54; *Connell v. Chandler*, 13 Tex. 5; *Seawell v. Lowery*, 16 Tex. 47, 50; *Hunt v. Butterworth*, 21 Tex. 133, 141; *Hoeser v. Kraeka*, 29 Tex. 450.

"By the laws of this forum, the administrator does not sue in his own right, but as an agent." *Portis v. Cole*, 11 Tex. 157, 159.

Article 1882, Rev. Stat., authorizing executors and administrators to prosecute actions, does not apply to any matter which does not pertain properly and strictly to the estate of decedent. *H. & T. C. R. Co. v. Hook*, 60 Tex. 403, 407.

Upon a contract made with an administrator as such, he may sue in his own name, or as administrator at his election. Thus an administrator may sue in his own name on note payable to him, "as administrator." *Claiborne v. Yoeman*, 15 Tex. 44; *Gayle v. Ennis*, 1 Tex. 184, 187; *Butler v. Robertson*, 11 Tex. 142; *Groce v. Herndon*, 2 Tex. 410; *Llano Improv., etc., Co. v. Cross*, 5 Tex. Civ. App. 175, 24 S. W. 77.

An administrator obtained a note of third persons, before its maturity, in payment of a note secured by a vend-

or's lien on land, payable to his intestate, which he surrendered. Held that, although he may not have been authorized to accept the note in payment, he paid a consideration for it, and it is immaterial whether he sues such third persons on the note in his character as administrator or otherwise. *Brainerd v. Bute* (Civ. App.), 44 S. W. 575. See the title *BILLS, NOTES AND CHECKS*, vol. 2, p. 1041.

Objections to Capacity to Sue.—See post, "Waiver of Objections," VIII, J, 4.

3. Actions against Executor or Administrator.

In order to bind the estate of a deceased person by judgment, the representative thereof must be sued in his representative capacity. *Lewis v. Nichols*, 38 Tex. 54; *Lewis v. Nichols*, 37 Tex. 54; *Woodson v. Same*, Id. See, also, *Moore v. Guest*, 8 Tex. 117, 119.

A suit against a defendant, in his individual capacity, can not in any way affect the rights of those interested in an estate of which such defendant may, at the time be administrator. *De Witt v. Miller's Adm'r*, 9 Tex. 239.

Where the pleadings show that a suit is brought against an executrix in her representative capacity as a surviving wife, it is immaterial that she was sued as executrix. *Woodley v. Adams*, 55 Tex. 526.

Injury Resulting from Act of Representative.—In a suit between an administrator and another party, it seems that the administrator can not be made liable in his individual capacity for injury resulting from his unauthorized act as administrator. *Edmonson v. Garnett*, 33 Tex. 250; *Johnson v. Brown*, 25 Tex. Supp. 120.

C. JURISDICTION AND VENUE.

1. Jurisdiction.

Probate court is appropriate tribunal for adjusting differences, between

coadministrators, on subject of administration. *Swenson v. Walker*, 3 Tex. 93, 96.

Suits against executor must be brought in court having jurisdiction of probate proceedings, notwithstanding executor is exempted by will from control of court. *Bondies v. Buford*, 58 Tex. 266, 269; *Neill v. Owen*, 3 Tex. 145; *Richardson v. Wells*, 3 Tex. 223.

Nature of Jurisdiction of Probate Court—District Court.—"The right of a party interested in an estate to bring suit against the administrator in the district court has been several times recognized by this court. (See *Wilson v. Chevallier*, 1 Tex. 161, and *Dobbin v. Bryan*, 5 Tex. 276.)" *Hagerty v. Scott*, 10 Tex. 525, 530. But see *Cannon v. McDaniel*, 46 Tex. 303. See the title COURTS, vol. 5, p. 268, et seq.

"There are cases, however, in which the jurisdiction of the district court has been maintained in suits relating to estates of deceased persons, on account of some legal or equitable right of the party, for the adjudication of which the powers of the county court were inadequate. Where a creditor sought to reclaim for an estate a large amount of property, alleged to have been fraudulently conveyed by the intestate before his death, it was decided that the suit was properly brought in the district court, and the administrator was properly made a party to the suit to receive the property, and have it adjudged to him in the event of a recovery. (*Hall v. Cormick*, 7 Tex. 269, 279.)" *Cannon v. McDaniel*, 46 Tex. 303, 310.

2. Venue.

Under 1 Laws, p. 364, § 1, requiring all actions against administrators to be brought in the county where the estate is administered, all actions must be brought in such county, notwithstanding the fact that the subject of controversy arose in another county. *Neill v. Owen*, 3 Tex. 145; *Finch v. Edmonson*, 9 Tex. 504, 510.

A suit against an executor or administrator must be brought in the county in which the estate is administered; and this rule can only be departed from, if at all, in those extreme cases where it may become necessary to prevent an absconding administrator from abducting the property of the estate. *Richardson v. Wells*, 3 Tex. 223.

A suit against an independent executor, as such, to restrain waste and remove him from the trust, was brought in the county of his residence, while the will under which he derived his authority as executor was probated in a different county, in which also an estate was still being administered from which the decedent obtained the property devised. Held, that a plea to the jurisdiction was properly sustained. *Bondies v. Buford*, 58 Tex. 266.

Effect of Statute Requiring Bond of Independent Executor.—A right of action against an independent executrix is not confined to the county court of the county where administration is had, by Rev. St., arts. 1997, 1998, 2010, providing for an order by the county court requiring an executor to give bond, and to deliver a legacy or bequest, since such provisions are not exclusive. *Morton v. Morris* (Civ. App.), 56 S. W. 559.

D. PARTIES.

1. In General.

Where defendant dies, ordinarily the representative brought in is the executor or administrator, but in a proper case the heirs are treated as the representatives, though the facts must be stated which entitled plaintiff to bring them in. *Wadsworth v. Cardwell*, 14 Tex. Civ. App. 359, 37 S. W. 367.

Heirs need not be parties to suit against administrator. *Holt v. Clemmons*, 3 Tex. 423, 428.

Minor children are proper parties plaintiff to suit by husband and wife

against administrator of wife's mother's estate. *Guy v. Metcalf*, 83 Tex. 37, 39, 18 S. W. 419.

Joinder of Husband Where Wife Administratrix.—A married woman, appointed administratrix, can not sue in her representative capacity without being joined by her husband. *Mitchell v. Wright*, 4 Tex. 283.

So held under act of 1848. *Mitchell v. Wright*, 4 Tex. 283, 287.

In an action for specific performance, not upon a bond for title or other written obligation for a conveyance of the land upon a verbal sale, followed by improvements, heirs need not be made parties defendant with the administrator. *Lawson v. Kelley*, 82 Tex. 457, 17 S. W. 717.

Intervention in Action on Joint Note.—Where one of several makers of a note dies, the representative of such deceased maker has the right to appear as a party defendant for the purpose of contesting the validity of the note. *Womack v. Shelton*, 31 Tex. 592. See the title INTERVENTION.

Declaring Interest before Intervention.—When anyone seeks to become party contestant, executor or administrator may require him to declare his interest before he can be compelled to enter into any litigation with him. *Davenport v. Hervey*, 30 Tex. 308, 327.

2. Action to Try Title.

Rev. St., art. 1202, provides "that in every suit against the estate of a decedent, involving the title to real estate, the executor or administrator, if any, and the heirs shall be made parties defendant." The plaintiff company brought suit to quiet the title to certain land. Held, that the heirs were necessary parties to the suit. *Russell v. Texas & P. Ry. Co.*, 68 Tex. 646, 5 S. W. 686.

Article 1202, Rev. Stat., providing that executor or administrator and heirs shall be made parties in every suit against an estate involving title to real property, applies to suits in which

title is in controversy and not to such as merely seek to enforce liens. *Howard v. Johnson*, 69 Tex. 655, 659, 7 S. W. 522.

The heirs are not necessary parties to an action to cancel a tax deed by the executor and sole devisee, in which defendant files a plea in reconvention in the nature of a cross action of trespass to try title; Rev. St., art. 1202, providing that in suits against a decedent's estate, involving title to realty, the administrator and heirs shall be made parties defendant. *Lufkin v. City of Galveston*, 73 Tex. 340, 11 S. W. 340.

An executor under an independent will is not a necessary party to a suit, in a controversy involving title between the heir and one who had discharged a judgment lien on the land; the judgment having been rendered against the executor, as such, and a defective sheriff's deed executed to the purchaser; the object of the suit being to subrogate the purchaser who had discharged the lien to the lien of the original judgment. *Jones v. Smith*, 55 Tex. 383.

When Administrator De Bonis Non Proper Party Plaintiff.—Thus in a suit of trespass to try title, brought by a widow and sole heir of deceased, an administrator de bonis non is a proper party plaintiff with widow, where it appears that property in dispute has never been turned over to her. *Casidy v. Kluge*, 73 Tex. 154, 160, 161, 12 S. W. 13.

E. PROCESS.

See, generally, the title SUMMONS AND PROCESS.

Where a defendant is sued as executor of the estate of a deceased person, and also in his individual capacity, he need not be served with more than one copy of the citation. *Owsley v. Paris Exch. Bank*, 1 Posey Unrep. Cas. 93.

If a suit is filed by mistake or otherwise in the name of a decedent, and

his administrator is permitted to carry on the suit as administrator, it would be necessary that new process should be served on the defendant in the name of the proper party. *Finlay v. Merri-man*, 39 Tex. 56, 60.

F. APPEARANCE.

The voluntary appearance of the legal representative of one of the makers of a note sued on was a waiver of, and dispensed with the necessity of, a citation. *Womack v. Shelton*, 31 Tex. 592.

G. TIME TO SUE AND LIMITATIONS.

See the title **LIMITATION OF ACTIONS AND ADVERSE POSSESSION.**

Until partition takes place, any just debt may be enforced against the administrator, even though his application for final settlement be on file. *Bledsoe v. Beiler*, 66 Tex. 437, 1 S. W. 164.

Suit can not be maintained against executor or administrator as such after expiration of period of administration. *Fisk v. Norvel*, 9 Tex. 13, 17.

Administrator can not sustain action in representative capacity, after expiration of year from his appointment under Louisiana law, unless administration is continued. *Boyle v. Forbes*, 9 Tex. 35, 40.

Retention of Bequest by Executor.—In the absence of fraud on the part of an executor, the simple fact that a legatee was ignorant of the bequest will not impede the operation of the statute of limitations in favor of the executor. *Tinnen v. Mebane*, 10 Tex. 246.

Where an executor retains property bequeathed to another by his testator in his own possession under claim of ownership after the beneficiary arrives at full age and the estate has been settled, his claim becomes adverse, and the statute of limitations will run against an action for its re-

covery. *Tinnen v. Mebane*, 10 Tex. 246.

H. JOINDER OF CAUSES OF ACTION.

See the title **ACTIONS**, vol. 1, pp. 134, 145.

It is not competent for an administrator de bonis non, nor even for parties "interested in the estate," to combine in one suit an action against the former administrator, to set aside an order obtained by him, with an action against a third party to recover land conveyed under such order. *McDonald v. Alford*, 32 Tex. 35.

That a proceeding for specific performance of written contract for sale of land made by deceased (Pas. Dig. 1313), and one for partition at suit of a holder of a joint interest with the estate (Pas. Dig. 1367), are joined, is no objection to the action of the court upon each. *Guilford v. Love*, 49 Tex. 715.

I. CROSS ACTION AND COUNTERCLAIM.

In an action by an administratrix, as such, a cross action can not be maintained against her individually, though she is administering on her deceased husband's estate. Judgment (Civ. App.), 50 S. W. 1058, reversed. *Gresham v. Harcourt*, 53 S. W. 1019, 93 Tex. 149.

A lien in favor of a debt against which limitation has run can not be asserted as a counterclaim against property belonging to an estate in course of administration, in an action by the administrator to secure an accounting of partnership property, as liens of this character are, under the probate law, made subordinate to other claims, and it is peculiarly within the jurisdiction of that court to classify them and determine the order of payment. Judgment (Civ. App.), 50 S. W. 1058, reversed. *Gresham v. Harcourt*, 53 S. W. 1019, 93 Tex. 149.

J. PLEADING.**1. Petition.****a. In General.**

Setting Forth Interest.—The party claiming the right to litigate should state his interest before the administrator is required to answer him. *Davenport v. Hervey*, 30 Tex. 308, 309.

Showing Necessity for Administration after Great Lapse of Time.—There may be cases in which, even after a great lapse of time, administration, at least a limited one, may be deemed expedient; and it seems that the administrator, in such a case, when suing in the district court, must set out the facts and prove them, which justified the issue of letters of administration in the particular case. *Blair v. Cisneros*, 10 Tex. 34.

Failure to Attach Copy of Proceedings to Be Revised.—Where a petition by heirs seeks to revise proceedings in the administration of the estate, it is subject to demurrer, unless a copy of the proceedings complained of is attached thereto. *Ward's Heirs v. Ward*, 1 Posey, Unrep. Cas. 234; *H. & G. N. R. Co. v. Winter*, 50 Tex. 597; *Frisby v. Withers*, 61 Tex. 134.

b. Averments as to Capacity.

Executor or administrator must aver facts showing his authority when suing as such. *Beal v. Batte*, 31 Tex. 371, 372.

Administrator seeking to reverse judgment in suit to which he is not party, must allege his appointment and that property would be assets in his hands, if recovered. *Thomas v. Jones*, 10 Tex. 52, 54.

Averment as to Reappointment.—By the law of Louisiana, introduced into Texas in 1836, the powers of an administrator continued but one year, unless renewed; and a similar law was afterwards passed by the Texas legislature. Therefore, where an administrator, 13 years after his appointment, sued to recover land of the intestate, and neither proved nor alleged that

his appointment had, been renewed the court held that he was incompetent to sue, and dismissed the action. *Boyle v. Forbes*, 9 Tex. 35.

Averments Held to Show Right in Individual Capacity.—An allegation that A. B., administrator of C. D., is the owner of a promissory note payable to bearer, will be construed as an allegation that A. B. personally is the owner of such note. *Rider v. Duval*, 28 Tex. 622; *Gayle v. Ennis*, 1 Tex. 184; *Lipscomb v. Ward*, 2 Tex. 277; *Groce v. Herndon*, 2 Tex. 410; *Butler v. Robertson*, 11 Tex. 142; *Claiborne v. Yoeman*, 15 Tex. 44; *Hall v. Pearman*, 20 Tex. 168.

The affix of guardian or administrator to the plaintiff's name is mere personal description, and inconsistencies in such description in the record are immaterial, because the whole may be stricken out as surplusage. *Morrison v. Hodges*, 25 Tex. Supp. 176.

A petition declaring on a judgment of another state in favor of a decedent, which alleges that plaintiff was appointed and qualified as temporary administrator of the estate of said decedent, and was afterwards appointed administrator, but contains no allegation that he qualified as such, or that he brings the action in such capacity, is insufficient to support a judgment in his favor as administrator. *Wilson v. Hall*, 13 Tex. Civ. App. 487, 36 S. W. 327; *Roundtree v. Stone*, 81 Tex. 299, 16 S. W. 1035; *Rider v. Duval*, 28 Tex. 622; *Cochrane v. Day*, 27 Tex. 385; *Thomas v. Jones*, 10 Tex. 52; *Beal v. Batte*, 31 Tex. 371; *Guest v. Phillips*, 34 Tex. 176.

There is no error in overruling an exception to a petition which describes the plaintiff as administrator of a deceased resident of another state, and sets out as the cause of action a judgment recovered in that capacity in such other state. The words "as administrator" may be treated as surplusage, as it is immaterial in what

capacity the plaintiff recovered judgment. *Nelson v. Bagby*, 25 Tex. Supp. 305.

Words "executors and trustees under the last will and testament," etc., as used in petition in suit to try title, must be deemed as merely descriptive personae, and do not indicate the capacity in which plaintiffs sue. The plaintiffs were asserting title in themselves and not one of which they were the mere representatives. *Roundtree v. Stone*, 81 Tex. 299, 16 S. W. 1035; *Rider v. Duval*, 28 Tex. 622, 624; *Gayle v. Ennis*, 1 Tex. 134.

Where, in trespass to try title, plaintiffs alleged that they were executors under a will, and that they were lawfully seised and possessed of the land until a certain date, when they were ejected, and prays judgment for title and possession, etc., the allegation that they were executors should be treated as merely descriptive of the persons, and the petition construed as asserting a right to recover in their individual capacity. *Hayden v. Kirby*, 72 S. W. 198, 31 Tex. Civ. App. 441.

Sufficient Allegation of Representative Capacity.—A petition entitled "A., independent executrix of E.," is not the petition of A. in her individual right, when it again mentions A. as a distinct party suing in her own right, and thus makes evident an intention to proceed in both capacities. *McKee v. Ellis* (Civ. App.), 83 S. W. 880.

Instance of complaint held to charge sufficiently administrator in his official capacity. *Richardson v. Wells*, 3 Tex. 223, 229. See, also, *Craighead v. Bruff*, (Civ. App.), 55 S. W. 764.

That defendant is described in a complaint as the executor of the estate of deceased, instead of executor of the last will of deceased, is immaterial. *Craighead v. Bruff* (Civ. App.), 55 S. W. 764.

c. Amendment.

A petition, asserting title in the plaintiff, and seeking a recovery in his

right, was amended to assert title in an estate of which the plaintiff was administrator. Held, the amendment operated an abandonment of suit as first filed, and set up a cause of action in the estate. *Morales v. Fisk*, 66 Tex. 189, 18 S. W. 495.

Amendment Changing Character in Which Suit Brought.—See the title AMENDMENTS, vol. 1, p. 219.

Amendment Making Administrator Party Plaintiff.—A suit was brought in the name of B. after his death, but no service procured on the defendants. At a subsequent term B.'s administrator was made a party plaintiff, and filed an amended petition, after which defendants were cited to answer the petition of the administrator. Held, that a plea in abatement, alleging the death of B. at the time of bringing the suit, was properly overruled. *Finlay v. Merriman*, 39 Tex. 56.

d. Profert.

In an action by one for the use of another administrator of an estate, profert of the letters of administration can not be required and is not even proper. *Jones v. Nowland*, Dall. Dig. 451.

2. Plea or Answer.

a. Denial of Authority and Capacity to Sue.

(1) Necessity for and Sufficiency of Plea.

The right of one to sue as the administrator of a decedent must be questioned, if at all, by special plea in abatement. *Barton v. Davidson* (Civ. App.), 45 S. W. 400; *Spann v. Glass*, 35 Tex. 761, 762; *Fischer v. Giddings*, 43 Tex. Civ. App. 393, 95 S. W. 33, affirmed in 101 Tex. 635, no op.; *Callahan v. Hendrix*, 79 Tex. 494, 15 S. W. 593; *Dignowitty v. Coleman*, 77 Tex. 98, 13 S. W. 857; *Dolson v. De Ganahl*, 70 Tex. 620, 8 S. W. 321. See *Tobler v. Stubblefield*, 32 Tex. 188.

In a suit by an administrator the defendant may put in issue the plain-

tiff's right to sue in that capacity, and adduce in evidence the proceedings in the probate court to show his want of authority. *Cain v. Haas*, 18 Tex. 616.

Where an administrator is plaintiff, a general denial of all the allegations in the petition does not put in issue the character in which he sues. *Cheat-ham v. Riddle*, 12 Tex. 112; *Dignowitty v. Coleman*, 77 Tex. 98, 99, 13 S. W. 857; *Spann v. Glass*, 35 Tex. 761; *Tolbert v. McBride*, 75 Tex. 95, 12 S. W. 752, citing *Aulanier v. Governor*, 1 Tex. 653, 666, as having determined the principle. See to the same effect *Clifton v. Lilley*, 12 Tex. 130, 134; *Callahan v. Hendrix*, 79 Tex. 494, 15 S. W. 593.

Defendant having gone to trial without pleading specially that plaintiff was not an administrator when he sued in that capacity could not afterwards question his authority. *Dignowitty v. Coleman*, 77 Tex. 98, 13 S. W. 857; *Callahan v. Hendrix*, 79 Tex. 494, 15 S. W. 593; *Dolson v. DeGanahl*, 70 Tex. 620, 8 S. W. 321; *Cheatham v. Riddle*, 12 Tex. 112, citing *Aulanier v. Governor*, 1 Tex. 653, 666 as having determined the principle. See to the same effect *Clifton v. Lilley*, 12 Tex. 130.

Plaintiff was appointed temporary administrator to sue for the recovery of land belonging to the estate of a deceased person, under Rev. Stat., art. 1887. Under section 1880 such temporary appointment ceased to operate at the next regular term of the county court, unless an order was made at that time continuing the appointment. More than one term of the county court intervened between the appointment of plaintiff and the trial of the cause. Held, that defendant could not compel plaintiff to show his authority to prosecute the suit under a general denial or plea of not guilty, but only under a special plea denying plaintiff's authority. *Dignowitty v. Coleman*, 77 Tex. 98, 13 S. W. 857.

Answers alleging that administrator is not entitled to sue should state reasons. *Claiborne v. Yoeman*, 15 Tex. 44, 46.

Plea That Administrator Was Appointed without Notice.—It seems that a suit can not be sustained by an administrator except an administrator pro tem. appointed in conformity to the statute who has been appointed without notice, if the objection be properly taken by plea in abatement. *Cain v. Haas*, 18 Tex. 616.

Plea or Special Demurrer Objecting That Appointment Void.—An objection by the defendant, in a suit by an administrator de bonis non, that the plaintiff's appointment is void, the letters having been granted more than 14 years after the death of the intestate, should be taken by plea or special demurrer. *Cochran's Adm'rs v. Thompson*, 18 Tex. 652.

Answer of Previous Grant to Another and Determination Thereof.—It is no answer to a suit by one as administrator that administration was previously granted to another, and subsequently determined by operation of law, for the estate may not have been administered, and the administration may have been rightfully renewed and continued. *Claiborne v. Yoeman*, 15 Tex. 44.

Can Not Be Put in Question by Demurrer to Evidence.—Where a plaintiff sues in the character of an administrator, his right to sue in that capacity can not be called in question on a demurrer to his evidence or otherwise unless the answer of the defendant controvert and put in issue the character in which the plaintiff brings the suit. *Rider v. Duval*, 28 Tex. 622.

Plea Held a Sufficient Denial of Representative Capacity.—Where the petition showed that administration had been granted to the plaintiff in 1888, and there was no demurrer, but the defendant, by way of amendment of his answer, not under oath, denied

the representative character of the plaintiff, it was held that the plea was well pleaded. *Boyle v. Forbes*, 9 Tex. 35.

When Plea Immaterial—Action on Note.—In an action by an administrator on a note which describes the payee as administrator, a denial that plaintiff is administrator presents an immaterial issue and is bad, though it is in proper form. *Claiborne v. Yoe-man*, 15 Tex. 44.

A general denial by an administrator does not put in issue the character in which he is sued. In the absence of a specific plea denying his official character the plaintiff is not required to prove that defendant was administrator as alleged. *Tolbert v. McBride*, 75 Tex. 95, 98, 12 S. W. 752.

(2) Verification.

In order to put in issue the legal capacity of an administratrix to sue, defendant must, under Rev. St. 1895, art. 1265, cl. 2, deny such capacity under oath. *Young v. Meredith*, 85 S. W. 32, 38 Tex. Civ. App. 59.

(3) Time of Interposing.

See post, "Time within Which Answer Required," VIII, J, 2. c.

b. Plea of Not Guilty.

See post, "Necessity for and Sufficiency of Plea," VIII, J, 2. a. (1).

Facts which show that the plaintiff has no right to recover in the capacity in which he sues, as that of administrator, go to the foundation of the action, and may be given in evidence under the plea of not guilty, in the action of trespass to try title. *Blair v. Cisneros*, 10 Tex. 35. But see post, "Waiver of Objections," VIII, J, 4.

c. Plea in Abatement upon Removal of Administrator Pending Suit.

On the removal of an administrator, suing as administrator, pending the suit, the defendant must plea in abatement puis darrein, etc., or the judgment will bind him. *Hall v. Pearman*, 20 Tex. 168.

d. Time within Which Answer Required.

Privilege of Year within Which to Answer.—The right of executors to a year from their appointment within which to plead is in the nature of a personal privilege, and the entry of a judgment within the year does not render it void. *Ross v. Drouilhet*, 80 S. W. 241, 34 Tex. Civ. App. 327.

May Plead to Capacity after Craving Oyer.—Where the defendant craves oyer of the plaintiff's letters of administration in the first instance, it will be in time to plead to the capacity of the plaintiff as soon as the letters shall have been filed. *Lovering v. McKinney*, 7 Tex. 521.

Demurrer and Plea of Nonproft after Answer.—A plea of nonproft of letters of administration and demurrer interposed after a plea to the merits in an action on a note by one to the use of another administrator of an estate, should be disregarded as coming too late. *Jones v. Nowland*, Dall. Dig. 451. See the title DEMURRERS, vol. 6, p. 270.

3. Inconsistencies between Pleadings of Administrator and Heirs.

However inconsistent or repugnant to allegations in administrator's pleadings allegations in pleadings of heirs who have been made parties to suit by administrator may be, they will not annul allegations in administrator's pleadings. *Walton v. Talbot*, 1 Posey, 511, 514.

4. Waiver of Objections.

Failure to Make Intervener Declare His Interest.—If an administrator waive his right to make a party claiming the right to litigate to propound his interest in the matter in dispute, he can not be heard to object in the supreme court, for the first time, that his adversary had no interest in the estate. *Davenport v. Hervey*, 30 Tex. 308, 309.

Failure to Make Profert of Letters of Administration.—The fact that a

plaintiff who was administrator did not make proof of his letters of administration is such an error as must be objected to in the court below, or it can not be taken advantage of in the supreme court. *Holdeman v. Knight*, Dallam 566.

Failing to Show Continuance of Authority.—The civil law requires that all exceptions to the person of plaintiff, and tending to show that he had no right to sue in the character which he assumed, being dilatory exceptions, should be interposed before answer to the merits. An executor's petition showed that he had been appointed more than a year before, and did not show a continuance of his character by the proper tribunal. Defendant asked an instruction that, to "enable plaintiff to maintain this suit, it is indispensable that he show that he is now the executor." Held, that the objection, not having been taken in due time and in the proper manner, was waived. *Coles v. Perry*, 7 Tex. 109.

Failure to Plead Want of Capacity.—See post, "Necessity for and Sufficiency of Plea," VIII, J, 2, a, (1).

K. EVIDENCE.

1. Presumptions.

The presumption in favor of testimony arising from the failure of the opposite party to rebut it, does not obtain in case of an administrator, who may be ignorant of the facts necessary to enable him to make a full defense. *Chandler v. Meckling*, 22 Tex. 36.

2. Admissibility and Sufficiency.

a. In General.

More indulgence is extended to the representatives of deceased persons, in making proof of facts which rest in parol, than would be allowed to the persons, themselves, if living. *Gay v. McGuffin*, 9 Tex. 501.

Evidence to Show Discharge Pending Former Suit.—Where it appeared by bill of exceptions that the defendant read as a part of his claim of title

to the land in controversy, a judgment rendered in Gaudalope district court, wherein Frisbee, administrator of Bateman, deceased, as plaintiff, and the plaintiff and others were defendants, and an execution thereon under which the land was sold to Peyton Medlin; and that plaintiff then, by way of rebuttal, offered to read the deposition of F. Chenault, clerk of the county court of Gonzales county, and a certified copy of a decree of said court, to show that Frisbee had been discharged from the administration of the estate of Bateman, deceased, two months previous to the rendition of said judgment; which evidence, on objection of defendant, the court refused to receive, it was held there was no error, both because the plaintiff sued as "A, administrator of B." and the defendant failed to plead in abatement the discharge of the administrator since commencement of suit. *Hall v. Pearman*, 20 Tex. 168.

Clerk's Certificate That No Claims Filed.—In suit by administrator, ex parte certificate of clerk that no claims had been filed against estate was not admissible; he should testify as a witness. *Myers v. Jones*, 4 Tex. Civ. App. 330, 332, 23 S. W. 562.

b. Proof of Appointment and Authority.

Authority of an administrator may be proved not only by letters of administration, but by records of the court which appointed him. *Outler v. Elam*, 1 App. Civ. Cases, § 1003.

Where the record shows the appointment of an administrator, his annual reports, recognition of him by the court, his final settlement and discharge, and also a contest and compromise with him by the heirs in regard to the final report, his official status must be regarded as settled. *Halbert v. Carroll* (Civ. App.), 25 S. W. 1102; *Guilford v. Love*, 49 Tex. 715; *Alexander v. Maverick*, 18 Tex. 179, 197.

Under Pasch. Dig. art. 1286, prescribing the evidence necessary to make proof of the appointment and qualification of an executor and administrator, if, on the trial of an action, the authority of an executor or administrator be denied, he must produce his letters of administration, duly signed and sealed, or, if lost, then the certificate of the clerk that such letters have issued. *Werbiskie v. McManus*, 31 Tex. 116, explained in *Outler v. Elam*, 1 App. Civ. Cases, § 1003, in which it was said: "The case of *Werbiskie v. McManus*, 31 Tex. 116, was decided under the probate law of 1848, and the fact seems to have been overlooked that though letters may be sufficient evidence of administration granted, they are not made the only or exclusive evidence. That case, however, seems to have been decided chiefly on the ground of an assumed necessity of protecting the federal revenue by enforcing the prepayment of the stamp tax, without which letters could not be read in evidence."

An order appointing an administrator, and directing that letters issue to him accordingly, on his giving bond, is not sufficient evidence of his appointment without proof that the required bond had been given. *O'Neal v. Tisdale*, 12 Tex. 40.

When Proof Not Necessary.—Where character in which plaintiff sues is not put in issue by plea denying that he is executor, appointment need not be proved. *Callahan v. Hendrix*, 79 Tex. 494, 499, 15 S. W. 593; *Dolson v. De Ganahl*, 70 Tex. 620, 8 S. W. 321; *Dignowitty v. Coleman*, 77 Tex. 98, 13 S. W. 857.

Where, in an action on a note, plaintiff alleged that he was administrator de bonis non, and the note was payable to another person as administrator of the same estate, plaintiff need not prove that he was the administrator de bonis non, where there was no plea or answer

interposed denying his allegation to that effect. *Tobler v. Stubblefield*, 32 Tex. 188.

Under the general denial no proof of the representative character of an administrator, suing as such is required. *Cheatham v. Riddle*, 12 Tex. 112, citing *Aulanier v. Governor*, 1 Tex. 653, 666, as having determined the principle. See to the same effect *Clifton v. Lilley*, 12 Tex. 130, 134.

c. Proof as to Assets.

Creditor, heir, etc., of estate is inadmissible witness to increase fund out of which he may be benefited. *Johnson v. Alexander*, 14 Tex. 282, 385.

3. Effect of Admissions.

Estate is bound by administrator's admissions in pleading. *Carr v. Rowland*, 14 Tex. 275, 278. See, generally, the title DECLARATIONS AND ADMISSIONS, vol. 6, p. 1.

L. QUESTION OF LAW AND FACT.

The construction of the powers of an executor or administrator is for the court. *Altgelt v. Oliver Bros.* (Civ. App.), 86 S. W. 28.

M. JUDGMENT.

1. Capacity in Which Judgment Recovered.

Where R. sued on a note payable to D. or bearer, setting forth that he, R., was the holder, but describing himself as "administrator of the estate of L., deceased," the words were held to be *descriptio personæ* only, and in no way militating against his right to a judgment in his own name. *Rider v. Duval*, 28 Tex. 622; *Gayle v. Ennis*, 1 Tex. 184; *Lipscomb v. Ward*, 2 Tex. 277; *Groce v. Herndon*, 2 Tex. 410; *Butler v. Robertson*, 11 Tex. 142; *Claiborne v. Yoeman*, 15 Tex. 44.

2. Validity.

a. In General.

It is doubtful whether a judgment rendered against executors under act of 1848, where provisions of that act

have not been fully complied with, would be void. *Woodley v. Adams*, 55 Tex. 526, 532.

Where one of two joint defendants died pending suit, and the executors of the deceased defendant were made parties, it was proper for the court to render judgment against the defendants jointly, with an order that execution should issue against the surviving defendant, and that the executors should pay the judgment in due course of administration. *Bennett's Ex'rs v. Spillars*, 7 Tex. 600.

b. Judgment by Default and Decrees Pro Confesso.

Where, in an action against the executor of an insolvent estate, an exception was sustained to the answer, it was error to assume the facts alleged in the petition to be true for want of an answer, and to render judgment thereon without the introduction of evidence. *Hendrix v. Hendrix*, 46 Tex. 6.

Petition Insufficient to Support Judgment by Default.—A petition in a suit against an executor, instituted in one county, which alleges that defendant resided in another county, and which fails to allege that the estate was being administered in the former county, is insufficient to support a judgment by default against the executor. *Rogers v. Harrison*, 1 White & W. Civ. Cas. Ct. App. § 494.

3. Construction.

If a suit is instituted and progresses against the defendant as administrator, and the judgment is against "said defendant," it is a judgment *de bonis testatoris*. *Clapp v. Walters*, 2 Tex. 130.

Where suit was brought against an administrator, to establish a claim against the estate, and judgment went, by consent, against the administrator, for costs unnecessarily incurred by him upon which execution was ordered; the judgment was construed to be against the administrator in his repre-

sentative capacity. *Davis v. Thomas*, 5 Tex. 389. See post, "Costs," VIII, P.

Judgment recovered by "A. B., administrator," is presumed to be recovered in his own right, and not by him as administrator; it not appearing that he could not have recovered in his own right. *Hall v. Pearman*, 20 Tex. 168.

4. Operation and Effect.

a. As Merger of Cause of Action.

A proceeding in the probate court of another state against an administratrix to obtain necessary orders for settling the estate, and the issuance of such orders in administration proceedings, under which execution or *ieri facias* would issue against her in case of her failure to comply, would not merge a prior cause of action in favor of her resident creditor into such judgment, since such orders would not be deemed a judgment merging the creditor's right of action for damages. *Drane v. Gunymere*, 2 Posey Unrep. Cas. 496.

b. Conclusiveness.

(1) In General.

Where an issue has been fairly made and determined in probate court, it is not indefinitely open to re-examination at every succeeding term until the closing of the administration. *Hartwell v. Jackson*, 7 Tex. 576, 580.

Errors and irregularities in a judgment rendered in a temporary administration can not be corrected in the permanent administration, as they are distinct proceedings, and a judgment in one can not be collaterally attacked in the other. *Ball v. Ball's Estate* (Civ. App.), 45 S. W. 605.

A decree which, although not regular, is not an absolute nullity, will protect an administrator acting thereunder. *Johnson v. Wilcox*, 53 Tex. 413, 421.

As Evidence.—Where, in a suit to recover a tract of land which the defendant claimed to have purchased at a sheriff's sale and as part of his claim of title, set up a judgment recovered by

F. as administrator of B. against the plaintiff, it was proper to exclude as evidence the deposition of the county clerk of court that F. had been discharged as administrator of B. two months prior to the rendition of the judgment. *Hall v. Pearman*, 20 Tex. 168.

Effect of Failure to Appeal.—Where an administrator has neither objected to nor appealed from a final judgment against him in favor of certain minor heirs, he can not, at a subsequent term of court, be heard to say that he should not pay the judgment. *Harmon v. Bynum*, 40 Tex. 324.

Collateral Attack.—The validity of a judgment, rendered in a court of general jurisdiction, against one named in a will as executrix and sole legatee, after the failure of the executrix to file an inventory of the estate, which judgment recites that she is executrix, and directs the issuance of execution against the executor to sell the property of the estate to satisfy the judgment, however erroneous it may have been, had an appeal been prosecuted, is not a nullity, and can not be attacked in a collateral proceeding. *Wilis & Bro. v. Ferguson*, 46 Tex. 496.

(2) Persons Bound.

Suit by holder of title under heirs; defense, a decree in a suit in district court rendered in 1868, the administrator being party; the heirs were not parties. Held, that the decree against the administrator divested title from the heirs. *Lawson v. Kelley*, 82 Tex. 457, 17 S. W. 717.

Rev. Stat. 1895, art. 2255, provides for the review of a probate order by the district court by appeal at the instance of any person who may consider himself aggrieved thereby, and article 332 authorizes such review by certiorari at the instance of any person interested in the estate. Held, that, where the administrator of a decedent's estate unsuccessfully prosecuted an appeal from an order setting

aside a homestead to the widow, the judgment on such appeal was conclusive on decedent's minor heirs, who were distributees of the estate in course of administration, though they were not represented by guardian, and precluded the administrator from subsequently maintaining certiorari as guardian of such minors to review the same order. *Pearce v. Leitch*, 43 Tex. Civ. App. 398, 96 S. W. 1094, affirmed in 101 Tex. 652, no op.

Persons who are distributees of an estate are parties to the administration, and are bound by the orders of the probate court in the administration. *Cooper v. Loughlin*, 75 Tex. 524, 13 S. W. 37.

Creditors.—Where an executor was sued by a creditor of the estate, who exhibited, as part of his petition, a judgment of the orphans' court in Alabama against the executor for all the assets in his hands unaccounted for, in favor of the heir of the testator, it was held that said judgment, so long as it remained unreversed and unimpeached on the ground of fraud, was conclusive against suits by creditors against the executor. *Parker v. Cater*, 3 Tex. 318.

c. Evidence of Capacity in Which Defendant Sued.

Where sale under judgment which prima facie made defendants personally liable was attacked more than twenty-five years after it was made, the pleadings may be read in connection with such judgment, to show defendants were sued as executors. *Croom v. Winston*, 18 Tex. Civ. App. 1, 4, 43 S. W. 1072.

5. Amendment.

See post, "Judgment on Appeal," VIII, O, 12.

C. Revival.

Judgment Recovered by Decedent.—Prior to Act 1846 (Hart. Dig. art. 784), an action of debt on the judgment, in the name of the administra-

tor de bonis non, was the proper remedy to revive a judgment recovered by a deceased administrator. *Austin v. Townes*, 10 Tex. 24.

Where the plaintiff died, after judgment had been rendered against him, his administrator had no means of reviving the judgment against himself, in the district court. *Teas v. Robinson*, 11 Tex. 774; *Tucker v. Anderson*, 25 Tex. Supp. 155.

N. BILL OF REVIEW.

The bill of review provided in the probate act of 1870 (Paschal's Dig., art. 5791) is not governed by the rules of chancery practice in bills of review. *Janson v. Jacobs*, 44 Tex. 573.

If a probate order casts a cloud on the right of an heir or devisee, creating an obstacle in asserting such right, as in a compromise by an administrator of a judgment obtained by him in behalf of the estate and by him compromised, which judgment was compromised by mistake or fraud, such order by bill of review may be annulled, and the party in interest allowed to use the name of the administrator in proceedings asserting his rights; the administrator and the defendants in the judgment being necessary parties, but the decree would only extend to the revision of the act of the court in administering the estate; the judgment affected by the compromise could not be litigated in such proceeding. *Janson v. Jacobs*, 44 Tex. 573.

O. APPEAL.

1. Right of Appeal as Governed by Nature of Decision and Interest Therein.

See the titles APPEAL AND ERROR, vol. 1, pp. 369, 370; COURTS, vol. 5, p. 297; JURISDICTION.

Any person interested in the administration of an estate may appeal to the district court from any order of the court made in the administration. *Levy v. W. L. Moody & Co.* (Civ.

App.), 87 S. W. 205, affirmed in 101 Tex. 646, no op.

While there may be cases in which executors or administrators will be deemed to represent persons interested adversely to one seeking a revision of a decree in probate, an executor can not be said to represent persons adversely interested where he is seeking to set aside a decree requiring him to administer the estate in accordance with the will. *Smithwick v. Kelly*, 79 Tex. 564, 15 S. W. 486.

Where an administrator is made a party to a suit involving more than one estate, and verdict and judgment are certain as to the estate which he represents, he is not in position to allege error on the ground that they are uncertain as to the other estate, in which he has no interest. *Taylor v. Barron*, 2 Posey, Unrep. Cas. 689.

Interest.—One seeking district court's revision of probate court's action must prove his interest in estate and its injury by probate court's action; held, the fact that exadministrator filed account claiming debt due from estate does not constitute such interest. *Stark v. Seale*, 59 Tex. 1, 3. See the title APPEAL AND ERROR, vol. 1, p. 370.

2. Manner of Exercising Right.

Appeal not certiorari, is certainly the proper appellate process, where the object is to revise an order of the county court, on some special matter, not involving a settlement or a long course of proceedings with reference to estates. *Coupland v. Tullar*, 21 Tex. 523, 525. See the titles APPEAL AND ERROR, vol. 1, p. 357; CERTIORARI, vol. 4, p. 35.

3. Jurisdiction.

The district court has jurisdiction of proceedings to revise and correct proceedings in the county court relating to the estates of deceased persons. *Harrison v. Oberthier*, 40 Tex. 385; *Lott v. Ballaud*, 21 Tex. 167; *Ray v. Parsons*, 14 Tex. 370; *Poag v. Rowe*,

16 Tex. 590; *Phelps v. Ashton*, 30 Tex. 344; *Lynch v. Baxter*, 4 Tex. 431, 443.

District court has no original jurisdiction to revise probate proceedings in county court, but only on appeal or certiorari. *Buchanan v. Bilger*, 64 Tex. 589, 591; *Franks v. Chapman*, 60 Tex. 46; *Frank v. Chapman*, 61 Tex. 576; *Nichols v. Oliver*, 64 Tex. 647, 651.

4. Time.

In an action against an administrator to recover property claimed by him as his own, which plaintiff alleged should have been embraced in the inventory, a writ of error not sued out by plaintiff until 1 year and 5 months after judgment, during which time the estate has been fully administered and the property distributed, will be dismissed. *McMillan v. Kelch*, 16 Tex. 150.

5. Notice of Appeal.

See the title APPEAL AND ERROR, vol. 1, p. 499.

6. Waiver of Process by Appearance.

See the title APPEAL AND ERROR, vol. 1, p. 532.

7. Bond.

See the title APPEAL AND ERROR, vol. 1, p. 539.

An executor or administrator, under proper bonds as such, need not give further security on appeal taken in the interest of the estate. *Jones v. Hughes*, 33 Tex. 598; *Masterton v. Conrad*, 2 Willson, Civ. Cas. Ct. App. § 754; *Ennis v. Crump*, 6 Tex. 34; *Daniels v. Gregg*, 13 Tex. 384.

That the estate of an intestate is insolvent, and the whole of the property may be ultimately set aside as an allowance to deceased widow and children, does not deprive the administrator of his right of appeal without giving bond, in an action to recover personalty belonging to such estate. *Anglin v. Barlow* (Civ. App.), 45 S. W. 827.

Under the probate acts of the fifteenth legislature (August 9 and 18,

1876), a bond was required as a prerequisite to an appeal from the county to the district court in cases pertaining to estates of deceased persons. *Lumpkin v. Smyth*, 57 Tex. 489.

Where administrator was interested in homestead as an heir and appealed from order treating it as property of father, held he should give an appeal bond. *Bills v. Scott*, 49 Tex. 430, 432.

Action Commenced by Decedent.—

Rev. St. art. 1408, allowing an administrator to appeal without a bond, applies only to appeals taken by the administrator after appointment, and not to those commenced by decedent. *Hanlon v. Silk* (Sup.), 3 S. W. 290.

Bond on Certiorari to Justice Court.

—See the title CERTIORARI, vol. 4, p. 63.

Security for Costs on Proceedings to Revive Judgment.—See the title APPEAL AND ERROR, vol. 1, p. 544.

8. Supersedeas.

The filing of a petition in error by an executrix, and its service on the officer, having a writ of possession issued under the judgment against her operates as a supersedeas, and the subsequent execution by that officer of the writ of possession is an abuse of the process of the court, which, as between the parties, may be corrected by motion, if the same be filed in a reasonable time. *McFarland v. Moorling*, 56 Tex. 118.

9. Injunction against Administrator as Ground for Dismissal.

An appeal by an administrator from a judgment rendered on the day he was enjoined from acting as administrator will be dismissed. *Jackson v. Daugherty* (Civ. App.), 26 S. W. 1116, 1117.

10. Scope of Review.

An issue as to the right of an administrator to prosecute an action as such can not be first raised on appeal. *Bull v. Jones* (Civ. App.), 47 S. W. 474.

That a judgment against an adminis-

trator is also rendered against his securities, who were not parties to the suit, is not ground for reversal on proceedings in behalf of the administrator; the defect not being objected to by him in the trial court, nor assigned as error. *Harmon v. Bynum*, 40 Tex. 324.

11. Trial De Novo in Appellate Court.

On an appeal to the district court from an order of the county court made in administration proceedings, the issue involved will be tried de novo. *Levy v. W. L. Moody & Co.* (Civ. App.), 87 S. W. 205, affirmed in 101 Tex. 646, no op.

When revision and correction of proceedings of county court in estate of deceased person is sought under arts. 290-297, Rev. Stat., by certiorari from district to county court, cause thus brought to district court shall be tried de novo and proceeding is direct and not collateral. *Wipff v. Heder*, 6 Tex. Civ. App. 685, 691, 26 S. W. 118; *Linch v. Broad*, 70 Tex. 92, 94, 6 S. W. 751.

12. Judgment on Appeal.

The county court rendered judgment against the estate of an intestate, and it came by appeal and writ of error to this court. Held, that the judgment should have been rendered against the administrator himself, and the judgment was reformed accordingly in this court, and entered against the administrator, who was plaintiff in error. *Pitner v. Flanagan*, 17 Tex. 7.

On motion for a rehearing, it appeared that the suit was originally brought by an administrator, who died before judgment in the court below, and an administrator de bonis non was made plaintiff, but that the final judgment was erroneously rendered in favor of the deceased administrator, instead of the administrator de bonis non. Held, that the judgment should be reformed, and rendered in favor of the administrator de bonis non, instead

of the deceased administrator. *Dawson v. Hardy*, 33 Tex. 198.

P. COSTS.

Costs in Suit in Individual Capacity.

—An executor defending a suit by a beneficiary for the termination of a trust, does not defend in his fiduciary capacity, but in his individual capacity, and is, on a judgment being rendered against him, liable for the costs, under Rev. St. 1895, art. 2253, making an executor contesting a suit liable for costs on being defeated in the action, notwithstanding article 1443, providing that executors shall not be required to give security for costs in suits by them in their fiduciary character. (Civ. App.), *Lanius v. Fletcher*, 99 S. W. 169, judgment reversed on another point in 100 Tex. 550, 101 S. W. 1076.

Suit Brought in Name of Decedent

—**Administrator Made Party by Amended Petition.**—A suit was brought in the name of B. after his death, but no service procured on the defendants. At a subsequent term B's administrator was made a party plaintiff, and filed an amended petition, after which defendants were cited to answer the petition of the administrator. Held, the administrator should be ruled to the payment of all costs before being permitted to carry on the suit. *Finlay v. Merriman*, 39 Tex. 56.

Attorney's Fees as Special Damages against Administrator.

—A defendant interposing the defense of fraud in an action brought by an administrator is not entitled to recover reasonable attorney's fees as special damages, it being the duty of the administrator to prosecute all suits pending at the time of his intestate's death. *Flack v. Neill*, 22 Tex. 253.

Issuing Execution for Costs.—A judgment for costs against the administrator of an estate does not authorize a sale, under execution issued thereon, of the property of such estate.

Schmidt v. Huff, 7 Tex. Civ. App. 593, 28 S. W. 1053.

It is error, under the statute, to order execution to issue against an administrator for costs. They should be certified to the probate court for allowance. Davis v. Thomas, 5 Tex. 389.

IX. Accounting and Settlement.

A. TIME OF RENDERING ACCOUNT.

Though the period within which an administrator of a vacant succession should account is limited to one year from the date of his appointment as administrator, yet if the succession is not settled at the expiration of such time, the probate judge may prolong the administration from year to year for five years, at the interest of the estate, each year exacting from the administrator a renewal of the security for the faithful performance of the trust. Flores v. Howth, 5 Tex. 329.

B. STATING AND SETTLING ACCOUNT.

1. Form and Requisites.

Where an administrator filed an account styled a "final account," showing a balance in his hands applicable to unpaid audited claims, but it did not state what the indebtedness of the estate amounted to, or the names of the creditors, their residence, etc., or ask that the administrator be discharged, and the court allowed the same in the form prescribed by Batts' Ann. Civ. St. art. 1876, for the allowance of an annual exhibit, and did not audit and settle the same as article 2197 requires in the case of a final account, such account should not be treated as a final account. Thomas v. Hawpe, 80 S. W. 129, 35 Tex. Civ. App. 311.

Regular pleading is not necessary in county court in settlement of estates. Langley v. Harris, 23 Tex. 564, 569.

2. Character and Contents.

a. Necessity for Itemized Account.

Under Rev. St. 1895, art. 2248, providing that all charges by an executor or administrator against the estate shall be made in writing, showing specifically each item of expense, and the date thereof, charges for extra services and interest which are not properly itemized will be disallowed. McShan v. Lewis, 76 S. W. 616, 33 Tex. Civ. App. 253.

The final account of executors contained the following items: "Dec. 16, Jake Maurer, \$48.35; Aug. 12, Malin & Colvin, \$43.90." One of the executors testified that one of them "was for board and meals furnished myself and hands while attending to business for the estate;" and that the other "was for board and feed for horses while looking after stock belonging to the estate, and also for feed for stock while attending to business for the estate." Held, that neither the account nor the evidence contained the specific statements of expense required by Rev. St. art. 2193, providing that such charges shall be made in writing, showing specifically each item of expense, and the date thereof. Richardson v. Kennedy, 74 Tex. 507, 12 S. W. 219.

b. Charges against Executor or Administrator.

Where a promissory note which stipulated that "I, the undersigned administrator of the estate of A. B., deceased, promise to pay," etc., is paid with money of the estate of A. B., the probate court would refuse to charge the same to the estate in the administrator's account, but hold the administrator individually liable. Gregory v. Leigh, 33 Tex. 813, citing Morrison v. Hodges, 25 Tex. Supp. 176.

"When the executor is negligent in the performance of his duties as such and costs accrue thereby, they may be taxed against him on final settlement. Thomas v. Hawpe, 35 Tex. Civ. App. 311, 80 S. W. 129, affirmed in 98 Tex.

636, no op." *Crawford v. Hord*, 40 Tex. Civ. App. 353, 89 S. W. 1097, 1098.

c. Credits.

Expenses of Administration, Attorney's Fees and Costs.—Costs of administration including attorney's fees was a credit to which an administratrix was entitled. *Henderson v. Riley*, 1 White & W. Civ. Cas. Ct. App. § 484.

Where payment of attorney's fees is exacted of administrator, such expense forms item in his account and will be allowed him on his settlement. *Gammage v. Rather*, 46 Tex. 105, 107.

An administrator is entitled to a credit for the legitimate expenses incurred in defending a suit for the recovery of the land of the estate or to protect its interest therein, if he has paid them. *Williams v. Robinson*, 56 Tex. 347; *Callaghan v. Grenet*, 66 Tex. 236, 18 S. W. 507; *Manning v. Mayes*, 79 Tex. 653, 655, 15 S. W. 638.

The administrator may, before he has filed his final account, file with the clerk and have entered on the claim docket his charges for reasonable expenses and attorney fees as provided by arts. 2195 and 2193, Rev. Stat. *Richardson v. Kennedy*, 74 Tex. 507, 12 S. W. 219; *Houston v. Mayes*, 77 Tex. 265, 267, 13 S. W. 1036.

Where devisees, before instituting a suit for an accounting, demanded an account, which the executor refused, but it appeared that if he had rendered, at that time, the account which he rendered in the suit, and which was a proper one, the devisees would not have been satisfied with it, his refusal to render the account did not preclude him from charging to the estate his attorney's fees for defending such count. *Ackermann v. Ackermann* (Civ. App.), 99 S. W. 889.

Where jury find that contest of administrator's account has been improperly made—i. e., where they find his account correct, they should allow him

attorney's fees for defending such contest. *Johnson v. Wilcox*, 53 Tex. 413, 423.

Extravagant counsel fees should not be allowed an executor for litigious resistance of an obviously just demand against the estate. *Watt v. Downs*, 36 Tex. 116.

When an executor sought a credit for money paid out for attorney fees and supported the claim by his own testimony, it was error to refuse to the plaintiff the right to cross-examine the defendant upon the necessity for the services and the reasonableness of the charges. *Grothaus v. Witte*, 72 Tex. 124, 11 S. W. 1032.

Outlays for Benefit of Distributees.

—When distributees of an estate sue an administrator or his sureties for a devastavit, defendants are entitled to credit for necessary outlays by the administrator in the maintenance of the distributees during their minority, and for expenses of administration, including reasonable attorneys' fees; the amount of the estate coming to the distributees, as well as their social condition, furnishing a guide in estimating such outlays. *Johnson v. Hogan*, 37 Tex. 77.

That an administratrix was the mother of the distributees and bound to support them if able did not make her liable where through poverty she was compelled to sell some of the property of the estate and expend the proceeds in supporting the distributees. *Henderson v. Riley*, 1 White & W. Civ. Cas. Ct. App. § 484.

An administratrix will be allowed for disbursements made without an order of court for purposes for which an order would have been granted had application been made. *Henderson v. Riley*, 1 White & W. Civ. Cas. Ct. App. § 484.

Allowance to Widow and Children.

—An administrator is not entitled to credit for allowance to widow and children until court has ordered it set

aside for them. *Chifflet v. Willis & Bro.*, 74 Tex. 245, 251, 11 S. W. 1105.

Claims Barred by Statute Allowed by Executor or Administrator.—Notwithstanding the allowance of a creditor's claim by the probate court from which there is no appeal, either creditors or heirs on the final settlement of the administrator's accounts may show in the probate court that the claims were barred at the time they were allowed and thus defeat the claim of the administrator to credit therefor. *Sabrinus v. Chamberlain*, 76 Tex. 624, 13 S. W. 634; *Hefflefinger v. George*, 14 Tex. 569.

d. Necessity for Vouchers for Payment.

An administrator must exhibit vouchers, on settlement, to establish his conduct and rights in regard to all alleged liabilities of the estate, except as to the ordinary commissions which the law allows him. In order to do this, if he seeks greater compensation than the commissions, or has to incur expenses in managing the property, he should present his account therefor, and have the same allowed by the chief justice as a liability against the estate, same as any other claim; and when so presented and allowed, it can only be attacked by creditors or heirs, in the same manner as other claims. *Montgomery v. Nash*, 23 Tex. 157; *Davenport v. Lawrence*, 19 Tex. 317.

e. Annual Report and Exhibit of Claims and Conditions of Estate.

(1) Time of Filing.

Administrator must, after twelve months, from the grant of his letters file at the first term of court an exhibit of claims and condition of estate. *Lockhart v. White*, 18 Tex. 102, 108; *Ryan v. Flint*, 30 Tex. 382.

"An exhibit showing the number, character and condition of the claims against the estate which have come to the knowledge of the administrator is required to be filed within one month

after the expiration of the year. Art. 2043." *Buchanan v. Wagnon*, 62 Tex. 375, 378.

"At the third term thereafter, it is his duty to make a similar exhibit; and from time to time such further exhibits of claims allowed or registered as may have been presented for his action. Pas. Dig. 1345. These requirements must be complied with, under the peril of a revocation of his letters of administration, without notice." *Ryan v. Flint*, 30 Tex. 382, 384.

An executor is liable in the same way as an administrator to make an exhibit of an estate. *Langley v. Harris*, 23 Tex. 564.

(2) Proceedings to Compel.

Petition.—Petition in county court to have administrator render statement of condition of estate need only aver petitioner to be interested party. *Langley v. Harris*, 23 Tex. 564, 568. To require any greater certainty, would introduce into the county court, in the settlement of estates, regular pleading, as in the district court, which is not required.

The creditor of an estate, in calling upon the administrator in the county court to make an exhibit, need only state in his complaint facts which, if true, show that he is "a person interested in such estate." *Langley v. Harris*, 23 Tex. 564.

Exceptions and Objections.—

Where report of administrator was not complete, it was not error to sustain exceptions to the exhibits filed, and require the administrator to make full report to county court. *Chifflet v. Willis & Bro.*, 74 Tex. 245, 251, 11 S. W. 1105.

When creditors of an estate unite in contesting a report of the administrator, without objection, no objection can prevail on appeal on the ground of misjoinder, and it is not error for such creditors to join in an appeal bond. *Chifflet v. Willis & Bro.*, 74 Tex. 245, 11 S. W. 1105.

3. Proceedings in Settlement.

a. Hearing and Reference.

Right to Open and Close.—In a proceeding by an administrator for final settlement, where objections are filed to his account, the court may award him the opening and closing of the argument, under Rev. Stat., art. 1299, as having the burden of proof on the whole case; but a failure to do so would not be cause for a reversal of the judgment, when it is apparent no injury resulted from such ruling. *Higgs v. Garrison* (Civ. App.), 27 S. W. 34. See, also, *Kennedy v. Upshaw*, 66 Tex. 442, 448, 1 S. W. 308.

Scope of Hearing.—1 Sayles' Civ. St. 1897, arts. 2190, 2197, declare that, after payment of all claims by an executor, he shall file his account for settlement, which the court shall examine, and, after hearing all objections and evidence offered, shall restate it if necessary, and audit and settle the same. Article 2198 provides that, if any of the estate remains in the executor's hands, and the heirs or persons entitled thereto are present or represented in court, the county judge shall order partition, distribution, etc. Held, that the only matter to be determined on the settlement of an executor's account was its correctness, and, if the estate was fully settled, direction of distribution, and that the court had no power in that proceeding to render judgment against the executor for the amount due a legatee. *Cobb v. Speers* (Civ. App.), 49 S. W. 666. See, also, post, "Order or Decree of Confirmation or Rejection," IX, B, 3, d.

Auditor.—In an action for an accounting by an executor where the estate is large, embracing in its settlement mercantile transactions of the testator, continued by the executor some time after the testator's death, the appointment of an auditor is not only proper, but necessary. But in such cases the powers of the auditor should be confined, as nearly as possi-

ble, to the statement of the account. Disputed questions of fact should not be referred to him when avoidable. *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75. See the title REFERENCE.

"Either party may except to the conclusions of the auditor, and thus secure the right of trial by jury upon any issue presented in the case." *Dwyer v. Kalteyer*, 68 Tex. 554, 559, 5 S. W. 75.

Conclusiveness of Auditor's Report.—Where an administrator to whom the estate was indebted was sued by the heirs for devastavit, and the amount due the administrator was submitted to an auditor, the auditor's report was conclusive as to the amount due. *Herbert v. Harbert* (Civ. App.), 59 S. W. 594, citing *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75; *Richie v. Levy*, 69 Tex. 133, 6 S. W. 685, and *Whitehead v. Perie*, 15 Tex. 7.

Continuance.—See the title CONTINUANCES, vol. 4, p. 517.

b. Evidence.

Evidence to Support Charges in Account.—The administrator may introduce any competent and satisfactory evidence to support items charged in his account. *Stonebraker v. Friar*, 70 Tex. 202, 206, 7 S. W. 799.

In settling an administrator's account, it is not error to exclude evidence as to disbursements which do not appear on his account. *James v. Craighead* (Civ. App.), 69 S. W. 241.

Worthlessness of Claims.—When an administrator seeks credit for insolvent claims with which he stands charged as solvent claims, some evidence of their worthlessness must be offered. His oath to his report may, in some cases, when the fact is not contested, be sufficient. *Chifflet v. P. J. Willis & Bro.*, 74 Tex. 245, 11 S. W. 1105.

c. Exceptions and Objections.

Rev. St. art. 2031, giving the action of the court in approving or disproving a claim the force and effect of a

final judgment, does not apply to orders of the court to the administrator to pay out money, and such orders are treated as interlocutory orders and when the exhibit of the administrator is filed a creditor may contest his account and show any money which has been illegally expended. *Walker v. Kerr*, 7 Tex. Civ. App. 498, 27 S. W. 299; *Sabrinus v. Chamberlain*, 76 Tex. 624, 630, 13 S. W. 634.

Where an administrator filed his final account and gave notice of confirmation at the next term, at which a creditor filed objections to the confirmation on the ground that his claim had not been paid, and the hearing of the creditor's objections was continued, it was error to confirm the administrator's account and close the estate on a future day of the same term, before the objections had been heard. *Neill v. Hodge*, 5 Tex. 487.

Time of Making.—Rev. St. art. 1818, provides that any person interested in an estate may, at any time before any application or other proceeding is decided on by the court, file opposition thereto in writing, and shall be heard as in other suits. Held, that after an order has been made discharging an administrator, and directing payment of the estate to another person, it is too late to hear objections in behalf of persons entitled to a share in the estate, who did not appear in the court below. *Houston v. Mayes' Estate*, 66 Tex. 297, 17 S. W. 729.

Objections to administrator's account are not required to be made within two years, when neither annual nor final exhibits have been filed by administrator showing payment by orders of court, or referring to such orders, especially where creditor files his contest upon first opportunity after such exhibits have been prescribed. *Walker v. Kerr*, 7 Tex. Civ. App. 498, 502, 27 S. W. 299.

The legality of a payment by an administrator under an erroneous order

of court may be contested by a creditor of the deceased when the administrator files his final account, no other account having been filed, and it not having appeared that the estate was insolvent until the account was filed, though it is filed more than two years after the erroneous order of court. *Walker v. Kerr*, 7 Tex. Civ. App. 498, 27 S. W. 299.

d. Order or Decree of Confirmation or Rejection.

What Constitutes.—A petition signed and sworn to by three commissioners, and filed in the probate court, there being no evidence of a petition for partition, or of action thereon by the probate court, can not be relied on as an adjudication settling the estate and releasing the executor and his sureties upon the executor's bond. *Stephenson v. McFaddin*, 42 Tex. 322.

Power of Court.—Rev. St. art. 1948, provides that, where a will does not distribute the entire estate, the executor may file his final account in the court in which the will was probated, and that distribution or partition shall be made as in the case of estates administered under direction of the court. Held, that this does not empower the court to adjudge that an executor has properly administered the estate, and to allow extra compensation, and discharge the executor from liability. *Lumpkin v. Smith*, 62 Tex. 249. See post, "Final Discharge and Release," IX, G; "Compensation," IX, H.

Construction and Operation.—Where a decree ascertains that a decedent's estate is entitled to a sum of \$10,800, which is undisposed of by the will, and of right belongs to his heir, requires the payment of the expenses of the administration out of such sum, leaving a balance of \$5,412.89, which the executors are directed to pay over to the heir, and the decree is not appealed from, in an action against the executors by such heir to recover

sums alleged to be due, plaintiff is not entitled to the \$10,800 on the ground that it was adjudicated that she was the owner of that sum, since the decree did not order such sum paid to her, but only a portion thereof, and, if it was erroneous, the error should have been corrected by appeal. *Kearney v. Nicholson* (Civ. App.), 67 S. W. 361.

Where a sum with which it is sought to charge executors, if received at all, was received in the manner found by the court, a contention that the court erred in so finding is without merit, since otherwise, if the executors have not received the fund, they are not liable. *Kearney v. Nicholson* (Civ. App.), 67 S. W. 361. See, also, *Stewart v. Morrison*, 81 Tex. 396, 397, 17 S. W. 15; *Cobb v. Speers* (Civ. App.), 49 S. W. 666, 667.

Correction of Mistake.—An administrator's mistake in his account, in charging himself with items which he did not owe, should be corrected on the settlement of the account. *James v. Craighead* (Civ. App.), 69 S. W. 241.

Where, in a suit by a devisee against the executors of a decedent to recover certain moneys claimed under a decree, it appears that the sum adjudicated to plaintiff by the decree and the sums received by the executors since the decree amount to \$15,583.55; that the executors are entitled to commissions, which, added to the sum plaintiff has received, increases the credit to which the executors are entitled to \$15,403.28; and the executors attempt to account for the difference by charging plaintiff with costs, attorney fees, etc., with which she is not properly chargeable,—she is entitled to judgment against them for such difference. *Kearney v. Nicholson* (Civ. App.), 67 S. W. 361.

Persons Concluded—Creditors.—A creditor of an estate filed his petition against the confirmation of an administrator's final account, on the

ground that he had a claim unpaid, and the hearing of this petition was continued. At a subsequent day of the same term the account of the administrator was allowed. The creditor's petition was continued from term to term, and finally a part of it was allowed, less than had before been allowed and approved. The court held that it was erroneous to allow the administrator's final account before the creditor's petition was decided. *Neill v. Hodge*, 5 Tex. 487.

4. Conclusiveness and Effect of Settlement.

The payees of a note executed by a wife and her second husband, brought suit against the guardian of the children of the first marriage to subject to the payment of the note the interest of the wife in the estate of her deceased husband and of a deceased son, which was alleged to have passed into the possession of the guardian and the suit was brought after the husband and wife, as administrators of the first husband, had closed their administration by final settlement. Held, that the guardian could not go back of the final settlement and show that the second husband, as administrator, had converted to his own use property of the estate for the purpose of relieving the interest of the wife in his hands from liability on the note. *Debrell v. Ponton*, 27 Tex. 623.

Approval of Payments in Confederate Money Void.—During the Civil War an administrator in Texas obtained orders of the probate court to sell assets "for cash," and under such orders he sold them for confederate notes, which he paid to such creditors of the estate as would accept them. After the war the probate court permitted him to resign his office and settle his accounts on Confederate money returns and vouchers. Held, on exceptions by creditors to the account that the orders and judgments of the probate court, approving such accounts and

discharging the administrator, were void, and not merely erroneous. *Trammel v. Philleo*, 33 Tex. 395.

Effect of Approval of Probate Court.

—"It seems to be settled that *** the approval by the probate court of the annual exhibits of the administrator showing the collection and disbursements of funds does not have the force of a judgment so as to preclude the heirs from contesting the same. And especially is this true when, as in this case, the heirs charge the administrator with fraud. *Ingraham v. Rogers*, 2 Tex. 465; *Walker v. Kerr*, 7 Tex. Civ. App. 498, 27 S. W. 299; *Birdwell v. Kauffman*, 25 Tex. 189, 191; *Hefflefinger v. George*, 14 Tex. 569, 581; *Sabrinus v. Chamberlain*, 76 Tex. 624, 629, 13 S. W. 634; *Hagerty v. Scott*, 10 Tex. 525; *Murphey v. Menard*, 11 Tex. 673, 677." *Thomas v. Hawpe*, 35 Tex. Civ. App. 311, 316, 80 S. W. 129 affirmed in 98 Tex. 636, no op. See, also, post, "Reopening, Revising and Correcting Settlement," IX, C.

Where heirs brought an original suit in the district court to recover of an administrator for devastavit, the orders of the probate court approving the administrator's accounts are conclusive. *Herbert v. Harbert* (Civ. App.), 59 S. W. 594.

Approval Irregular.—A temporary administrator, without authority, paid a second-class claim as a first-class claim. Held, that the judgment of the probate court approving the report of the administrator and allowing the claim was not void for want of jurisdiction, but merely irregular. *Ball v. Ball's Estate* (Civ. App.), 45 S. W. 605.

Probate Court Powerless to Revise Judgment Previously Rendered.—Where an executor filed an account which was denominated a current account by the probate court, and a judgment was rendered against him in favor of the estate for the balance found due thereon, from which judg-

ment an appeal was taken to the district court, which remanded the case to the probate court for further proceedings because the record was not sufficient to enable the district court to proceed to hear and try the case, the judgment appealed from being final, the only proceedings which the probate court could take was to carry the judgment into effect, since it could not revise its own final judgment rendered at a previous term. *Townsend v. Munger*, 9 Tex. 300.

Presumption as to Revocation of Order of Removal.—Where defendant rendered an account as executor, which was received and allowed by the court, such fact was sufficient to charge him as executor at that time, and to create the presumption that a previous order for his removal and the appointment of another in his place, who qualified, had been revoked. *Townsend v. Munger*, 9 Tex. 300.

Conclusiveness in Suit on Bond.—District court can not annul orders of probate court in suit on bond of administrator. *Sabrinus v. Chamberlain*, 76 Tex. 624, 629, 13 S. W. 634; *Franks v. Chapman*, 61 Tex. 576.

The approval by the probate court of the final account and settlement of an administrator is a judgment, and, in the absence of appeal, certiorari, or bill of review, conclusive on the distributees and creditors. It can not be reviewed or annulled by the district court in a suit by a creditor on the administrator's bond, alleging a waste of assets by the payment of claims already barred by limitation. *Jose San Roman Sobrinus v. Chamberlain*, 76 Tex. 624, 13 S. W. 634.

Effect of Filing Supplemental Account.—Where, after an administrator had filed an alleged final account, which was allowed, he filed what was termed an "administrator's supplemental account," showing money in his hands unpaid to creditors, he thereby recognized the administration as still

pending. *Thomas v. Hawpe*, 80 S. W. 129, 35 Tex. Civ. App. 311.

Collateral Attack.—Where an administrator has filed his final account, and made final settlement with the estate, and been discharged, it is not competent, in a collateral proceeding, to falsify the final settlement for the advantage of the heirs of the estate. *Debrell v. Ponton*, 27 Tex. 623.

Direct Proceeding Necessary.—A judgment, approving the account of a temporary administrator, and discharging him, is a final judgment, which can only be assailed in a direct proceeding for that purpose. *Ball v. Ball's Estate* (Civ. App.), 45 S. W. 605.

Effect of Settlement upon Jurisdiction.—Where an estate has been fully settled, and the administratrix discharged, the jurisdiction of the probate court is exhausted, and actions against the administratrix for improper administration can not be brought therein. *Long v. Wooters*, 45 S. W. 165, 18 Tex. Civ. App. 35.

Effect on Pending Suits.—Where, pending administration of an estate in the probate court, an order was entered by the district court in a partition suit requiring the administrator, who was not a party, to pay certain sums to defendant and his minor children, and thereafter the administrator paid such sums to defendant for the benefit of the children, and his report showing such payment was approved by the probate court, and he discharged, the order approving the report and discharging him as administrator was an absolute defense to an action by the children to recover such money from the administrator, since the district court was without jurisdiction either of the estate while pending in the probate court, or of the administrator, not a party to the proceeding. *Watkins v. Sansom*, 54 S. W. 1096, 22 Tex. Civ. App. 178; *Branch v. Hanrick*, 70 Tex. 731, 8 S. W. 539;

Franks v. Chapman, 60 Tex. 46; *Buchanan v. Bilger*, 64 Tex. 589; *Sabrinus v. Chamberlain*, 76 Tex. 624, 13 S. W. 634.

Settlement as Raising Presumption That Debts and Legacies Paid.—Where administration has been granted, and after the expiration of the period contemplated by law for the settlement of an estate, the administrator returns a final account and is discharged, the presumption is that the estate is fully administered; the property of the estate remains in the heirs unincumbered by the administrative trust, although liable for any subsisting claims remaining unpaid. *Hurt v. Horton*, 12 Tex. 285.

If an administration has been closed, the presumption is that all the debts have been paid off; and it would seem, that, after a lapse of thirteen years from the grant of administration, and no order for its continuance open, the presumption would be equally strong, that all the debts had been paid off. *Boyle v. Forbes*, 9 Tex. 35.

Independently of the statute fixing the precise period of one year to the administration, it would seem, that, after a lapse of thirteen years, the presumption would be that all legal demands against the succession had been discharged. *Boyle v. Forbes*, 9 Tex. 35.

Lapse of over forty years raises presumption that specific legacies have been satisfied and administration closed. *Grimes v. Smith*, 70 Tex. 217, 220, 8 S. W. 33.

C. REOPENING, REVISING AND CORRECTING SETTLEMENT.

1. Right to Reopen.

Where an administrator during the pendency of the administration of the estate made a report in which he claimed credit for sums paid out by him or for money due him from the estate, which report was approved by the court, that action did not have the effect of a final judgment, but the

whole matter of settlement between administrator and the estate he represented could be opened and gone into upon the examination of his final account. *Eastland v. Williams*, 92 Tex. 113, 116, 46 S. W. 32, affirming 45 S. W. 412. See, also, *Ingraham v. Rogers*, 2 Tex. 465; *Oldham v. Brooks* (Civ. App.), 25 S. W. 648.

Effect of Approval of Exhibits.—The approval of the annual exhibits by the probate judge does not prevent a re-examination of the administrator's account as to the items of expense of administration. *McShan v. Lewis*, 76 S. W. 616, 33 Tex. Civ. App. 253; *Richardson v. Kennedy*, 74 Tex. 507, 510, 12 S. W. 219; *Houston v. Mayes*, 77 Tex. 265, 13 S. W. 1036. See, also, *Stonebraker v. Friar*, 70 Tex. 202, 204, 7 S. W. 799.

2. Power of Probate Court to Require Additional Inventory.

See ante, "Corrected, Additional and Supplementary Inventories," IV, H.

In an action by the heirs against the administrator of the administrator of their intestate on a note alleged to have been given by the administrator to the deceased, and never accounted for, proof that the estate was withdrawn from administration and turned over to the heirs; that two years afterwards the probate court ordered the administrator to file an account to include the note, which was not done, is not sufficient to establish the debt, the court having no authority to order an inventory after the estate had been withdrawn from administration, though no formal discharge had been entered. *Davis v. Harwood*, 70 Tex. 71, 8 S. W. 58.

3. Grounds for Reopening or Setting Aside.

Certain charges for sums advanced by an administrator to the heirs, alleged to have been for their support, were transferred by the court from the account of the administrator, as such, to his account as guardian. Held, that

such transfer, being made without prejudice to either party, was no cause for reversal of a judgment in favor of the administrator, on certiorari by the heirs for a revision of probate proceedings. *Stonebraker v. Friar*, 70 Tex. 202, 7 S. W. 799.

Mistakes and Omissions.—The allowance of an administrator's final account is not a bar to further inquiry as to matters omitted therefrom either by accident or fraud. *Thomas v. Hawpe*, 80 S. W. 129, 35 Tex. Civ. App. 311; *Blackwell v. Blackwell*, 86 Tex. 207, 24 S. W. 389.

The judge of probate has power to correct errors in an administration account that has been previously passed upon at any time before a final settlement of the estate. *Ingraham v. Rogers*, 2 Tex. 465.

4. Effect of Lapse of Time.

See ante, "Grounds for Reopening or Setting Aside," IX, C, 3.

5. Operation and Effect of Opening or Setting Aside.

The allowance of the account of an administrator is not *res adjudicata* until final settlement. *Ingraham v. Rogers*, 2 Tex. 465, 467.

Where several persons are interested in an estate, and one of them institutes proceedings to revise an administrator's account, whatever is recovered, if successful, inures for the benefit of all others interested. *Hefflefinger v. George*, 14 Tex. 569.

Ex parte Proceedings.—As to claims arising before the commencement of administration, Rev. St. 2031, provides that the action of the court in approving or disapproving such a claim shall have the force and effect of a final judgment. Articles 2192, 2193, provide that executors and administrators shall be allowed all reasonable expenses, necessarily incurred by them in the administration, which charges shall be acted upon by the court in like manner as other claims against the estate. Article 2142 pro-

vides that the court shall examine the final account of an executor or administrator, and the vouchers accompanying the same, and, after hearing all the exceptions and objections thereto, and the evidence in support of or against such account, shall restate the account if necessary, and audit and settle the same. Held, that these provisions do not give the force and effect of a final judgment to the action of the court upon expenses of administration, they being established upon ex parte proceedings, without notice to any one interested in the estate. *Richardson v. Kennedy*, 74 Tex. 507, 12 S. W. 219.

6. Liability of Sureties.

The sureties are liable for such amount as may be shown to be due and recoverable from the administrator, upon a revision of the final settlement of the estate, and are proper parties under the ordinary rule established in our practice, "that all persons materially interested in the subject matter, or all persons having an interest in the object of the suit, ought to be made parties." *Sayles, Pr.*, § 154. By this course, a second action is avoided, and the sureties are allowed immediately and directly to contest the plaintiff's demand, which is to their advantage, rather than otherwise. Such is the view taken of this subject, by the supreme court, in the case of *Francis v. Northcote*, 6 Tex. 185. *Ponton v. Bellows*, 22 Tex. 681, 682.

7. Actions to Open or Set Aside Settlement.

a. Nature and Scope of Remedy.

Hart. Dig., art. 1230, providing that any one interested in a decedent's estate may, within two years after settlement by the chief justice of "any account" of an executor, have the same revised, does not limit revision to the "final account;" and an action will therefore lie for such a settlement pending the administration before final

settlement. *Birdwell v. Kauffman*, 25 Tex. 189; *Murphy v. Menard*, 11 Tex. 673, 677.

b. Jurisdiction and Venue.

The district court has ample power to sustain an action as an original proceeding against the administrator, the estate having been closed within two years, and the administrator having been discharged from his trust. *Hagerty v. Scott*, 10 Tex. 525; *Chevalier v. Wilson*, 1 Tex. 161; *Ray v. Parsons*, 14 Tex. 370; *Poag v. Rowe*, 16 Tex. 590; *Moore v. Hardison*, 10 Tex. 467; *Ponton v. Bellows*, 22 Tex. 681, 682.

Suit may be brought in district court to correct and revise final settlement of administrator and against his bondsmen for balance due estate. *Ponton v. Bellows*, 22 Tex. 681.

An administrator de bonis non instituted in the district court of B. county a suit against the sureties of the original administrator, who had been appointed by the probate court of C. county. The suit involved a revision of the accounts of the original administrator. Pending the suit, the administrator de bonis non was discharged from the administration, and the distributees were admitted as plaintiffs in his stead. The defendants pleaded to the jurisdiction. Held, that the plea to the jurisdiction should have been sustained. The distributees could only take the place of the administrator de bonis non. *Johnson v. Hogan*, 37 Tex. 77.

If the estate was improperly administered and if plaintiffs have claims against the administrator they must prosecute them in another tribunal than that of the probate court. *Long v. Wooters*, 18 Tex. Civ. App. 35, 37, 45 S. W. 165, citing *Portis v. Cummings*, 14 Tex. 139, 170; *Davis v. Harwood*, 70 Tex. 71, 8 S. W. 58.

Suit against administrator's sureties, involving revision of administrator's accounts, must be brought in county

where administrator was appointed. The district court of a different county has no jurisdiction to entertain such proceedings. *Johnson v. Hogan*, 37 Tex. 77, 80.

c. Limitation of Actions.

The statute of limitations commences to run against an action to revise the settlement of an estate, not from the time such orders are made in the progress of the administration, but from the date of final settlement. The orders of the probate court, before the final settlement and discharge of the administrator, are in the nature of interlocutory decrees. *Tindal v. McMillan*, 33 Tex. 484.

d. Parties.

(1) Parties Plaintiff.

(a) Persons Who May Be Plaintiffs.

Parties interested in the distribution of an estate, as legatees, distributees, or creditors, may surcharge and falsify the accounts of an administrator, by a proper proceeding instituted in the district court of the county where the succession was opened. (Pas. Dig., Art. 1382.) *Johnson v. Hogan*, 37 Tex. 77.

In a suit in the district court under article 1382 there can be no other plaintiffs than the persons "interested in the estate," no other subject matter than the matters or things adjudicated by the probate court, and no other defendants than the former administrator or his heirs. *McDonald v. Alford*, 32 Tex. 35.

A widow may institute a proceeding to revise the final settlement of an administrator's account. *Hefflefinger v. George*, 14 Tex. 569.

Creditors may revise account of administrator on appeal or certiorari, and charge accounts barred by limitation, which were allowed by him, against him. *Hefflefinger v. George*, 14 Tex. 569, 582.

"The heirs, through their guardian, certainly had a right to have this settlement revised by a proceeding instituted in the district court, as

against the administrator. Hart. Dig. art. 809; *Hagerty v. Scott*, 10 Tex. 525." *Ponton v. Bellows*, 22 Tex. 681.

Administrator De Bonis Non.—

Since an administrator de bonis non has nothing to do with the maladministration of the estate by the former administrator, he can not maintain an action to revise the accounts of such administrator. *Johnson v. Hogan*, 37 Tex. 77.

Under Hart. Dig. art. 1230, providing that "any one interested" in the estate of the deceased may, at any time within two years after settlement with the chief justice of the executor's account, have the same revised, an administrator de bonis non can not bring the action for correction, as the act means only some one standing in the position of heir, legatee, or other person to be benefited by the estate. *Murphey v. Menard*, 11 Tex. 673; *Martel v. Martel*, 17 Tex. 391, 396.

(b) Joinder of Parties.

When it is provided that any one interested in the estate may have the account of an administrator reviewed, it will not be understood that it is intended that all persons so interested must be joined in the proceedings instituted for that purpose. *Hefflefinger v. George*, 14 Tex. 569.

All creditors or heirs need not join in proceeding to have account of administrator revised and corrected. *Reese v. Hicks*, 13 Tex. 162, 166.

Effect of Misjoinder.—Had it been improper to have joined the sureties in such a proceeding, the correct practice on a special exception for such misjoinder, would have been to dismiss the suit as to the sureties, and retain it as to the administrator. *Ponton v. Bellows*, 22 Tex. 681.

(2) Parties Defendant.

In a suit under article 1382 there can be no other defendants than the former administrator or his heirs. *McDonald v. Alford*, 32 Tex. 35.

Sureties.—The sureties being liable

for such amount as might be found due from the administrator, upon a revision of his final settlement, were proper parties, under the ordinary rule established in our practice, "that all persons interested in the subject matter, or having an interest in the object of the suit, ought to be made parties." *Ponton v. Bellows*, 22 Tex. 681.

e. Pleading.

A petition to revise an administrator's account must distinctly show the character in which plaintiff sues, and with it must be filed a copy of the proceedings sought to be revised, or else it must itself contain the substance of such proceedings. *Dunson v. Payne*, 44 Tex. 539.

A petition to revise an administrator's account must be filed within two years after the settlement in the probate court. *Dunson v. Payne*, 44 Tex. 539.

This objection could be raised by demurrer. *Dunson v. Payne*, 44 Tex. 539, 543; *Alford v. Cochrane*, 7 Tex. 485, 487.

Joinder of Causes.—Heirs taking up suit of discharged administrator *de bonis non*, against prior administrator, can not prosecute for unadministered property and for devastavit in same action. *Johnson v. Hogan*, 37 Tex. 77, 80.

f. Order or Decree.

In a suit by a father and mother, who were the only heirs of a deceased son, to have the account of his administrator revised, judgment was entered in their favor and execution issued. Held, on a petition by defendant in such judgment for an injunction against the execution thereof on the ground that the father was dead at the time of the rendition of the judgment, that it was error to give judgment in the mother's favor for the whole of her son's estate, where none of the facts on which the rights to a share of her husband's estate were in evidence. *Reese v. Hicks*, 13 Tex. 162.

In proceeding for revision and correction of account of administrator, plaintiffs are entitled to order for partition and distribution of balance remaining in his hands. *Reese v. Hicks*, 13 Tex. 162, 167.

D. REVIEW.

1. Nature and Form of Review.

An appeal, not a certiorari, is the proper mode in which an administrator could obtain the revision by the district court of the orders of the probate court in the settlement of his account. *Mitchell v. Harrison*, 32 Tex. 331.

Rev. St. 1895, art. 332, provides that any person interested in a decedent's estate may have the proceedings of the county court revised within two years by a writ of certiorari. Held, that such remedy was a statutory legal remedy independent of the remedy by appeal, and was not conditional on a showing of cause why the remedy by appeal was not pursued. *Friend v. Boren*, 95 S. W. 711, 43 Tex. Civ. App. 33.

Where a petition for certiorari to review an order allowing an administrator's account, and discharging such administrator, alleged that he received a fund from the United States in payment of Indian depredation claims, and that he paid the estate without legal order to certain heirs other than petitioners, whereupon his final account showing such payment was approved and he was discharged without notice to petitioners who were heirs of the intestate, and entitled to share in his estate, the petition was not subject to general demurrer. *Friend v. Boren*, 95 S. W. 711, 43 Tex. Civ. App. 33.

Under Rev. St. 1895, arts. 2198, 2202, making it the duty of the court in the settlement of a decedent's estate to ascertain the persons who are heirs, and to make a proper distribution of the estate not lawfully paid out by the administrator, it was proper for the court on certiorari to compel a restatement

of an administrator's account to award to certain heirs, who were not parties to the proceedings, the distributive share of the estate to which they are entitled. *Friend v. Boren*, 95 S. W. 711, 43 Tex. Civ. App. 33; *Reese v. Hicks*, 13 Tex. 162, 164.

2. Right of Review.

Creditor.—Where the objection was to the final account of the administrator, and the issue made was as to the correct balance in his hands subject to distribution, any creditor of the estate would have the right to appeal to the district court, under the 123d section of the act to regulate proceedings in the district court in relation to estates. *Davenport v. Hervey*, 30 Tex. 308.

Administrator.—Administrator may appeal to district court to have action of county court in auditing and settling his accounts revised. *Mitchell v. Harrison*, 32 Tex. 331, 332.

Article 2200, Rev. Stat., furnishes authority for appeal from order rejecting administrator's account or report, and directing him to file another. *Halbert v. Alford*, 82 Tex. 297, 17 S. W. 595; *Davenport v. Hervey*, 30 Tex. 308.

That an administrator had paid out the entire estate, and that he had been finally discharged by the county court, was no defense to a writ of certiorari to review such proceedings, and to compel a restatement of the administrator's account. *Friend v. Boren*, 95 S. W. 711, 43 Tex. Civ. App. 33.

An administrator may appeal to the district court without bond from an order of the county court denying him his statutory commissions. Such appeal concerns his official acts. *Hudleston v. Kempner*, 87 Tex. 372, 28 S. W. 936.

3. Scope of Review.

Where expense account of executor is made part or final exhibit and acted upon by court same day as final exhibit, the action of the court in approving the account, overruling exceptions to it and approving the final exhibit, was one

and the same judgment, and an appeal from it to district court took the whole case. *Richardson v. Kennedy*, 74 Tex. 507, 510, 12 S. W. 219.

On appeal to the district court from the approval of the final account of an administrator, objections to the account sufficiently alleging fraud, and demurrers thereto, were stricken out without their merits being considered, and, without any evidence being taken, the judgment of the county court was sustained. Held error. *Rahm v. Bergstrom* (Civ. App.), 36 S. W. 494.

In such case proof should be heard on contestant's well-pleaded allegations of fraud and the merits of the demurrers to the answer should be passed upon. *Rahm v. Bergstrom* (Civ. App.), 36 S. W. 495.

4. Presentation and Reservation in Trial Court.

An heir can not charge executors with items not referred to in the briefs and first urged on motion for rehearing. *Kearney v. Nicholson* (Civ. App.), 67 S. W. 361.

An administrator can not object, first on appeal to the supreme court, that one opposing the allowance of his account has no interest in the estate. *Davenport v. Hervey*, 30 Tex. 308.

5. Parties.

On an appeal to the district court from an order of the county court settling the account of an administrator, he is not entitled to have a person to whom he has paid money made a party, so that judgment may be awarded against such person in case credit for the payment is disallowed. *James v. Craighead* (Civ. App.), 69 S. W. 241.

Where a minor distributee of an estate, by her guardian, filed in the district court a motion to reinstate on the docket an appeal in an action against the administrator of the ancestor's estate, brought by persons representing all the distributees, and asked for her proportionate share of the judgment

recovered by them in the county court against the appealing administrator, she thereby became a party to such action, and was charged with notice of an instrument filed by the persons representing the distributees, acknowledging settlement with the administrator, since his appeal, in reliance on which the court dismissed the appeal. *Bridgens v. West*, 80 S. W. 417, 35 Tex. Civ. App. 277.

6. Perfecting Appeal.

Rev. St. arts. 2789, 2795, declare that an appeal may be taken, and the judgment be suspended, as a matter of right, from a county to a district court, without bond, in certain cases. Article 1408 declares guardians shall not be required to give a bond on an appeal taken by them in their fiduciary capacity. Held that, since articles 2789, 2795, applied to appeals in guardianship proceedings, and article 1408 to appeals to the court of civil appeals only, a district court's refusal to dismiss an appeal from an order of a county court approving an administrator's final account was error, where neither the widow nor guardian of intestate's minor children, appellants, filed an appeal bond or affidavit in lieu thereof. *Kleinsmith v. Northcut* (Civ. App.), 56 S. W. 537.

An administrator filed his final account, and gave notice that at the next term he would move for its confirmation, etc. A creditor whose claim had been allowed and approved filed his petition opposing the confirmation, etc., on the ground that his claim had not been paid. The hearing of the creditor's petition was continued until next term. On a future day of the same term an order was made confirming the administrator's account and closing the administration. The petition of the creditor was continued from term to term, and finally disposed of by an order for the payment of part of the amount which had been allowed and approved. Held, that there was

no error in confirming the administrator's account and closing the administration pending the creditor's petition; that it was not incumbent on the creditor to appeal from that order; and that his appeal from the final judgment on his petition was in time. *Neill v. Hodge*, 5 Tex. 487.

Petition Defective.—An administrator, in his petition for certiorari to remove proceedings of the probate court to the district court for revision, sought to make the guardian of his intestate's minor children a party, although he was no party in the probate court, and no cause was shown, or is it apparent, why he should be made a party. Held, that the petition was clearly exceptionable, and there was no error in its dismissal by the district court, on motion. *Mitchell v. Harrison*, 32 Tex. 331.

Allegations.—Where the heirs of an estate filed their petition for writ of error to revise a judgment rendered in the district court on an appeal from the county court on a proceeding by the administrator of the estate for allowance of his claim against the estate, it was necessary for the heirs, inasmuch as they were not parties to the proceeding, to have alleged in their petition for the writ of error that the suit against their ancestor's estate was brought by or on behalf of its personal representative, and that the plaintiff still occupied that relation to the estate, or at least that no other person was at that time the representative of it. *Cochrane v. Day*, 27 Tex. 385.

Allegation of Interest in Estate.—When those objecting to final account of administrator allege that they act for creditors and heirs, they sufficiently show their interest in estate to entitle them to appeal from order. The appellate court can not say that such a contestant is not an heir. *Dayenport v. Hervey*, 30 Tex. 308, 328.

Failure to Appeal—Remedy by Certiorari.—"The petition was filed within the statutory period, and a

failure to appeal from the order of the county court approving the final report and discharging appellant as administrator did not preclude the remedy by certiorari, of which appellees seasonably availed themselves. Under our law the latter is as distinctly statutory, and hence legal as the former, and is not made dependent upon a showing of cause why the remedy of an appeal was not pursued. *Rev. Stat. 1895, art. 332; Lynch v. Broad, 70 Tex. 92, 94, 6 S. W. 751; Wipff v. Heder, 6 Tex. Civ. App. 685, 26 S. W. 118.* Nor will the facts that appellant had paid out the entire estate and that the county court entered an order finally discharging him take from the district court the power to review the proceedings below, and to restate the administrator's account in accordance with the law and the evidence. *McShan v. Lewis, 33 Tex. Civ. App. 253, 76 S. W. 616; Richardson v. Kennedy, 74 Tex. 507, 12 S. W. 219.* *Friend v. Boren, 43 Tex. Civ. App. 33, 95 S. W. 711, 712, affirmed in 101 Tex. 636, no op.*

Amendment Setting Up Other Claims.—An administrator, on appeal to the district court from an order of the county court refusing to allow an exhibit filed therein asking for an allowance for extra services, can not amend his pleadings in the district court, and set up other claims against the estate not embraced in his exhibit, since *Rev. St. Tex. art. 2193*, requires such claims to be filed in the county court, and there entered on the claim docket. *Houston v. Mayes, 77 Tex. 265, 13 S. W. 1036.*

7. Record—Proceedings Not in Record.

Where exception is made to the final account of an administrator, that he had compromised a debt for less than the amount stated in the inventory, a finding by the court, in the absence of a statement of facts in the record, that the full sum really due had been paid, must be held conclusive. *Wright v. Pate (Sup.), 1 S. W. 661.*

8. Operation and Effect of Appeal.

Appeal from order approving executor's final account, suspends effect of order or discharge, and precludes suit on executor's bond. *Wiren v. Nesbitt, 85 Tex. 286, 288, 20 S. W. 128.*

A judgment of the probate court approving an executors' expense account, and a judgment several days after approving their final account, constitute practically but one judgment; and objections by creditors to items in the expense account, appealed by them to the district court, require a trial there de novo, which suspends the final judgment, leaving the estate unsettled, and pending the appeal the creditors can not sue on the executors' bond. *Wiren v. Nesbitt, 85 Tex. 286, 20 S. W. 128; Callaghan v. Grenet, 66 Tex. 236, 18 S. W. 507.*

Where the account of an administrator failed to show the amount of interest collected or paid, a decree of the district court, on appeal, charging interest against interest, will not be disturbed in the absence of data on which to state a correct account. *Davenport v. Hervey, 30 Tex. 308.*

Reformation of Judgment.—Plaintiff, an heir, alleged that defendant administrator neglected to collect claims and to rent the property, and that thereby such claims and rent were lost to the estate, and prayed that defendant be charged with the amount. The jury found that defendant had failed to charge himself with certain items, but allowed the expenses of defending the suit. Held, that the items being separable, the judgment might be reformed on appeal. *Johnson v. Wilcox, 53 Tex. 413.*

Parties Concluded by Decision.—Action of appellate court affirming order approving executor's final account concludes all creditors. *Wiren v. Nesbitt, 85 Tex. 286, 289, 20 S. W. 128.*

Reversal of Judgment Inures to Benefit of All.—When the district court reversed the judgment of the county court and found a larger balance in

the hands of the administrator, the judgment inured as well to the benefit of those who did not appeal as of those who did. *Davenport v. Hervey*, 30 Tex. 308; *Hefflefinger v. George*, 14 Tex. 569.

E. PROCEEDINGS TO COMPEL ACCOUNTING AND SETTLEMENT.

1. In General.

Under act of February 16, 1843, an administrator can not be called upon to settle accounts except in the mode prescribed thereunder. *Thompson v. Buckley*, 1 Tex. 33, 35.

Article 18259, Rev. Stat., provides, that "Where letters testamentary or of administration shall have once been granted any person interested in the administration may proceed, after any lapse of time, to compel the settlement of the estate when it does not appear from the record that the administration thereof has been closed." *Branch v. Hanrick*, 70 Tex. 731, 8 S. W. 539. There was no order discharging the administrator nor closing the estate. The executor could not claim a discharge by any presumption based on his own neglect to call for a discharge. *Blackwell v. Blackwell*, 86 Tex. 207, 210, 24 S. W. 389, reversing 23 S. W. 31; *Main v. Brown*, 72 Tex. 505, 10 S. W. 571.

Where a bona fide settlement has been had between heirs and administrator, and claims allowed which had not been probated, in an action for an accounting, the same claims may be allowed. *Hanlon v. Wheeler* (Civ. App.), 45 S. W. 821, affirmed in 93 Tex. 641, no op.

Order Showing Final Settlement.

—The last order in probate records of a decedent's estate showed that partitions of the estate having been fully made, and bond given, and the administratrix having made it appear to the court that all property allotted to the heirs had been turned over, it was decreed that the administratrix be dis-

charged, and her sureties released. Held, that this order showed conclusively that the estate had been fully administered, and the administratrix discharged, in a subsequent suit in said court to compel an accounting. *Long v. Wooters*, 45 S. W. 165, 18 Tex. Civ. App. 35.

2. Jurisdiction.

Equity has jurisdiction over suit for account and discovery of matters of administration, papers of which are lost and matters lie peculiarly within knowledge of administrator. *Love v. Keowne*, 58 Tex. 191, 196.

District Court.—If an administration has been closed, and the administrator discharged, or if the lapse of time is sufficient to raise such presumption, the heir can not call on the administrator to account in the probate court. He must seek his remedy in the district court. *Portis v. Cummings*, 14 Tex. 139, citing *Ingram v. Maynard*, 6 Tex. 130; *Murphy v. Menard*, 14 Tex. 62.

County and Probate Court.—Probate court has power to settle executor's account as necessary incident to partition. *Shiner v. Shiner*, 90 Tex. 414, 417, 38 S. W. 1126.

Rev. St. art. 1948, provides that, if the will does not distribute the entire estate, or provide a means for partition of the estate, the executor may file his annual account in the court in which the will was probated, and ask partition and distribution, and the same shall be partitioned and distributed in the manner provided for the partition and distribution of estates administered under the direction of the court. Held that, on making partition under the statute, the county court also has jurisdiction to settle the executors' accounts. *Shiner v. Shiner*, 38 S. W. 1126, 90 Tex. 414.

But while the independent executor under such will continues to discharge his duties, the county court has no jurisdiction to settle the accounts be-

tween him and the heirs or devisees. *Lumpkin v. Smith*, 62 Tex. 249; *Roy v. Whitaker*, 92 Tex. 346, 355, 48 S. W. 892, 49 S. W. 367.

Partition.—Until administration is closed, county court has exclusive jurisdiction to decree a partition of the lands of the estate among the heirs; when the title is clear as among themselves and there are no complications with third persons claiming adverse interests. *Branch v. Hanrick*, 70 Tex. 731, 734, 8 S. W. 539. See the titles **COURTS**, vol. 5, p. 161; **PARTITION**.

After Final Settlement.—Const. art. 4, § 15, limits the jurisdiction of the county courts as courts of probate to appointing guardians, granting letters testamentary and of administration, settling the accounts of executors, administrators, and guardians, and transaction of business pertaining to estates. Act 1848 (Hart. Dig., art. 308) provides that a county court shall retain jurisdiction over an administrator until he shall have accounted for and delivered the estate to the proper person. Held, that the county court had no jurisdiction over a suit brought by an administrator *de bonis non* against a prior administrator, after the settlement of the latter's account, to compel a re-accounting. *Francis v. Northcote*, 6 Tex. 185.

After Resignation.—The probate law of 1848 confers no jurisdiction on the county courts over executors or administrators who had resigned under the former law. *Ingram v. Maynard*, 6 Tex. 130.

By the laws in force in 1844, an executor could resign his trust, and afterwards the county court had no authority to settle his accounts. A decree rendered on a voluntary settlement by the county court against an executor after his resignation was irregular, and not sufficient to sustain an action. *Ingram v. Maynard*, 6 Tex. 130.

After Death of Executor or Administrator.—In view of *Battis' Ann. Civ. St. art. 3357*, which makes limitations begin to run, as to suits on bonds of executors and administrators, from their death, resignation, removal, or discharge, and other provisions of the statutes, it must be deemed the legislative intent that the death of an executor or administrator should sever the relation theretofore existing between him and the estate, and therefore it is not within the jurisdiction of the county court, sitting in probate, to determine the amount due from the deceased executor or administrator to the estate. *McClellan v. Mangum*, 75 S. W. 340, 33 Tex. Civ. App. 193. See the following cases not entirely analogous, but tending to support the views expressed by the court: *Ingram v. Maynard*, 6 Tex. 130; *Fort v. Fitts*, 66 Tex. 593, 1 S. W. 563; *Marlow v. Lacy*, 68 Tex. 154, 2 S. W. 52; *Timmins v. Bonner*, 58 Tex. 554, 558; *Davis v. Harwood*, 70 Tex. 71, 8 S. W. 58; *Bopp v. Hansford*, 18 Tex. Civ. App. 340, 45 S. W. 744, affirmed in 93 Tex. 725, no op.

3. Persons Entitled to Require Accounting.

The act of congress of January 16, 1843, does not prohibit judges of probate from calling on administrators to exhibit their accounts and show their actings and doings in the administration, even without the application of an interested party; but, except on such application, an administrator can not be called on to render and settle his accounts. *Thompson v. Buckley*, 1 Tex. 33.

After discharge of administrator, heir may compel him to account by action in district court. *Portis v. Cummings*, 14 Tex. 139, 140.

"An administrator may be cited by an heir or by the court to render his final account and close the estate, or he may himself file the account and ask his discharge by the court after

the estate has been fully administered." *Main v. Brown*, 72 Tex. 505, 508, 10 S. W. 571.

A purchaser of the interest of an heir has the same right to apply for a settlement and partition as the heir would have had. *Branch v. Hanrick*, 70 Tex. 731, 8 S. W. 539.

If it were conceded that the probate court can not confer on an administrator authority to sell notes and accounts belonging to the estate, and that the purchaser of such notes and accounts, therefore, acquired no title, yet that would be no defense to an action on a note given in consideration of such a sale, unless the defendant returns, or offers to return, the notes, etc., or otherwise account for them. *Perry v. Booth*, 7 Tex. 493.

4. Limitation and Laches.

So long as the administration on an estate is still pending, the statute of limitations does not run against an action by the heirs against the administrator for moneys of the estate which he has received and failed to account for. *McKinney v. Nunn*, 82 Tex. 44, 17 S. W. 516.

In suit against defaulting administrator brought before administration was closed, jury is properly charged that suit is not barred by limitation. *McKinney v. Nunn*, 82 Tex. 44, 49, 50, 17 S. W. 516; *Parish v. Alston*, 65 Tex. 194; *Main v. Brown*, 72 Tex. 505, 10 S. W. 571; *Hunter v. Hubbard*, 26 Tex. 537.

Under the express terms of Rev. St. 1895, art. 1882, where the record of an estate failed to show that administration had been closed, the intestate's heirs were not barred by limitations or laches from maintaining a suit against the administrator to compel a settlement thereof. *Thomas v. Hawpe*, 80 S. W. 129, 35 Tex. Civ. App. 311; *Main v. Brown*, 72 Tex. 505, 10 S. W. 571; *Branch v. Hanrick*, 70 Tex. 731, 8 S. W. 539.

What Law Governs.—After the act

of 1840 (Hart. Dig., p. 324), the laws of Louisiana ceased to afford the rule of practice in our courts in the settlement of successions; and the five-years limitation, under the code of practice of Louisiana, within which vacant successions were required to be fully administered, and beyond which the court had not power to extend the administration, never had any effect on any estate administered in this country, because five years did not elapse from the period of its introduction (January, 1836) until it was superseded by the act of 1840. *Burdett v. Silsbee's Adm'r*, 15 Tex. 604.

"In the absence of an order of record showing the settlement of an estate, such settlement may be compelled at any time. It would, in our opinion, be competent in a case like the present, where the records had been destroyed, to show their destruction, and to prove by parol that an order closing the administration had been duly entered on the minutes of the court. Any order not so entered would be a nullity." *Branch v. Hanrick*, 70 Tex. 731, 734, 8 S. W. 539.

Effect of Lapse of Time.—Without a statute or a well established rule to that effect we would be loath to hold that mere lapse of time without action by the court in an administration would relieve the administrator from being called to account in the probate court. *Main v. Brown*, 72 Tex. 505, 10 S. W. 571.

Rev. St., art. 1829, providing that, when letters have been granted, "the persons interested in the administration may proceed after any lapse of time to compel a settlement of an estate which does not appear from the record to have been closed," abrogates the rules that the administration is presumed closed, where a considerable length of time has elapsed since the last order, and, in the absence of an order of record showing settlement, a settlement may be compelled at any

time. *Branch v. Hanrick*, 70 Tex. 731, 8 S. W. 539.

There being no statutory limitation of the time within which an administrator may be cited to an account of his trust, the lapse of more than sixteen years since the appointment of an administrator c. t. a., during which no account has been filed or proceedings taken, will not bar a motion for an account by the legatees, the eldest of whom is 25 and the youngest 19 years old, when the answer of the administrator shows that he still has personality of the estate in his hands, and that he had until the year previous collected rents from the realty of his testator. *Main v. Browne*, 72 Tex. 505, 10 S. W. 571.

No Presumption That Estate Has Been Closed.—A lapse of sixteen years and nine months during which time an administration was ignored by the probate court, would not in absence of statutory provision, raise the presumption that estate had been closed. *Main v. Brown*, 72 Tex. 505, 507, 10 S. W. 571.

"In *Murphy v. Menard*, 14 Tex. 62, it was held that under the law in force in 1841 an administration must be presumed to have been closed after a lapse of a much shorter time than is shown in the present case. The same doctrine has been recognized and applied in the subsequent cases of *Portis v. Cummings*, 14 Tex. 139, 140, and *Marks v. Hill*, 46 Tex. 345. But we think that the forty-sixth section of the act of August 15, 1870, was clearly intended to abrogate this rule. That section reads as follows: 'But when letters testamentary or of administration shall have once been granted no presumption is admissible which is contrary to the record, and the persons interested in the administration may proceed, after any lapse of time, to compel a settlement of an estate which does not appear from the record to have been closed. (Pas. Dig., art.

5507.)'" *Branch v. Hanrick*, 70 Tex. 731, 734, 8 S. W. 539.

Administrator Not Allowed to Plead His Own Laches.—An administrator is a trustee charged with the management of a trust estate under the rules of the probate law and ought not to be permitted to plead his own laches as a bar to the jurisdiction of the court to compel him to settle the trust estate. *Main v. Brown*, 72 Tex. 505, 10 S. W. 571.

5. Pleading.

Certainty of Allegations.—In a proceeding by an heir to review administration proceedings, an allegation "that in the final account of the administrator he was allowed a credit of \$850 as commissions, when, as a matter of right and of law, he was not entitled to any commission, or, if any, such commission should not be allowed on a greater sum than \$2,500," was not uncertain or argumentative. *Kalteyer v. Wipff* (Civ. App.), 49 S. W. 1055.

Plea or Answer.—The answer of an administrator in a suit by the heirs to compel an accounting is not defective because it shows that an agent of his intestate collected more money than he turned over to the administrator. *Hanlon v. Wheeler* (Civ. App.), 45 S. W. 821.

In an action against an administrator by the heirs to compel an accounting, the administrator may, in his answer, set out a copy of his final account, although a reference to it on file is sufficient. *Hanlon v. Wheeler* (Civ. App.), 45 S. W. 821.

Where an executor's expense account, having been presented as a part of his final exhibit, is acted on by the court on the same day with such exhibit, the action of the court in approving the expense account and the final exhibit is substantially one and the same judgment, and, as an appeal from the approval of the exhibit carried the whole case into the district court, it is not error to overrule the

executor's plea of former recovery as to the expense account. *Richardson v. Kennedy*, 74 Tex. 507, 12 S. W. 219.

Where, in a suit by the heirs of an estate to compel an accounting by the administrator, the latter alleges in his answer that a certain sum was reserved by him at a final settlement had with the heirs, the statement is demurrable; but the error in overruling a demurrer to it is cured by the administrator showing on the trial that the sum reserved had all been expended in payment of costs of administration. *Hanlon v. Wheeler* (Civ. App.), 45 S. W. 821.

Attorneys who contract with a minor, and perform services under that contract, are entitled to a reasonable compensation; and the minor's administrator may set up the contract in his answer to a suit brought by the heirs to compel an accounting, and may show, if the contract is invalid, that the sum paid the attorneys is a reasonable compensation. *Hanlon v. Wheeler* (Civ. App.), 45 S. W. 821, affirmed in 93 Tex. 641, no op.

Setting Up Receipt or Release.—In an action against an administrator, by the heirs of his intestate, to compel a final accounting, the administrator may set up in his answer a settlement with the attorney in fact of the heirs, and a receipt by him in full for their share of the estate. *Hanlon v. Wheeler* (Civ. App.), 45 S. W. 821.

6. Evidence.

Sufficiency.—In an action by a partner against the administrator of his deceased copartners to recover money claimed to have been paid by him individually as the purchase price of certain land purchased for the partnership, evidence examined and held sufficient to sustain the finding that the account was subsequently adjusted in transactions between the parties. *Glasscock v. Glasscock's Adm'r*, 17 Tex. 480.

In an action by a partner against the

administrator of his deceased copartners to recover money claimed to have been paid by him individually as the purchase price of certain land purchased for the partnership, evidence examined and held sufficient to sustain the finding that the money was the partnership funds. *Glasscock v. Glasscock's Adm'r*, 17 Tex. 480.

Burden of Proof.—In a proceeding against executors and for partition the executors claim a credit for money paid out for taxes, and it is shown that the amount claimed is the aggregate of the taxes as well upon the property of the estate as upon the widow's share and upon her separate property, it devolves upon the party resisting the claim to show by testimony the amount of overcharge. *Haley v. Gatewood*, 74 Tex. 281, 12 S. W. 25.

7. Trial.

Taxes Paid Out of Funds of Estate.

—In an action against an administrator to recover money alleged to have been paid out by plaintiff for deceased during his lifetime, an instruction that, if the jury found that plaintiff had made such expenditures, they should find for him for the amount thereof, "less such sums as you find from the evidence the plaintiff in the lifetime of [deceased] collected belonging to said deceased," was erroneous, in view of the testimony, which tended to show that plaintiff had collected sums of money belonging to deceased and had paid the same to him or used the money for his benefit. *Granberry v. Granberry*, 90 S. W. 711, 40 Tex. Civ. App. 420.

In a suit against administrators for having fraudulently sold certain assets of the estate at less than their real value, it was not error for the court to instruct the jury that they should find certain facts from the undisputed evidence and to direct them to answer certain questions submitted as special issues. *Moore v. Woodson*, 44 Tex. Civ. App. 503, 99 S. W. 116.

Issues.—In an action against an administrator and another, beneficiaries under the will, for the administrator's failure to account for notes executed by him to the testator, the only issue being as to whether testator had given the notes to the administrator's codefendant, the question of value was immaterial, and it was not error for the court in its instructions to assume that they were worth their face value. *Crawford v. Hord*, 89 S. W. 1097, 40 Tex. Civ. App. 352.

8. Costs.

Where a court's order assessing all costs previously incurred in an action by heirs against an administrator against such heirs, as a condition to setting aside a dismissal of the action for the heirs' failure to prosecute, was not set aside or appealed from, the court had no power after the term to adjudge such costs against the administrator. *Thomas v. Hawpe*, 80 S. W. 129, 35 Tex. Civ. App. 311.

Under Batts' Ann. Civ. St., art. 2251, providing that in all cases where an executor or administrator shall neglect the performance of any duty required, and any costs are incurred on account thereof, he and his sureties shall be liable therefor, the trial court had power to adjudge costs against an administrator in an action by heirs to compel a settlement of his accounts. *Thomas v. Hawpe*, 80 S. W. 129, 35 Tex. Civ. App. 311.

Where, by reason of an administrator's failure to file a proper account, it becomes necessary to cite him to account, it is within the discretion of the district court to tax the costs of his appeal from the order of the county court on such accounting against him, though the amount with which he is charged is reduced on the appeal. *James v. Craighead* (Civ. App.), 69 S. W. 241.

In an action against administrators and one to whom they had sold certain stock on the ground that the sale

had been a fraudulent scheme between the parties, it was no abuse of discretion to tax all the costs against the defendants jointly. *Moore v. Woodson*, 44 Tex. Civ. App. 503, 99 S. W. 116.

The district court had no power to adjudge costs against the administrator which might accrue in the appellate courts, in anticipation of an appeal from its judgment. *Thomas v. Hawpe*, 80 S. W. 129, 35 Tex. Civ. App. 311.

F. ORDER TO PAY DEBTS.

"If, after the exhibit has been fully and correctly stated, an amount of money shall be found in the hands of the administratrix appropriated by the law to the payment of the costs of administration and debts of the estate, an order for their payment should be made, having regard to the class of the debts as well as to pro rata payment of debts of the same class. The judgment of the district court ordering payment of the money on hand pro rata without regard to the classification of the claims must be reversed and the cause remanded." *Chifflet v. Willis & Bro.*, 74 Tex. 245, 253, 11 S. W. 1105.

G. FINAL DISCHARGE AND RELEASE.

A record entry in the probate court that an administrator's final account be admitted and filed, and that he be discharged upon paying costs, and continuing the cause for further action of the administrator, is not necessarily an absolute and final settlement and discharge. *Alexander's Heirs v. Maverrick*, 18 Tex. 179.

In the absence of anything from which the contrary inference should be drawn, it is presumed that an executor assuming the trust of administering without control of the probate court does not surrender it until he has discharged all the duties which he knows are imposed on him. *McDonough v. Cross*, 40 Tex. 251. See,

also, *Stone v. Ellis*, 69 Tex. 325, 328, 7 S. W. 349.

An administrator can not be discharged on settlement of administration when creditor opposes because his claim is not paid. *Neill v. Hodge*, 5 Tex. 487, 489.

Administrator appointed under act of March 16, 1840, is not liable five years subsequent to filing of his return and expiration of his bond, although he was never finally discharged. *Murphy v. Menard*, 14 Tex. 62, 66.

What Constitutes—Presumption That Order of Discharge Revoked.—An administrator, on settlement of his final account, was discharged by the probate court in 1848. He was afterwards recognized by, and acted in, said court as administrator. Held, that it was presumed, in an action to compel an accounting, that the order of discharge was revoked. *Bayne v. Garrett*, 17 Tex. 330.

H. COMPENSATION.

1. Right to Compensation in General.

It is error to require an administrator to execute and deliver a deed to purchaser of property without allowing him compensation for his services fixed by statute. *Claridge v. Lavenburg*, 7 Tex. Civ. App. 155, 157, 26 S. W. 324, affirmed in 93 Tex. 702, no op.

Where an administrator on resigning failed to file a proper account, and the one filed was rejected, he was not entitled to be allowed an attorney's fee for services in filing a new account and in representing him on a contest thereof. *James v. Craighead* (Civ. App.), 69 S. W. 241.

Amount Discretionary with Court.—The compensation of a temporary administrator is not fixed by the statute, but is left to the discretion of the court appointing him, which discretion will not be disturbed unless an injustice has been done. *Bell v. Goss*, 76 S. W. 315, 33 Tex. Civ. App. 158.

Where property was sold upon the petition of a mortgage creditor and an

arrangement made with the purchaser whereby he extinguished that mortgage and a second in satisfaction of his bid, the two mortgages exceeding the bid, \$6,000, the administrators were not absolutely entitled to the commissions prescribed by the statute, but to such allowance as the county court might order. *James v. Corker*, 30 Tex. 617.

Unauthorized Acts.—Administrator can claim no benefit or remuneration for unauthorized acts, either for himself or estate he represents. *McLamore v. Heffner*, 33 Tex. 514, 516.

So far as a contract for the location of public lands is executed in the lifetime of the locator, his administrator has a right to enforce its stipulations and to recover for the locator's estate the stipulated locative interest in the land located; but if the administrator, against or without the consent of the owner, proceeds to make locations, he does so in his own wrong, and is entitled to no compensation either for his own benefit or that of his intestate's estate. *McLamore v. Heffner*, 33 Tex. 514.

Effect of Negligence or Mismanagement.—"Compensation should be refused an administrator if he has been guilty of willful default or gross negligence in the management of the estate, whereby it has suffered loss." *Chapman v. Brite*, 4 Tex. Civ. App. 506, 513, 23 S. W. 514.

"The principle upon which compensation is refused is, that where the estate has suffered loss by the dereliction of the administrator, the loss will not be enhanced by the allowance of commissions. But when the loss arising out of misconduct is made up to the estate, so that the beneficiaries get the full benefit of a vigorous and efficient administration, it is neither just nor logical that a bonus should be granted to them in the shape of commissions denied the administrator, thus increasing the burden which, in such

cases, usually falls upon the delinquent sureties. To the extent to which the estate has been properly administered, and on the amounts which he or his sureties pay, or make up for the losses by devastavit or maladministration, the administrator should be allowed such commissions as the statute provides.' 2 Am. Law of Administration (Woerner), § 526. But where money is collected by an administrator, and upon his failure to account for it judgment is obtained against him for the money so collected, the commissions he would have been entitled to if he had properly accounted for it should not be allowed him in offset to such judgment, for the reason that the administrator *de bonis non* would be entitled to his commissions for collecting the judgment, and if the defaulting administrator was allowed commission also, the estate would be made to pay commissions twice for a collection it would not have had to pay but once if the administrator had discharged his duty. Nor do we think an administrator should be allowed to offset a claim for the value of property of the estate he had appropriated to his own use, by expenses incurred by him in its care and preservation, unless his care and preservation enhanced its value, and such enhanced value is made the measure of his liability; in which event his reasonable expenses in such care and preservation, not to exceed the amount the property has been increased in value by reason thereof, should be allowed." *Chapman v. Brite*, 4 Tex. Civ. App. 506, 513, 23 S. W. 514.

2. Commissions.

An administrator, after being made party to an action which had been commenced against his decedent on vendor's lien notes, obtained from the probate court an order to sell the land for payment of these notes and other debts. The purchaser at such sale surrendered the notes and receipted bills of costs in the two suits thereon, and

paid the balance of the price in cash. Held, that the administrator was entitled to commissions for the amount of the notes and costs of suits as on money paid out. *Wolf's Estate v. Wolf*, 81 S. W. 90, 36 Tex. Civ. App. 168.

Administrators are not entitled to commissions on money not received or paid out. *James v. Corker*, 30 Tex. 617, 630.

Administrator selling land of insolvent decedent is entitled to commission where land is purchased by creditor, although purchase money is paid on debt. *Claridge v. Lavenburg*, 7 Tex. Civ. App. 155, 157, 26 S. W. 324, affirmed in 93 Tex. 702, no op.

Must Be Based on Legal Currency.

—During the civil war, an administrator obtained orders of the probate court to sell assets "for cash;" and, under such order, he sold them for Confederate notes, which he paid to such creditors of the estate as would accept them. After the war, the probate court permitted him to resign his office and settle his accounts on confederate money returns and vouchers. Held, on exceptions by creditors to the account, that the administrator's commission should be computed upon a legal currency, and not on a Confederate currency, basis, and he should not be allowed commissions on commissions. *Trammel v. Philleo*, 33 Tex. 395.

Commission on Commission.—Administrator should not be allowed to charge commission on his commission. *Trammel v. Philleo*, 33 Tex. 411.

Collection of Own Debt Due Estate.

—An administrator is not entitled to commission for collection of his own debt due the estate. *Brown v. Walker*, 38 Tex. 109.

Money Paid Out for Goods of Trade.—An executor continuing the business of the testator is not entitled to commissions on money paid out for goods, and on money received from

the sale of the goods so bought. In such a case, the proper compensation is a reasonable allowance for the time and labor bestowed in carrying on the business. *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75.

Commission for Paying Over Money.

—An administrator with the will annexed, appointed at the request of a foreign executor to administer the testator's estate in Texas, is not entitled, upon payment of the proceeds to such executor, to the statutory commission of 5 per cent; such payment being in effect a payment to the heirs, within Rev. St., art. 2191, providing that a commission shall not be allowed for paying money to the heirs and legatees. *Spofford v. Minor*, 13 Tex. Civ. App. 534, 36 S. W. 771, affirmed in 93 Tex. 650, no op.

Sale under Mortgage.—Under Rev. St., art. 2190, which allows an administrator 5 per cent commission on all money "actually received," and Id. art. 2093, providing that he may demand the payment to him of money due the estate, he is entitled to such commission on an amount bid at a mortgage foreclosure sale of land of the estate, to pay a debt of the estate, though the money was not actually handed over to him. *Huddleston v. Kempner*, 87 Tex. 372, 28 S. W. 936.

So held where he made a foreclosure sale, at which the judgment creditor, purchasing for less than judgment, pays in no money, but credits on judgment. *Huddleston v. Kempner*, 87 Tex. 372, 28 S. W. 936, affirming 28 S. W. 236.

When an incumbrance on property of an estate is discharged by the incumbrancer bidding off the property, the bid being applied to his claim, the personal representative of the estate is not entitled to the statutory commissions on the amount as though he had received and paid it out in cash. *Watt v. Downs*, 36 Tex. 116.

Where holder of lien against prop-

erty of an estate buys such property at sale and applies purchase price on his lien, held the executor was not entitled to commission on such sale. *Watt v. Downs*, 36 Tex. 116, 117; *James v. Corker*, 30 Tex. 617.

When Properly Refused.—Where judgment is obtained against an administrator for money which he has collected, but for which he has failed to account, the commissions to which he would have been entitled if he had properly accounted, should not be allowed him in offset to such judgment. *Chapman v. Brite*, 4 Tex. Civ. App. 506, 23 S. W. 514.

Failure to Account for Money Collected.—Where an administrator wrongfully and knowingly failed to account for moneys in his hands belonging to the estate, he was not entitled to commissions thereon. *Thomas v. Hawpe*, 80 S. W. 129, 35 Tex. Civ. App. 311.

3. Additional or Extra Allowances.

Where a decree settling a decedent's estate directs that on all sums paid over to a devisee the executors are to have the statutory commissions, it is proper for the executors to deduct 5 per cent commissions on paying over such sums in addition to the 5 per cent for receiving such funds. *Kearney v. Nicholson* (Civ. App.), 67 S. W. 361.

An administrator may be allowed compensation for extra personal services rendered the estate, when shown to have been performed and necessary. Such a claim may be properly presented to the probate court in an exhibit made by the administrator under oath. *Stonebraker v. Friar*, 70 Tex. 202, 7 S. W. 799. See, also, *Dwyer v. Kalteyer*, 68 Tex. 554, 564, 5 S. W. 75.

In settling an administrator's account, he should not receive credit for extra services not shown to be necessary or to have been performed. *James v. Craighead* (Civ. App.), 69 S. W. 241.

A special administrator, directed to continue the management of a farm

belonging to the estate, and devoting nearly all his time to such management, performing services for which a former manager had been paid three times as much as was allowed the administrator by the county court, should receive credit on his account for the amount so allowed. *James v. Craighead* (Civ. App.), 69 S. W. 241.

Attacking Claim for Extra Compensation.—Administrator's claim for extra compensation which has been allowed and approved can only be attacked in same manner as other claims. *Davenport v. Lawrence*, 19 Tex. 317, 320.

4. Proceedings for Allowance.

Limitations.—D. was appointed administrator de bonis non on the estate of W. in 1868; the executor having previously died without having rendered an account. D. rendered an account, in which no mention of commission to the deceased executor was made, by reason of which the executor's administrator resisted the approval of D.'s account as administrator de bonis non, claiming such commission. Held that, more than five years having expired since the executor's qualification and since the appointment of an administrator de bonis non, the executor's right to commission was barred by limitation, and D.'s account was properly allowed. *Craig v. Davidson*, 2 Posey Unrep. Cas. 190, distinguishing *Hagerly v. Scott*, 10 Tex. 525, 531, and *Hefflefinger v. George*, 14 Tex. 569, 581.

Liability of administrator de bonis non to estate of deceased executor for commissions due such executor is fixed upon his filing report failing to recognize such commissions as due, and statute begins to run from that time. *Craig v. Davidson*, 2 Posey 190, 192.

Hefflefinger v. George, 14 Tex. 569, 581, only held that while the final account had been passed, the orders from time to time made in the pro-

cess of one administration were, in their nature, interlocutory, and that limitation only ran from the final order. *Craig v. Davidson*, 2 Posey 190, 191.

I. ACTION TO SURCHARGE AND FALSIFY AS FOR DEVASTAVIT.

To establish devastavit, it must be shown that administrator collected debt or could have collected it by use of diligence, and has failed to account for it if collected. *Mason v. Rodgers*, 83 Tex. 389, 392, 18 S. W. 811; *Townsend v. Munger*, 9 Tex. 300, 309. See, also, *Stewart v. Morrison*, 81 Tex. 396, 17 S. W. 15; *Peveler v. Peveler*, 54 Tex. 53; *Fort v. Fitts*, 66 Tex. 593, 1 S. W. 563; *Giddings v. Steele*, 28 Tex. 732; *Bufford v. Holliman*, 10 Tex. 560; *Patton v. Gregory*, 21 Tex. 513; *Remick v. Luter*, 32 Tex. 797; *Herbert v. Harbert* (Civ. App.), 59 S. W. 594, 595.

An action against an independent executrix for property belonging to minor children, alleged to have been wasted, does not come within Rev. Stat. art. 1194, § 6, requiring suit against an executor, as such, to establish a money demand against the estate which he represents, to be brought in the county in which such estate is administered, though such section applies to independent executors, since such demand is not a money demand against the estate. *Morton v. Morris* (Civ. App.), 56 S. W. 559.

Where the heirs of an estate, which was indebted to the administrator, and had many unpaid claims outstanding against it, brought an action against the administrator for devastavit, an instruction that, if the estate was insolvent, the verdict should be for defendant, was proper, since the burden of proof was on plaintiffs to show an injury to themselves as heirs. *Herbert v. Harbert* (Civ. App.), 59 S. W. 594.

Venue—Waste.—Action against independent executrix for waste held not within Rev. Stat., art. 1194, requiring

suits on money demands to be brought in the county where administration was had. *Morton v. Morris* (Civ. App.), 56 S. W. 559.

X. Distribution.

A. STATUTORY PROVISIONS.

Statutory provisions respecting the payments of legacies and the distribution of estates must be substantially met. *Chapman v. Austin*, 44 Tex. 133.

B. AUTHORITY OF EXECUTOR OR ADMINISTRATOR TO MAKE AND DUTY OF COURT TO ORDER.

Under a will devising all the testator's property to his executors in trust for his children, and making such executors guardians for the children, with full power to manage his estate independent of the probate court, an executor who qualifies has authority to enter into an agreement for the partition of a land certificate belonging to the estate. *Hall v. Reese's Heirs*, 58 S. W. 974, 24 Tex. Civ. App. 221.

Where husband's executors were empowered to partition the community land, he could, for purpose of making such partition, set off to each estate the share belonging to it, although not so expressly empowered by the will. *Livingston v. Koenig*, 20 Tex. Civ. App. 398, 403, 50 S. W. 463, affirmed in 93 Tex. 645, no op.

Partition of Realty and Pay Legacies Charged upon the Land.—The author of *Cyc.* (vol. 18, p. 595), in speaking of the authority of an executor, says that "it is no part of his duty to partition or convey among heirs or devisees the real estate of his decedent, or to pay legacies charged upon the land, unless empowered by the will to do so." So, too, the Texas supreme court, in *McDonough v. Cross*, 40 Tex. 251, while discussing the powers of an independent executor under a will similar in the feature un-

der consideration to the one before the court, uses the following language: "It can hardly be thought the executor is authorized by such a will to change the devise of the testator from an undivided part of the estate into a specific part thereof, selected and designated by him at his mere will and pleasure, especially when he is one of the devisees among whom it is to be partitioned. Nor do we see that the settlement of the estate requires that he shall determine for the devisees whether they shall accept the money value of their interest in the land devised, or an undivided interest in the land itself." *Johnson v. Short*, 43 Tex. Civ. App. 128, 94 S. W. 1082.

Where a will devised land to several devisees, their right to the land so devised became fixed on probate of the will. It was within the power of the executors, when they had properly qualified, to partition the exact interests. *Robertson v. DuBose*, 76 Tex. 1, 13 S. W. 300.

Duty of Court to Order.—It is the duty of the court to order distribution of moneys in hands of administrator when it appears he has moneys in his hands subject to distribution. *Davenport v. Lawrence*, 19 Tex. 317, 320.

C. PRIORITIES OF DEBTS TO LEGACIES, DISTRIBUTIVE SHARES, ETC.

See ante, "Primary Fund," VII, C, 3; "Legacies and Devises," VII, C, 19.

D. LIABILITIES OF HEIRS, LEGATEES, DISTRIBUTEES, ETC.

1. Liability to Estate.

Set-Off against Legacy or Distributive Share.—Where one heir has bought the interest of some of the others in decedent's land, the purchased portion can not, in partition, be charged with a debt due from such heir to decedent's estate. *Ruiz v. Campbell*, 6 Tex. Civ. App. 714, 26 S. W. 295.

Heirs of Deceased Distributee.—A grandchild inheriting per stirpes, un-

der 1 Sayles' Civ. St., art. 1652, is entitled to recover his full share of the estate without accounting for a debt due by his deceased insolvent father to the intestate grandfather. *Powers v. Morrison* (Civ. App.), 30 S. W. 849, reversed 88 Tex. 133, 30 S. W. 581.

Liabilities of Grantees of Heirs, etc.—Upon settlement and distribution of an estate, it was proper to charge the interest of purchasers of real property from one of the heirs, such purchasers being parties to the proceeding, with a lien for the amounts due from their vendor for rents received from such property, in favor of the heir entitled to share in same. *Kalteyer v. Wipff*, 92 Tex. 673, 52 S. W. 63, reforming and affirming 49 S. W. 1055.

2. Liability for Debts of Decedent.

See ante, "Persons Liable for Debts of Decedent and Incumbrances on Property," VII, D.

E. TIME OF MAKING.

Under law, executrix is allowed reasonable time to ascertain condition of estate and gather in its assets and ascertain its liabilities before she can be compelled to pay legacies and debts. *Hawkins v. Forrest*, 1 Posey 167, 174.

The personal property of a decedent is subject to partition where the estate is not insolvent and no debts against the estate are shown, though nearly all such property is exempt from sale. *Sims v. Hixon* (Sup.), 65 S. W. 35, affirming judgment *Simms v. Same* (Civ. App.), 65 S. W. 36.

Where administration upon decedent's estate has not been formally closed though a very long interval has elapsed since any action has been taken, where the administrator is living, and where there is large indebtedness against the estate and a necessity for continued administration, including the disposition of the property in controversy if the title to it is in the estate, heirs can not sue to recover such property. *Northcraft v. Oliver*, 74 Tex. 162, 11 S. W. 1121.

Contest of Will.—Executor can not carry out terms of will by delivering legacies until it has been duly probated, and is not liable for withholding legacies pending contest of probate. *Roberts v. Stuart*, 80 Tex. 379, 382, 15 S. W. 1108.

Independent Executor.—An executor with power to administer uncontrolled by the probate court may determine when to surrender the estate to the heirs or devisees, free from any claim thereto for the purpose of administration; and upon such delivery of the estate to the devisees it ceases to be assets in his hands, but passes to the devisees subject to the debts of the estate. *McDonough v. Cross*, 40 Tex. 251.

F. PLACE.

Distribution in another state is valid and binding where no fraud shown. *Nimmo v. Davis*, 7 Tex. 26, 34.

G. MODE.

1. Will Declared Void.

Where will is declared void debts must be deducted from mass of property, and remainder, increased, by such advancements as may be brought in, must be partitioned according to laws regulating distribution of estates of intestates. *Parker v. Parker*, 10 Tex. 83, 98.

2. Partition.

See the title PARTITION.

H. PERSONS TO WHOM MADE.

Where heir has executed title bond, court on distribution should order deed made out to purchaser. *Ackerman v. Smiley*, 37 Tex. 211, 218.

If a tract of land belonging to an unpartitioned estate is subject to a lease for years, and a person purchases the fee from an heir who expects that particular tract to be allotted to him, taking and duly recording the heir's bond to make him title when the estate shall be partitioned, and then the purchaser also buys up the lease and thereby obtains posses-

sion, the lease becomes merged in the fee, and his possession is as purchaser of the fee, and is notice to all the world of his claim to the fee under his recorded title bond. *Ackerman v. Smiley*, 37 Tex. 211.

I. PROPERTY SUBJECT.

Where the widow and the children of a husband by a former marriage entered into an agreement for the distribution of an estate, in consideration of which agreement the widow conveyed such children property acquired by a deed of gift and bill of sale executed by the deceased in his lifetime, and delivered to said widow, which was not subject to distribution, and the probate court refused to make distribution according to such agreement because of an alleged lack of jurisdiction; the parties would then be restored to their original rights; and a refusal of the children to perform the agreement, ipso facto, revived the rights of the widow to the property which she had surrendered in consideration of said agreement; and her claim to a restoration of said property and of the bill of sale, if it still exists, is just, and must be sustained. If there had been no such agreement, the bill of sale, if valid, would have secured the property conveyed to the widow; and such property formed no part of the succession, and was not the subject of distribution between the heirs. *Hartwell v. Jackson*, 7 Tex. 576.

The debt of one of the heirs to an estate is a part of the general mass of property subject to distribution, and if the heir fails to pay it, if more than his share, so much of it as amounts to the value of his share should be set apart to him, if less than his share, it should be taken by him in satisfaction of that share so far as it will go. *Oxsheer v. Nave*, 90 Tex. 568, 40 S. W. 7.

In a suit by a surviving husband against his children for partition of community property, it appeared that

one of the distributees was insolvent and owed the estate more than the amount of his share in the property, and that a judgment creditor of such distributee had purchased his interest in the estate at execution sale. Held that, since it is the policy of the common law and of the statutes (Rev. St. 1895, arts. 1688, 1694) to equalize the shares of heirs or distributees, the interest of such insolvent distributee will be considered as extinguished, leaving his creditor with no interest in the property, though the debt to the estate was partially secured by a lien on other property. *Oxsheer v. Nave*, 40 S. W. 7, 90 Tex. 568.

The fact that the indebtedness of the insolvent distributee is partially secured by a lien on other property will not affect the rights of the parties in such a case. *Oxsheer v. Nave*, 90 Tex. 568, 40 S. W. 7.

J. PAYMENT.

1. Medium and Sufficiency.

Where a power was given to administer an estate and to divide it in property or money, in the discretion of the trustee, and the instrument conferring the power does not show in what sense the word money was used, it may be ascertained and inferred from the nature and character of the business to which it refers; the habits, usage, and general course of dealing; the situation of the country; the kind of circulating medium in ordinary use, and the sense in which the word is generally understood in business transactions at the time and in the locality where the instrument was drawn. *Kennedy v. Briere*, 45 Tex. 305.

Power of Executor to Contract as to Medium.—Testator gave his property to his children equally, and appointed an executor, and provided that no court should take any further action over the estate than the probate of the will and the return and approval of an inventory. Held, that the ex-

ecutor had no authority to enter into an oral agreement with one of the children whereby the latter agreed to take certain personal property of an agreed value as his share in the testator's estate by virtue of the will. *Johnson v. Short*, 43 Tex. Civ. App. 128, 94 S. W. 1082.

Construction of Agreement.—Testator gave his property to his children equally. The executor agreed with one of the children whereby the latter was to take certain property as his share under the will. None of the other children were parties to the agreement, and they did not consent thereto. There was nothing to show that at the time of the agreement any of the debts of the testator had been paid, or that the will had been probated. The child on receiving the property executed receipts, reciting that he had received from the executor property to apply on his part in the testator's estate. Held, that the agreement did not amount to a legal partition of the land belonging to the estate of the testator, but merely required the child on a final distribution of the estate to account for the property received by him at the agreed value. *Johnson v. Short*, 43 Tex. Civ. App. 128, 94 S. W. 1082. See, also, *Munk v. Weidner*, 9 Tex. Civ. App. 491, 29 S. W. 409.

2. Primary Fund—Subrogation, Marshaling Assets.

Where personal property which would be the primary fund from which to pay legacies is applied to the discharge of debts, so that sufficient does not remain to pay the legacies, legatees are subrogated to the rights of creditors and may satisfy their legacies out of land not devised. *Smith v. Cairns*, 92 Tex. 667, 51 S. W. 498, reversing 49 S. W. 728.

3. Interest on Legacies and Distributive Shares.

Where an administrator tenders into

court money remaining in his hands, he can not be charged with interest on the funds; but, if he withholds proceeds of one entitled to distribution of such funds, he will be charged with interest from the time the money should have been paid over or demand made. *Simpson v. Knox*, 1 Posey Unrep. Cas. 569.

Legatees can not recover interest on legacies until it is shown that executrix was clearly at fault in not paying them on demand. *Hawkins v. Forrest*, 1 Posey 167, 175; *Adrian v. Brooks*, 13 Tex. 279, 281; *Davis v. Thorn*, 6 Tex. 482, 486.

Distributees are not entitled to recover interest until after demand made of the administratrix for their portion of the estate. *Henderson v. Riley*, 1 White & W. Civ. Cas. Ct. App. § 487.

4. Payment of Annuities.

A county court has jurisdiction to order payment of an annuity from the estate of a decedent to an assignee in the absence of any statute prohibiting the sale by creditors or heirs of their claims against or shares in an estate. *Key v. Craig*, 21 Tex. 491.

5. Proof of Payment.

In trespass to try title, brought in 1884 by one claiming under a will devising the land after payment of specific legacies, the facts that the will was probated in 1838, and that the last act appearing in the administration was in 1853, are sufficient to raise the presumption that the specific legacies have been paid, and the administration closed. *Grimes v. Smith*, 8 S. W. 33, 70 Tex. 217.

K. OVERPAYMENT.

1. In General.

Husband and wife, who have, in latter's right, received, in irregular mode, more than wife's distributive share in estate, may be sued jointly by codistributees after administration has been closed. *Brinson v. Cunliff*, 25 Tex. 760, 763.

2. Actions for Recovery.

The petition in this case was a sufficient statement of a cause of action by a codistributee of an estate against another who had received an amount beyond her distributive share, which, after the estate had been settled and closed, and the administrator discharged, had been left in the hands of herself and husband by said administrator; and where it was also alleged that all the heirs, except the plaintiffs, had received the portions of said estate to which they were entitled. *Brinson v. Cunliff*, 25 Tex. 760.

If the husband and wife, in right of the latter, in some informal distribution not sanctioned by the judgment of the county court on final distribution, or by the legal assent of the other heirs, receive an amount of property greater than her share of the estate, and retain it in such capacity as her share until the administration upon the estate is closed, they may be jointly sued and compelled to account for such surplus by those codistributees who have not received their shares. *Brinson v. Cunliff*, 25 Tex. 760.

L. EFFECT OF DISTRIBUTION OR PAYMENT.

1. In General.

Upon delivery of property to devisees by executors it ceases to be assets in his hands, but remains subject to debts of estate. *McDonough v. Cross*, 40 Tex. 251, 281.

The delivery of land by executors to the heirs is sufficient evidence that it was not needed for the purposes of administration. *Hall v. Haywood*, 77 Tex. 4, 13 S. W. 612.

2. Parties Not Brought in as Defendants.

Distribution of estate to parties applying for it or brought in as defendants, is not binding on parties not represented. *Johns v. Northcutt*, 49 Tex. 444, 457.

The action of a county court in

granting letters of administration in 1845, and directing partition without notice to parties interested in a will which had been probated and was on file in the same court, and which was made by the decedent and disposed of the estate, can not affect the rights of the legatees under the will. *Lewis v. Ames*, 44 Tex. 319.

3. Delivery to Devisees for Life.

Land devised by testator to his wife for life, remainder to his heirs, on being turned over to the life tenant ceases to be part of the estate, and does not on the death of the life tenant become part of the estate, to be administered as property belonging thereto. *Blackwell v. Blackwell* (Civ. App.), 23 S. W. 31.

M. EFFECT OF FAILURE TO MAKE.

Where will devises an undivided interest in land, the executors, after their qualification, may partition to devisee his exact interest, but their failure to do so does not affect devisees' rights in any respect. *Robertson v. Du Bose*, 76 Tex. 1, 11, 13 S. W. 300.

N. ADVANCES BY EXECUTOR OR ADMINISTRATOR.

The county court had no jurisdiction on partition to charge the shares of said devisees with advancements made to them by the executors as trustees under the will. *Shiner v. Shiner*, 15 Tex. Civ. App. 666, 40 S. W. 439.

Where portions of a decedent's estate are sold by order of the probate court to provide support for certain of the heirs, such heirs are chargeable, at the final partition of the estate, not with the value at that time of the portions so sold, but only with the proceeds of the sale, and interest. *Lee v. Smith*, 18 Tex. 141.

O. EXPENSES AND COMPENSATION OF EXECUTOR OR ADMINISTRATOR.

Where the county court has juris-

diction, under a will, to partition the estate on application of the executors, and to settle their accounts, it may set aside a proportionate part of the shares allotted to pay the expenses of administration. *Shiner v. Shiner*, 15 Tex. Civ. App. 666, 40 S. W. 439.

Under will providing that after partition, executor should hold property until majority of minor heirs, such shares were chargeable pro rata with the expenses of administering under the will, and it was proper for court to decree to executor a portion of the property determined to be of value of their contributive shares of such expenses. *Shiner v. Shiner*, 14 Tex. Civ. App. 489, 492, 40 S. W. 439, affirmed in 93 Tex. 720, no op.

P. RECEIPT OR RELEASE.

The heirs of an estate are not estopped from showing that they have not received all that was due them by their receipt in full to the administrator; nor will such receipt relieve the administrator from his duty to account to the court. *Hanlon v. Wheeler* (Civ. App.), 45 S. W. 821.

A receipt for a specific amount of money in full of a legatee's share of the estate is not binding as to any residue coming to him. *Cliff v. Wade's Ex'r*, 51 Tex. 14.

Such payment being made of the funds of the estate, the receipt as to any excess of the share over the amount paid was without consideration, and the executor took no right by the receipt, save as evidence of payment of so much to the heir executing it. *Cliff v. Wade*, 51 Tex. 14.

Q. REFUNDING OR INDEMNITY BOND.

1. Necessity.

Where an estate is being settled without proceedings in the probate court, a creditor should, under Hart. Dig. art. 1219, cite the heirs to give bond for payment of the debts, and it is not necessary to have the claim of

such creditor acknowledged or established by suit before so citing the heirs. *Wood v. McMeans*, 23 Tex. 481.

Unless heirs file bond required in art. 822, O. & W. Dig., for payment of debts, the estate must be settled by chief justice as in other case. *Runnels v. Kownslar*, 27 Tex. 528, 533.

"The reason why a creditor will not be permitted to proceed against the parties in possession of the estate, until after the heirs and legatees have made their election and executed the bond contemplated by the statute, is that to permit him to do so, might have the effect to enable a vigilant and active creditor to subject more than a due proportion of the estate to the payment of his demand, to the injury of other creditors, equally entitled to payment out of the estate. The statute, in requiring the bond to be executed, intends to protect all the creditors of the estate alike. The bond must be of an amount equal to the full value of the estate, to be ascertained by the inventory, so that if one creditor should elect to proceed against those in possession of the estate, other creditors would find their protection in the bond." *Shaw v. Ellison*, 24 Tex. 197, 200.

Bond upon Withdrawal of an Estate from Administration by Sole Heir.—See ante, "Bond Required of Party Withdrawing," I, E, 3, a, (2).

2. Persons Who May Require.

Creditors of an estate administered under a will without control of probate court, by an executor not required to give bond, may require devisees, legatees and heirs to give bonds to secure their claims. Suit to recover such claims may be maintained on such bond. In default of such bonds, creditors may force administration. *Kauffman v. Wooters*, 79 Tex. 205, 211, 13 S. W. 549.

The statute applies as well to creditors who hold claims against an estate evidenced by promissory notes as

to those whose claims have been established by final judgments; nor does the fact that a judgment, rendered in the district court, has been appealed from or removed by writ of error to the supreme court, affect the rights of such judgment creditor under the statute to compel the legatees or heirs to execute a bond. *Runnels v. Kownslar*, 27 Tex. 528.

Independent Executor.—An executor with power to administer without control of the probate court is a trustee for those entitled to take under the will, and, before turning the estate over to the heirs, may demand a bond, with security, to protect himself against liability for an unpaid legacy. *Stephenson v. McFaddin*, 42 Tex. 322.

3. Form and Requisites.

Amount.—See post, "Review," X, Q, 5, c.

The bond must be of an amount equal to the full value of the estate, to be ascertained by the inventory. *Shaw v. Ellison*, 24 Tex. 197, 200; *Runnels v. Kownslar*, 27 Tex. 528, 533.

4. Operation and Effect.

The primary object of article 1372, *Paschal's Digest*, allowing partition of an estate upon execution of a bond as therein required, was to provide a speedy mode of settling estates, and at the same time to transfer the responsibility of the debts from the estate to the obligors on the bond; and they, by the execution of the bond, become primarily liable for the debts of the estate. *Wilson v. Kyle's Ex'rs*, 35 Tex. 559.

In a suit to recover the amount of a note (allowed by the administrator, and approved by the chief justice), against the obligors of a bond, given to pay the debts of the estate, the defendants answered, that the note was given as an attorney's fee, in consideration that the plaintiff would defend the maker on an indictment for murder, but that he died before a trial was had upon the said indictment, and

that the plaintiff had rendered him no service, beyond giving advice and counsel, which were not worth the amount of the note, held, that a general demurrer to the answer was properly sustained. *Headley v. Good*, 24 Tex. 232.

5. Action to Compel Execution.

a. Who May Institute.

A creditor of a testator's estate, who holds a judgment claim against the estate, may institute a complaint under the statute to compel the legatees to execute a bond for the payment of debts due by the estate, although the judgment has been appealed from the district court and removed by writ of error to the supreme court, and is still pending there. *Runnels v. Kownslar*, 27 Tex. 528.

Court Where Executed.—See post, "Review," X, Q, 5, c.

b. Citation and Complaint.

In a complaint under the statute to compel legatees to execute a bond for the payment of the debts due by the estate, it is not necessary that the citation or notice which must be served upon the persons entitled to the estate under the will should pursue the forms or contain all the ingredients essential in original writs or citations for the commencement of actions in the district court; and if the citation in such case is sufficient to inform the opposite party with reasonable certainty, of the nature and object of the proceeding against him, it is sufficient, and, where the citation was accompanied by and referred to a copy of the complaint which the party was required to answer, it was held to be a sufficient compliance with the statute. *Runnels v. Kownslar*, 27 Tex. 528.

The complaint which the statute (art. 822, O. W. Dig.) requires a creditor to file in order to compel persons entitled to the estate under the will, or the heirs at law, to execute an obligation to pay all debts that may be established against it, is not to be

held nor regarded as a suit in its technical sense. *Runnels v. Kownslar*, 27 Tex. 528.

"It was never intended to introduce into proceedings in the county court, in the settlement of estates, the regularity and formalities which are required in pleading and practice in actions in the district court. (*Langley v. Harris*, 23 Tex. 564.)" *Runnels v. Kownslar*, 27 Tex. 528, 532.

c. Review.

Where, on a complaint under the statute, the county court "required the legatees under a will to execute a bond with security in double the amount of the property as appears by the inventory on file in this court," and the district court "reversed and so reformed the decree as to require of defendants bonds to the amount of the inventory, as appears by the record in said court, and that this order be certified to said court for observance," it was held, that the district court did not err in directing the bond to be given in the county court; and that the decree referring to the inventory was sufficiently definite to fix the amount of the bond. *Runnels v. Kownslar*, 27 Tex. 528.

6. Actions in Bond.

a. Right of Action.

(1) In General.

Where provision is made by will for the settlement of an estate in the way provided by the act relating to the estates of deceased persons, without proceedings in the probate court, suit can not be brought against the executor, but should be brought in the manner prescribed by statute. *Wood v. McMeans*, 23 Tex. 481; *Hogue v. Sims*, 9 Tex. 546; *Carroll v. Carroll*, 20 Tex. 731, 747.

(2) Conditions Precedent.

In a suit on a partition bond by a creditor of the estate, it is immaterial whether the estate has been settled up or not. *Wilson v. Kyle's Ex'rs*, 35 Tex. 559.

b. Jurisdiction and Venue.

In suit upon statutory bond for partition of estate, district court of county where estate is being administered has exclusive jurisdiction as against executors of deceased surety. *Wilson v. Kyle*, 35 Tex. 559, 564.

Pasch. Dig., p. 346, art. 1423, requires suits against executors and administrators to be brought in the county in which the estate is administered. Article 1372 authorizes the distribution of estates in advance of the payment of the debts by giving a bond for the payment of all debts of the deceased, payable to the chief justice of the county where the estate is being administered, which bond must be filed in the office of the county court of that county. Held, that an action on such bond against the executors of a deceased obligor, whose estate is being administered in a county other than the one in which the estate for the distribution of which the bond was given was administered, must be brought in the county where the estate represented by defendants is being administered. *Wilson v. Kyle's Ex'rs*, 35 Tex. 559.

Suit for a money demand was brought upon a statutory bond for the partition of an intestate's estate. One of the sureties on the bond was deceased, and the suit was brought against his executors (and other defendants) in the county where his estate was being administered by them. They pleaded that another suit upon the same demand had been brought by the plaintiff in an adjoining county, where some of the defendants lived, and that it was still pending there; wherefore, they alleged that the court wherein the present suit was brought had no jurisdiction. Held, that the plaintiff's demurrer to this plea should have been sustained. The district court of the county where the suit was brought not only had jurisdiction, but it seems had exclusive

jurisdiction as against the executors of the deceased surety. *Wilson v. Kyle*, 35 Tex. 559.

c. Demurrer.

See ante, "Operation and Effect," X, Q, 4.

d. Judgment and Execution.

Where a creditor sues on a bond given for the settlement of an estate under Acts 1845, § 111, he is entitled to personal judgment for the full amount of his debt against the obligors, though the principal obligor applied for distribution of the property of the deceased in right of his wife and of a minor for whom he was guardian. *Headley v. Good*, 24 Tex. 232.

Where a bond has been given in order to enable a party interested in an estate to take it into his own hands, a creditor of the estate may have execution for his debt against the obligors of the bond, though none of them were interested in the estate in their own right. *Headley v. Good*, 24 Tex. 232.

R. CONTRIBUTION FROM CO-DISTRIBUTEES WHERE TITLE TO DISTRIBUTIVE SHARE FAILS.

See the title CONTRIBUTION AND EXONERATION, vol. 4, p. 662.

S. ACTIONS TO COMPEL DISTRIBUTION.

1. Right of Action and Defenses.

An administrator, when sued for misappropriation of the funds of the estate, may show that he paid such funds to the heirs and distributees, the estate being solvent, and the payments made being less than the respective shares of the heirs, though said heirs have not been made parties to the suit. *Oglesby v. Forman*, 77 Tex. 647, 14 S. W. 244.

A legatee sued an executor for his alleged failure and refusal to deliver certain articles, silver plate, etc.,

given plaintiff by the testatrix. It was competent in answer to show that immediately on the death of the testatrix defendant, who was the executor, knowing that the will would be contested, obtained temporary letters of administration and had taken possession and preserved the articles, and as soon as the contest of the will was ended and the will established he had qualified as executor and had turned over the property to the plaintiff. *Roberts v. Stuart*, 80 Tex. 379, 15 S. W. 1108.

The fact that an administrator holds real estate belonging to the estate which is subject to future proceedings and partition, is no defense to an action to recover a distributive share of other property belonging to the estate. *McKinney v. Nunn*, 82 Tex. 44, 17 S. W. 516.

The facts that the administration upon an estate is still pending, that the administrator has not made a final report, and that the county court can ascertain the amounts due the heirs and order their payment, do not prevent the heirs from suing in the district court to recover judgments against the administrator, and to foreclose a deed of trust given by him to secure the payment of money which he has collected and failed to account for. *McKinney v. Nunn*, 82 Tex. 44, 17 S. W. 516.

Where the assets were sufficient, it is no defense to a suit against an executor for a legacy that the estate has been partitioned among the heirs or other legatees. *Stephenson v. McFaddin*, 42 Tex. 322.

2. Jurisdiction.

a. County and Probate Courts.

County court has power to compel executor to pay bequest according to terms of will. *Hudgins v. Leggett*, 84 Tex. 207, 211, 19 S. W. 387.

The estate may by decree of the county court be distributed. *Key v. Craig*, 21 Tex. 491, 492.

Const. 1895, art. 5, § 16, gives the county court general jurisdiction of the administration of decedents' estates. The constitution also limits the jurisdiction of such court in civil cases to amounts between \$200 and \$1,000. Rev. St. 1895, tit. 39, art. 2211, provides that, when unclaimed funds of a decedent's estate have been paid to the state treasurer by order of the county judge, any heir, devisee, or legatee claiming the same shall sue therefor in the county court where the estate was administered. Held, that such suit was a matter pertaining to the administration of such estate, and, no matter what the amount, was properly brought in the county court. *Dodson v. Wortham*, 45 S. W. 858, 18 Tex. Civ. App. 666.

Partition.—The probate court has jurisdiction in the administration of an estate to partition the same among the heirs and wife of the deceased person. *Case v. Penn* (Civ. App.), 62 S. W. 801. See *Hartwell v. Jackson*, 7 Tex. 576, 583.

Testatrix gave each of four children one-sixth of her estate, and two-sixths in trust to executors, whom she directed "to procure" a partition of the estate, giving them "power to have the same done" before expiration of the year after probate, and stating that she desired no further action in court than probate of the will, filing of inventory and claims, and partition, and that the executors should act thereafter independent of court. Held, that the will did not provide "a means for partition" (Rev. St. 1879, art. 1948); hence the county court had jurisdiction to make it. *Shiner v. Shiner*, 38 S. W. 1126, 90 Tex. 414.

Where a will provides that, if the mind of testator's daughter shall become permanently impaired, certain other legatees shall contribute a stated sum out of the amounts bequeathed to them, the county court, on a showing that the mind of the

daughter is permanently impaired, has jurisdiction to order the executors to pay such sums to her, or those entitled to receive them, under Rev. St. arts. 1957, 2105, 2107, 2108, conferring on the court general powers of partition and distribution. *Hudgins v. Leggett*, 84 Tex. 207, 19 S. W. 387.

b. District Court.

District court has full equity jurisdiction in determining complicated questions arising out of disputed titles, and of accounting preliminary to distribution. *Kalteyer v. Wipff*, 92 Tex. 673, 682, 52 S. W. 63; *Grassmeyer v. Beeson*, 18 Tex. 753, 766; *Payne v. Benham*, 16 Tex. 364, 368.

District court has original jurisdiction in action by heir for distribution of estate where administrator is fraudulently attempting to appropriate and misapply assets of estate. *Smith v. Smith*, 11 Tex. 102, 108.

Where a petition for distribution avers that the administratrix has used funds belonging to the estate to buy property in her own name and in the name of her children, the district court can assume original equity jurisdiction over the case, though the estate is still in progress of settlement in the probate court, since the petition avers facts which create a trust for the heirs. *Smith v. Smith*, 11 Tex. 102.

The district court has jurisdiction of a suit by the distributees against the administrator, in which it appears that administration has been pending during 12 years, that during the last 3 the administrator has claimed the property as his own and has sold part, that the debts are all paid, and that the administrator's bond is worthless, though it does not appear that the estate has been settled in the probate court. *Hill v. Townsend*, 24 Tex. 575.

"Concerning the provision authorizing the executor, * * * to apply to the probate court for a partition, and incidentally to procure a final set-

tlement of his account, it has been held that the jurisdiction thus conferred is not exclusive, but that partition may be had in the district court. *Fortune v. Killebrew*, 70 Tex. 437, 440, 7 S. W. 759. And it has been intimated that the privilege of instituting such a proceeding in the probate court is given to the executor alone, and that others interested can not compel him to go into that court for such purposes. *Jerrard v. McKenzie*, 61 Tex. 40, 44." *Roy v. Whitaker* (Civ. App.), 50 S. W. 491, 494, affirmed in 93 Tex. 649, no op. This intimation is borne out by *Pressler v. Wilkie*, 84 Tex. 344, 19 S. W. 436.

3. Venue.

An action by distributees to recover their shares should be brought in the county where the defendants reside, since Rev. St. art. 1198, § 6, which requires suits against administrators to establish money demands against the estate to be brought in the county where the estate is administered, does not apply to such a case. *Stewart v. Morrison*, 81 Tex. 396, 17 S. W. 15.

4. Time to Sue.

Where will provided for specific legacies to other heirs, balance of estate to plaintiff, he may, after lapse of many—e. g., forty-nine—years, maintain action for property not disposed of in administering the estate. *Grimes v. Smith*, 70 Tex. 217, 220, 8 S. W. 33.

"The case of *Aklin v. Paschal*, 48 Tex. 147, in no way controverts the right of a devisee under these facts from asserting his rights in suit. In the case cited the holder of a money legacy was refused the privilege of intervening in a suit by the heirs of the testator to recover property lapsed by the extinction of the corporation taking under the will." *Grimes v. Smith*, 70 Tex. 217, 220, 8 S. W. 33.

Where an administrator in his report acknowledged a balance due cer-

tain heirs, and was then removed, and an administrator de bonis non appointed in his stead, held, that in the absence of any concealment, or any disability on the part of the said heirs, the statute of limitations commenced to run against their right of action against the administrator on the claim for such balance from the time of his removal. *Mott v. Ruenbuhl*, 1 White & W. Civ. Cas. Ct. App. § 601.

A defendant claiming to hold as administrator can not rely upon the statute of limitations, against the assignee of the heirs, though the plaintiff has alleged that the defendant, a short time before the commencement of the suit, set up an adverse claim to the property; and a former administrator pleaded, in a suit brought against him, but dismissed for want of security for costs, that the plaintiff was not the assignee, and that those under whom he claimed were not heirs. *Hill v. Townsend*, 24 Tex. 575.

5. Citation, Notice or Process.

"Each person entitled to a distributive share of an estate, and not applying for distribution, shall be cited before distribution shall be ordered." *Newland v. Holland*, 45 Tex. 588, 592.

Probate courts may, upon the mere general notices required by statute, make needful orders for settlement and distribution, without actual intervention of all the parties in interest. *Porter v. Sweeney*, 61 Tex. 213.

6. Filing Executor's or Administrator's Account and Sufficiency Thereof.

Where executor applied for partition of estate distributee could not claim surprise because executor was allowed, before jury impaneled, to file supplemental account containing additional items of same nature as those in original. *Shiner v. Shiner*, 15 Tex. Civ. App. 666, 670, 40 S. W. 439.

7. Parties.

A suit by a widow for her distributive share in her deceased husband's es-

tate can not be maintained unless the children of the marriage, if any, are made parties. *Newland v. Holland*, 45 Tex. 588.

Where testatrix directed her executors to procure partition of the estate into equal parts, and devised one of such parts to the children of a son, the children by the son's second wife were necessary parties on application by the executors for partition. *Shiner v. Shiner*, 15 Tex. Civ. App. 666, 40 S. W. 439.

Where plaintiff alleged that defendant administrator wrongfully paid money, to which they were entitled, to their father, who was joined as a co-defendant in a suit to recover it, and asked that, if defendant was justified in making such payment under an order of court, judgment be rendered against the codefendant, who wrongfully received and appropriated the same, there is no misjoinder of parties, since one who improperly receives money from a trustee and converts the same may be made a party to an action against the trustee to enforce the trust. *Watkins v. Sansom*, 54 S. W. 1096, 22 Tex. Civ. App. 178, citing *Love v. Keowne*, 58 Tex. 191.

8. Pleading.

a. Petition.

Administrator may be sued for property claimed by him, although it is not alleged that estate is settled. *Hill v. Townsend*, 24 Tex. 575, 580.

In action against executrix for legacy in which personal judgment against executrix was claimed, petition failing to allege facts authorizing personal judgment against her is insufficient. *Hawkins v. Forrest*, 1 Posey 167, 172.

A petition in a suit to recover a legacy alleged that decedent bequeathed \$2,000 to plaintiff's assignor; that the will was conditioned as in article 1371, Pasch. Dig.; that defendant took possession of decedent's estate under article 1372, Pasch. Dig.

Held, that the petition was demurrable for failing to show plaintiff's right to sue, since it did not allege that defendant qualified as executrix, or whether decedent's estate was in due course of administration, or in what capacity defendant took possession, other than by the reference to Paschal's Digest. *Hawkins v. Forrest*, 1 Posey Unrep. Cas. 167.

Admissions.—Petition to compel executors to pay plaintiff an annuity, which a will provided for in case there was income enough after paying other charges provided by the will, does not, by setting out the executors' statement of receipts and disbursements, assume that it shows the exact amount of legal disbursements; the petition expressly requiring that the executors produce their books on the trial. *Turner v. Clark*, 46 S. W. 381, 18 Tex. Civ. App. 606.

b. Answer.

In an action to recover property bequeathed to plaintiffs, and alleged to have come into defendant's possession as executor, and to be unlawfully detained by him, an averment in the answer that on January 23, 1888, eight days after the death of testatrix, defendant filed his petition for the probate of the will; that on March 8th following a contest of the will was filed, which contest continued until April, 1889,—is pertinent, as showing a reason for the detention of the property. *Roberts v. Stewart*, 80 Tex. 379, 15 S. W. 1108.

Date of Qualification.—In suit against executor for failure to deliver legacy as directed by will, executor may in answer allege date when he qualified, and such allegation is not conclusion of law. *Roberts v. Stuart*, 80 Tex. 379, 382, 15 S. W. 1108.

9. Hearing.

Where the widow and the children of her husband by a former marriage enter into an agreement for distribution of the estate, in consideration of

which agreement the widow conveys to such children property which is not subject to distribution, and the probate court refuses to make distribution according to such agreement because of an alleged lack of jurisdiction, it should nevertheless inquire as to what property does or does not belong to the estate, so as not to include in the distribution the property of the widow which formed the consideration for the agreement. *Hartwell v. Jackson*, 7 Tex. 576.

"Whatever may be the extent of the jurisdiction of the probate court, its powers are not so restricted as to incapacitate it from the making the necessary inquiries as to what property does or does not belong to the estate; and, in fact, the writ of partition is required to contain a full description of all the estate to be distributed. Such power is a necessary incident of the jurisdiction of the court, and can be exercised without usurpation." *Hartwell v. Jackson*, 7 Tex. 576, 581.

Questions Involved.—Where testatrix directed her executors to procure a partition of her estate into six equal parts, and devised one of such parts to certain grandchildren, to remain in the hands of the executors, who should deliver each child's interest to him when he reached majority, the county court, on partition, rightly allotted a one-sixth share to said devisees, without determining their particular interests therein. *Shiner v. Shiner*, 15 Tex. Civ. App. 666, 40 S. W. 439.

10. Evidence.

When, by a will made in 1862, a bequest was made of five hundred dollars, and suit was brought for the legacy against the executor, it was not error to refuse evidence offered by the executor, in defense, to show that the bequest was intended to be paid in confederate currency, or that it was to be discharged by a Louisiana bank

bill of that denomination. *Stephenson v. McFaddin*, 42 Tex. 322.

Sufficiency.—In an action by a devisee for a distributive share under a will, the executor claimed that plaintiff had consented, by letter, to an arrangement among the heirs that the estate be turned over to two of the sureties, who were the husbands of two of the devisees, for distribution. One of the sureties testified to having received such a letter from plaintiff, and that he showed it to the executor. His wife, a sister of the plaintiff, testified that the letter was in plaintiff's handwriting; and another of the sureties testified to having either read the letter or heard it discussed. But none of the witnesses could give the date of the letter, nor tell what had become of it. Plaintiff denied having written such letter, and testified that she did not learn that the estate had been turned over to the sureties until five years afterwards, nor did she know until then that she was entitled to any part of the estate. And her husband testified that he had never, either alone or together with his wife, authorized the arrangement referred to among the heirs. Held, that the evidence was sufficient to sustain a verdict for plaintiff. *Halsell v. Neal*, 56 S. W. 137, 23 Tex. Civ. App. 26.

Possession of Property by Executor.

—In an action to recover property bequeathed to plaintiffs, and alleged to have come into defendant's possession as executor, and to be unlawfully detained by him, it appeared that before the probate of the will defendant went to the house of one R., a daughter of testatrix, where the property sued for then was, and informed R. of the will, and that he (defendant) was executor, all of which R. denied. Defendant then told R. that she would "have to be responsible," to which she replied that she "reckoned she was responsible." Defendant left, saying to R. that he would call again

when she was calmer. He testified that he did not leave R. in charge of the property. Held, that the evidence was sufficient to sustain a finding that defendant never had possession of the property. *Roberts v. Stewart*, 80 Tex. 379, 15 S. W. 1108.

Possession of Property by Decedent.

—It appeared in such case that the property sued for had been stolen. Several witnesses testified that testatrix had owned such property, and that they had seen it in her house at various times, including her last illness. Defendant testified that he had never seen the property, but soon after the death of testatrix some one telephoned to him that it had been stolen. Held, that the court was justified in finding that there was no evidence that testatrix died possessed of the property in controversy, or when it was stolen. *Roberts v. Stewart*, 80 Tex. 379, 15 S. W. 1108.

11. Judgment or Decree.

a. Form and Requisites.

Where it did not appear that an executrix received and misapplied funds of the estate, or became liable in any way in her individual capacity, it was error, in a suit to recover a legacy, to render judgment against her individually. *Hawkins v. Forrest*, 1 Posey Unrep. Cas. 167.

In action against administrator of an estate, where special verdict found that a twelve hundred and eighty acre tract, which had been given decedent's widow on partial distribution, was not more than her community share and that two surveys alone remained in administrator's hands, judgment properly failed to give plaintiff any share in the twelve hundred and eighty acre tract. *Smith v. Smith*, 10 Tex. Civ. App. 485, 487, 32 S. W. 28, affirmed in 93 Tex. 671, no op.

b. Operation and Effect.

(1) Persons Concluded.

Where an executor was sued by one of several legatees, any adjustment or

settlement litigated in the suit would be without effect as to the rights of the other. The suit would affect only parties. *Thomson v. Shackelford*, 6 Tex. Civ. App. 121, 24 S. W. 121, affirmed in 93 Tex. 697, no op.

An executor can not acquit himself as to one legatee by accounting to another and a judgment in favor of one legatee does not acquit a legatee who is not a party to the suit. *Thomson v. Shackelford*, 6 Tex. Civ. App. 121, 24 S. W. 980.

Hart. Dig., p. 1195, provides that a creditor of a decedent's estate can require the administrator to make an exhibit, and that, if it appears from the exhibit or by other evidence that the administrator has funds subject to distribution among the creditors, the chief justice may order the same to be sold. Article 1188 declares that administrators shall receive a stated commission for their services, that all reasonable expenses shall be allowed by the chief justice, and that extra compensation may be allowed by him, if reasonable. Held that, where a creditor petitions for distribution, he can not in such proceeding question the orders made by the chief justice. *Davenport v. Lawrence*, 19 Tex. 317.

(2) Collateral Attack.

The district courts in 1872 derived their power to distribute the estate of deceased persons from the constitution, and this involved the power to determine not only what should be distributed but also to whom, and if their judgments regarding the distribution were erroneous, they were not therefore void and are not subject to collateral attack. *Pelham v. Murray*, 64 Tex. 477.

In such case the court had power, derived from the constitution, to settle the estate, which involved the power to adjust by decree the rights of persons claiming as creditors or heirs, and to enforce such decree; and this power extended to the entire estate,

whether exempt from forced sale or not. *Pelham v. Murray*, 64 Tex. 477.

A decree of the probate court having general jurisdiction of the subject matter attempted, in a manner apparently irregular, to make a partial partition of an estate. There was no appeal, or other direct proceeding to vacate it, no charge of fraud against the administrator, and the records had been destroyed by fire. Eight years afterwards, in a contest between one of the heirs and the administrator on his application for discharge, the validity of the order was attacked, and an effort made to charge the administrator with rents and profits of land partitioned under the decree; the same having been superseded by a subsequent decree dividing the entire estate. Held, that the decree was sufficient to protect the administrator against the claim of the heirs for rents and profits of property taken from his possession under it. *Johnson v. Wilcox*, 53 Tex. 413.

Every presumption should under the circumstances set forth in the preceding paragraph be indulged in favor of the decree. *Johnson v. Wilcox*, 53 Tex. 413; *Guilford v. Love*,* 49 Tex. 715; *Fitch v. Boyer*, 51 Tex. 336.

Statement of Distribution Approved but Not Entered as a Decree.—A statement of distribution of certain property, approved by the judge of the county court and entered on the records of the court, but not as a decree, is evidence of a partition of the property, but is not conclusive upon creditors of a distributee. *Debrell v. Ponton*, 27 Tex. 623.

Among the papers of a certain estate in the probate court was found a statement of the distribution thereof, purporting to have been made out, approved, and signed by the judge, but no entry of it was made on the record, nor did it appear that it was approved after a regular hearing. Held, that it did not clearly appear to be regular,

and that, as it was not entered on the minutes of the court, no presumptions could be indulged in favor of it, and that it did not conclude the parties. *Debrell v. Ponton*, 22 Tex. 686.

(3) Effect as Evidence of Recitals of Record of Probate Court.

The fact that the record of the probate court in describing the distributees of an estate, designates different parties as entitled to the same part or share, to wit: "The heirs and legal representatives of Leona Trammell," and "Leona Trammell," renders the record subject to explanation by the proof of facts to show who must have been intended; and upon proof in such case, that Leona Trammell was dead at the date of the proceedings, it must be held that her heirs were intended and were the parties whose presence and representation by attorney were recited in the decree. *Sawyer v. Boyle*, 21 Tex. 28, approved in *Eans v. Sawyer*, 27 Tex. 448.

A decree of distribution of an estate necessarily involves the determination of the fact that all the distributees are living, but only incidentally so, as the basis of the decree; the decree is therefore not conclusive of such fact, but it may be proved by any one whose interest warrants it, that one or more of the distributees were dead at the date of the decree; and it makes no difference that the decree recites that such person was present in court consenting thereto. *Sawyer v. Boyle*, 21 Tex. 28, approved in *Eans v. Sawyer*, 27 Tex. 448.

The rulings in the case of *Sawyer v. Boyle*, 21 Tex. 28, relate to the effect, as evidence, of recitals of a record of a probate court of another state in the distribution of an estate. *Eans v. Sawyer*, 27 Tex. 448.

The recital, in the proceedings and decree of the probate court, making partition of an estate, that all the heirs were present, or represented, and consenting thereto, must be taken to be

true, until the contrary is shown. *Millican v. Millican*, 24 Tex. 426.

That a letter of attorney from some of the heirs is found among the papers of the estate does not show that none others were represented. *Millican v. Millican*, 24 Tex. 426.

Recital That All Distributees Present in Court.—A decree of distribution of an estate, though incidentally determining the fact that all the distributees are living, is not conclusive of such fact; but it may be proved, by any one whose interest warrants it, that one or more of the distributees were dead at the date of decree, though the decree recites that such person was present in court, consenting thereto. *Eans v. Sawyer*, 27 Tex. 448, following *Sawyer v. Boyle*, 21 Tex. 28.

12. Costs.

Under the probate law of 1840, the share of each distributee was liable for the portion of the costs of the partition adjudged against the distributee; but this could not be held to be a lien upon all the real estate of the distributee in the county, attaching to lands in the hands of third persons, purchasers from the distributee, so long as executions were regularly issued upon the judgment for costs. *Fowler v. Evans*, 26 Tex. 636.

T. SETTING ASIDE.

In a suit by one of three heirs against the other two, based on the contention that the deed of the administrator to one of them, and hence the deed of such grantee of a half interest to the other, was void, children of the second grantee and the administrator, her husband, need not be joined. *Kalteyer v. Wipff* (Civ. App.), 49 S. W. 1055.

XI. Temporary and Special Administrators.

A. APPOINTMENT OF SPECIAL OR TEMPORARY ADMINISTRATOR.

1. In General.

The principal object of the tempo-

rary appointment of an administrator is to preserve and keep the estate together until it can pass into the hands of one fully authorized to administer it for the benefit of creditors and heirs, and it was not intended that such a temporary officer should possess greater powers than an ordinary executor or administrator so as to sell the land of the estate before either he or the court could possibly know of the necessity for such sale or other matters relating to the general condition of assets and liabilities of the decedent. *Dull v. Drake*, 68 Tex. 205, 4 S. W. 364.

Construction of Statute.—Statute authorizing appointment of temporary administrators is strictly construed. *Willis v. Pinkard*, 21 Tex. Civ. App. 423, 426, 52 S. W. 626. See, also, *Dull v. Drake*, 68 Tex. 205, 4 S. W. 364.

Compliance with Statute.—If any appointment of an administrator pro tem., does not conform to the statute (Hart. Dig., art. 1136), it must be treated as a nullity. *Alexander v. Barfield*, 6 Tex. 400.

Right to Object to Appointment.—“No party at interest has the opportunity to protest, whatever objection might be urged to the character or capacity of the individual appointed.” *Willis v. Pinkard*, 21 Tex. Civ. App. 423, 426, 52 S. W. 626.

2. Power of Court and Grounds for Appointment.

Nothing short of emergency contemplated by statute will authorize court to appoint temporary administrator. *Willis v. Pinkard*, 21 Tex. Civ. App. 423, 426, 52 S. W. 626.

Where an administrator filed his final account, and the court ordered the same to be received and recorded, and the succession closed, and that the administrator be discharged on his presenting to the court a receipt showing that the effects of the estate remaining in his name had been turned over to the heirs or other legal representatives, the appointment of an administrator

pendente lite or pro tem., a year afterwards, was void. *Fisk v. Norvel*, 9 Tex. 13.

Temporary Administratrix to Wind Up Partnership Business.—Where the estate of a decedent was in community, and consisted of cash in bank and of an interest in a partnership business in possession of the surviving partner, who was proceeding to wind up the firm affairs, the probate court could not by the appointment of a temporary administratrix authorize her to take possession of partnership assets or interfere with the right of the surviving partner to wind up the partnership business. *Goldtein v. Susholtz*, 46 Tex. Civ. App. 582, 105 S. W. 219.

Power to Authorize Husband to Prosecute Action Begun by Husband and Wife.—Under Rev. St. art. 1878, providing that the probate court shall "define the powers" of temporary administrators appointed by it, and article 1882, declaring that they shall have only such powers as are specifically committed to them, a probate court may authorize a husband, as temporary administrator of his wife's property, to prosecute an action already begun by the husband and wife to recover land belonging to her separate estate. *Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027.

Contest of Will.—Where a permanent administrator has been appointed, a subsequent contest over the will is not ground for the appointment of a temporary administrator. *Elwell v. Universalist Church*, 63 Tex. 220.

The county court can not refuse to appoint a permanent administrator because a contest over the will may arise in the future. *Elwell v. Universalist Church*, 63 Tex. 220, 222.

In absence of contest over will, county court must, upon application, appoint a permanent administrator, no executor having been named. *Elwell v. Universalist Church*, 63 Tex. 220, 222.

3. Designation.

A grant of administration pro tem., under art. 1137, Hart. Dig., is not rendered void by its designation as "pendente lite;" but the terms "pro tem.," being those employed in the state, should be used by the court from which the letters issue. *Fisk v. Norvel*, 9 Tex. 13.

4. Proceedings for Appointment.

Where a party to a suit dies, proceedings for the appointment of an administrator pro tem. should be had as on original appointment, under Hart. Dig. art. 1136. *Alexander v. Barfield*, 6 Tex. 400.

The appointment of a temporary administrator may be made upon the court's own motion without notice, and before the estate and condition of it has been otherwise brought within the cognizance of the probate judge. *Willis v. Pinkard*, 21 Tex. Civ. App. 423, 426, 52 S. W. 626.

The appointment of an administrator not in term time, must be for a particular occasion, or it is a nullity. *Alexander v. Barfield*, 6 Tex. 400, 405.

5. Duration and Termination of Appointment.

Where, on an appeal from orders of the probate court approving a sale by a temporary administratrix and appointing a permanent administratrix, the district court set aside the order of sale and the order appointing the permanent administratrix, and refused the application for such appointment, the authority of the temporary administratrix ceased, in the absence of an order made by either the probate or district courts continuing her authority as such, though there was no appeal from the order appointing the temporary administratrix. *Goldstein v. Susholtz*, 46 Tex. Civ. App. 582, 105 S. W. 219.

Extending or Continuing Appointment.—Where the county court has the authority to appoint a temporary administrator to prosecute the suit, it

has authority to continue such temporary administration so long as is necessary to "accomplish the ends of the original appointment. *H. & T. C. R. Co. v. Hook*, 60 Tex. 403; *Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027; *Williams v. Planters, etc., Nat. Bank*, 91 Tex. 651, 653, 45 S. W. 680, reversing 44 S. W. 617; *Metropolitan Life Ins. Co. v. Gibbs*, 34 Tex. Civ. App. 131, 132, 78 S. W. 398.

A temporary administration decreed by the probate court for the purpose of conducting this suit expired by limitation with the convening of the next term of the court, and was extended by order entered upon the minutes in open court. Held, that the proceeding was valid and correct. *Metropolitan Life Ins. Co. v. Gibbs*, 34 Tex. Civ. App. 131, 78 S. W. 398.

Order of Continuance Must Be Made in Term Time.—An order continuing a temporary administration must be made in term time and entered upon minutes in open court; hence such order made during vacation is void. *Willis v. Pinkard*, 21 Tex. Civ. App. 423, 427, 52 S. W. 626.

Presumption of Renewal.—One appointed temporary administrator of an estate till the next succeeding term of court, appeared in and defended a suit against his decedent, judgment being rendered against him after the term to which his appointment extended. Held, in support of such judgment it would be presumed that his appointment had been renewed. *Williams v. Planters', etc., Nat. Bank*, 91 Tex. 651, 45 S. W. 690, reversing 44 S. W. 617.

6. Review.

Where the county court refused to appoint a temporary administrator, and dismissed plaintiff's application therefor, plaintiff was entitled to appeal to the district court. *Long v. Richardson*, 62 S. W. 964, 26 Tex. Civ. App. 197.

B. POWERS AND DUTIES.

1. Powers.

Under the probate law, a temporary administrator has only such powers as are expressly granted him by the county judge at the date of his appointment. *Dull v. Drake*, 68 Tex. 203, 4 S. W. 364. See, also, *Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027.

To File Claimant's Oath and Bond.

—Under Rev. St. art. 1935, providing that temporary administrators shall have only such rights and powers with regard to the estate as are specifically expressed in the order appointing them, and any other acts performed by them shall be void, where a temporary administrator is appointed "to take charge of and care for" the estate of a decedent he is not authorized, on levy of execution on goods alleged to belong to the estate of decedent, to file claimant's oath and bond, and enter into litigation in behalf of the estate. *P. J. Willis & Bro. v. Pinkard*, 52 S. W. 626, 21 Tex. Civ. App. 423.

To Sue in Trespass to Try Title.

—Under Rev. Stat., arts. 1877, 1878, 1882, in the appointment of a temporary administrator, any power which may be exercised in a regular administration may be conferred by the probate court upon the temporary administrator. A suit by deceased in trespass to try title may be prosecuted by a temporary administrator when such power is given in his appointment. *Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027.

To Maintain Action to Recover Damages for Death by Wrongful Act.

—In the case of *H. & T. C. R. Co. v. Hook*, 60 Tex. 403, it was held by the supreme court of this state, that a temporary administrator might maintain an action to recover damages, for death of his intestate by wrongful act of the defendant although the sum recovered would constitute no part of the estate of his intestate. In that

case, however, jurisdiction of the court to grant the letters of administration was not called into question, nor could it have been successfully done under the facts. *Cooper v. Gulf, etc., R. Co.*, 41 Tex. Civ. App. 596, 93 S. W. 201, 205.

To Sue for Conversion of Personal Property.—A temporary administrator, empowered to take possession of property of an estate and collect debts, can not sue for damages for conversion of the property, since, under Rev. St. art. 1935, such administrators are forbidden to exercise any powers except those expressed in the appointment. *William J. Lemp Brewing Co. v. La Rose*, 50 S. W. 460, 20 Tex. Civ. App. 575; *Willis & Bro. v. Pinkard*, 21 Tex. Civ. App. 423, 426, 52 S. W. 626.

Power to Make Sale.—Power to sell lands is not one of the powers conferred by law on a temporary administrator. *Cruse v. O'Gwin*, 48 Tex. Civ. App. 48, 106 S. W. 757; *Dull v. Drake*, 68 Tex. 205, 4 S. W. 364; *Willis & Bro. v. Pinkard*, 21 Tex. Civ. App. 423, 52 S. W. 626. See the title EXECUTORS' AND ADMINISTRATORS' SALES.

An administrator pro tem. has no right to sell a negro slave belonging to the estate, and can give no title without an order of the probate court; and hence a bill of sale made without such order is not admissible in evidence against him in a suit afterwards commenced to recover the slave. *Robinson v. Martel*, 11 Tex. 149.

Collection and Disposition of Assets—Accepting Part Payment in Full Satisfaction of Life Policy.—A temporary administrator, authorized to "enter upon, collect, and take possession of all [the property of decedent]; to receive and receipt for all moneys due the estate," and continue the business of decedent,—has no power to accept a part payment on a policy of insurance on decedent's life in full satisfaction of the policy. *Germania Life Ins. Co.*

v. Peetz (Civ. App.), 47 S. W. 687, affirmed in 93 Tex. 708, no op.

Disposition Contrary to Order of Court.—Where the order appointing a special administrator directs him to sell certain property and deposit the money in court, and he deposits the money with the county judge instead of with the clerk, he can not receive credit in his account therefor. *James v. Craighead* (Civ. App.), 69 S. W. 241.

Disposition without Order of Court.—Where a special administrator was ordered not to pay out any money without an order of court, he should not receive credit for money paid, without an order, as interest on vendor's lien notes held against the estate. *James v. Craighead* (Civ. App.), 69 S. W. 241.

Acts Not Validated by Subsequent Order of Court.—Where a suit was improperly instituted by a temporary administrator for want of power in him to sue under the order of appointment, no subsequent order of the probate court authorizing the suit could give such act validity. *P. J. Willis & Bro. v. Pinkard*, 52 S. W. 626, 21 Tex. Civ. App. 423.

2. Duties.

Temporary administrator is not bound to use diligence before he qualifies. *Roberts v. Stuart*, 80 Tex. 379, 386, 15 S. W. 1108.

After Qualification.—An administrator pro tem. is required, after he qualifies, to use ordinary care to recover and hold assets within the scope of his power as fixed by the order of the court appointing him. Rev. Stat., arts. 1882, 1933. *Roberts v. Stuart*, 80 Tex. 379, 15 S. W. 1108.

Under Rev. St. art. 1933, a temporary administrator was only required to use ordinary diligence in protecting or recovering the property of the estate. *Roberts v. Stuart*, 80 Tex. 379, 15 S. W. 1108.

XII. Administrator De Bonis Non and with the Will Annexed.

A. APPOINTMENT.

1. Power and Discretion of Court.

a. In General.

Where an administrator is removed and it appears that the estate has not been fully settled and distributed, it is within the discretion of the probate court to grant letters of administration de bonis non. *Frost v. Frost*, 45 Tex. 324.

Where an estate has not been fully administered, whether an administrator de bonis non should be appointed is within the discretion of the probate court, and the unwise exercise of such discretion in appointing such administrator will not invalidate the appointment. *Frost v. Frost*, 45 Tex. 324.

Under Act Feb. 3, 1840, allowing the court to extend the time beyond one year, for administration, on good cause shown, but not definitely fixing the time to close it, and the laws of Louisiana, previously in force in Texas, giving the court the right to keep open an estate for five years, the court had power in 1844, upon the death of an administrator appointed in 1839, within five years of his appointment, to appoint a new administrator to close the estate. *Williams v. Howard*, 10 Tex. Civ. App. 527, 31 S. W. 835.

In *Frost v. Frost*, 45 Tex. 324, 342, the court held, "whether it was absolutely essential that further administration should be had upon it, or whether it was for the interest of the heirs or creditors that the administration should be longer continued, certainly it can not be said that it was not within the power and jurisdiction of the court to grant letters de bonis non to complete its full and final settlement." *Baker v. De Zavalla*, 1 Posey 621, 637.

"An Administration."—The management of the estate of a deceased per-

son and the disposition of property by executors acting under a will which withdraws the estate from the general control of a probate court, is to be deemed within the meaning of the law, an "administration." *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803.

Failure to revoke letters of former administrator who has neglected to administer does not invalidate subsequent appointment of administrator de bonis non. *Howard v. Bennett*, 13 Tex. 309, 314.

Form of Grant.—The fact that a second grant of administration on an estate is general, and not confined to the goods, etc., de bonis non, and makes no mention of a previous administration, can not affect the power of the court. That is the character of the grant, in substance, though not so expressed in form. *Grande v. Herrera*, 15 Tex. 533; *Brockenborough v. Melton*, 55 Tex. 493, 501.

b. Estate Administered by Independent Executor Unrepresented.

Estates administered by independent executors come within Rev. St. art. 1924, authorizing a grant of further administration, where the estate is unrepresented by reason of the death, or removal or resignation of the executor. *Roy v. Whitaker*, 92 Tex. 346, 48 S. W. 892, 49 S. W. 367; *Langley v. Harris*, 23 Tex. 564, 569; *Willis & Bro. v. Ferguson*, 59 Tex. 175, s. c., 46 S. W. 496; *Frisby v. Withers*, 61 Tex. 134; *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75; *Bell v. Farmers'*, etc., Bank, 33 Tex. Civ. App. 408, 410, 76 S. W. 798, affirmed, no op.

Article 1995, Rev. Stat., allowing testators to name independent executors does not contemplate such withdrawal of estates from jurisdiction of court that their settlement can not be resumed in case executor named fails to perform his duties. *Roy v. Whitaker*, 92 Tex. 346, 352, 48 S. W. 892, 49 S. W. 367. See *Langley v. Harris*, 23 Tex. 564.

2. Necessity and Grounds for Appointment.

Existence of Debts.—The statute granting authority to appoint an administrator de bonis non has not made it dependent upon the existence of debts against the estate. *Strickland v. Sandmeyer*, 21 Tex. Civ. App. 351, 354, 52 S. W. 87; See *San Roman v. Watson*, 54 Tex. 254; *Baker v. De Zavalla*, 1 Posey 621, 637; *Frost v. Frost*, 45 Tex. 324, 342; *White v. Downs*, 40 Tex. 225, 227.

Suits Pending against Estate.—Where suits are pending by or against an administrator, and property belonging to the estate has been fully distributed among those entitled to receive it, such facts constitute sufficient ground for the appointment of an administrator de bonis non on the removal or resignation of the administrator. *Frost v. Frost*, 45 Tex. 324.

A judgment barred by limitation is not such a claim against the estate as will authorize the appointment of an administrator de bonis non. *Chandler v. Hudson*, 11 Tex. 32, 37.

Where, in an application for letters of administration de bonis non, by a creditor, filed June 15th, 1852, it appeared that the deceased had died in 1840; that administration on his estate was granted in April of that year; and that the administration had been closed by the discharge of one administrator in 1849, and of the other in May, 1852; and it further appeared that the claim of the creditor was a judgment obtained against the deceased and another, in 1838, which was presented to one of the administrators and accepted by him in December, 1840, but was never presented to the probate judge to be ranked among the debts of the succession. Held, that there was no valid, subsisting claim, against the estate, disclosed by the facts, and that letters of administration de bonis non were rightly refused. *Chandler v. Hudson*, 11 Tex. 32.

Unadministered Assets.—An admin-

istration de bonis non can only be had where there are effects unadministered. *Francis v. Hall*, 13 Tex. 189, 193.

An intestate died in 1836. An administration was granted on his estate, which was kept open until 1841, when the husband of the decedent's widow was appointed administrator de bonis non, on showing that the administrator had departed from the republic and had been absent for more than 10 months. Such administrator d. b. n. continued to act until his death in 1850, when B. filed a petition for administration, showing that all of the decedent's property had been sold except a headright certificate and alleged that all the debts had been paid, except one owing to such petitioner, together with expense of administration. Administration was granted to B.'s deputy. Held, that such last administration was valid. *Baker v. De Zavalla*, 1 Posey, Unrep. Cas. 621.

Lapse of time and other circumstances raise a presumption that all debts against an estate are barred or paid, and that the remaining assets belonged to the heirs, and therefore the estate can not be reopened by the appointment of an administrator de bonis non. *Murphy v. Menard*, 14 Tex. 62.

Assets of Estate Collected but Undistributed.—The supreme court in the case of *San Roman v. Watson*, 54 Tex. 254, says: "We are of the opinion that no more proper case (for the appointment of an administrator de bonis non) could be found than one in which large sums belonging to the estate have been collected and not accounted for or distributed by the former administrator. The court had the authority to appoint an administrator to close up the affairs, of the estate, and if necessary to sue the representatives of the former administrator for the funds he owned the estate. That the remedy can be more conveniently and certainly exercised through the succeeding administrator than when left to the heirs

or creditors is quite apparent.'" *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75; *Strickland v. Sandmeyer*, 21 Tex. Civ. App. 351, 354, 52 S. W. 87.

Estate Unrepresented.—The land of a decedent, with the exception of one lot, omitted by mistake, was sold under order of the court to satisfy, *pro tanto*, a vendor's lien; and the sale was confirmed, and the administrator ordered to convey to the purchaser,—the original vendor. He died without making the conveyance. Held, that administration d. b. n. was properly granted, under Rev. St. art. 1871, providing that whenever an estate is unrepresented, by reason of the death of the administrator, the court shall, if necessary, grant further administration. *Adams v. Richardson's Estate*, 5 Tex. Civ. App. 439, 27 S. W. 29.

Fraudulent Disposition of Property by Administrator.—See, also, post, "Actions—When Maintainable," XII, E.

Where an administrator's sale was canceled because fraudulently made, the law regards the property as unadministered assets of the estate, and if necessary, the administrator who makes the fraudulent sale can be removed for that cause, and an administrator, *de bonis non*, appointed in his stead or, at the instance of the heir, a receiver might be appointed perhaps, and the property protected until a more faithful administrator can be appointed. *Giddings v. Steele*, 28 Tex. 732, 749. See, also, *Long v. Wortham*, 4 Tex. 382; *Evans v. Oakley*, 2 Tex. 182; *Burdett v. Silsbee*, 15 Tex. 604.

Right of Sureties to Compel Appointment.—Where an administrator is removed for mismanagement of his trust, the sureties on his bond can not compel the appointment of an administrator *de bonis non* for the purpose of determining the extent of their liability. *Mott v. Riddell*, 2 Posey, Unrep. Cas. 107.

Discharge of Former Administrator.—Where the county court discharged

an administrator *de bonis non* and closed the estate, the court had no power after the expiration of the term to grant another administration thereon and appoint another administrator *de bonis non*. (Civ. App.) *Wallace v. Turner*, 80 S. W. 432, judgment affirmed *Turner v. Wallace*, 92 S. W. 31, 99 Tex. 543.

Enforcement of Small Claims—Holder Having Remedy against Heirs.

—Where an estate was administered, with the exception of a claim of \$66.66, and final settlement made in 1895, and more than enough property distributed among the heirs to pay the remaining claim, the probate court was not justified in appointing an administrator *de bonis non* in 1901. Judgment, *Wallace v. Turner* (Civ. App.), 89 S. W. 432, affirmed. *Turner v. Wallace*, 92 S. W. 31, 99 Tex. 543; *Fisk v. Norvel*, 9 Tex. 13; *Hurt v. Horton*, 12 Tex. 285; *Wither v. Patterson*, 27 Tex. 491.

"After the lapse of so long a time from the close of the former administration, during which the property had been divided among and taken possession of by the heirs, it was no proper exercise of its jurisdiction for the court to grant a second administration and thereby consume the property in the expenses thereof merely to enforce a small claim for which the holders had a complete and simple remedy by suit for its collection out of the property which went into the hands of the heirs. Rev. Stat. 1895, arts. 1912, 1913, 1924, 1927; *Montgomery v. Culton*, 18 Tex. 736, 749; *Fisk v. Norvel*, 9 Tex. 13, 17; *Blinn v. McDonald*, 92 Tex. 604, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931." *Turner v. Wallace*, 99 Tex. 543, 92 S. W. 31, 32, affirmed in 92 Tex. 31.

Necessity in Suit to Subject Property in Hands of Guardian.—The holder of a note, which, by the acknowledgment of the administrator and the approval of the chief justice, has become a recognized claim against the estate of the deceased maker, which

has been closed without payment of the debt, may subject the interest to which the estate was entitled, in property that has passed into the hands of the guardians of the heirs of the maker, without the intervention of an administrator de bonis non, though such guardian received the property from an estate in which his wards and the deceased debtor were jointly interested, and on which the debtor was administratrix, but as to which there had not been a final partition and distribution. *Debrell v. Ponton*, 22 Tex. 686.

3. Jurisdiction and Proceeding.

Rev. St. 1895, art. 1995, authorizing a person to provide by will that no other action shall be had in the county court in relation to the settlement of the estate than the probate of the will, and the return of the inventory and list of claims, withdraws the estate from the court's jurisdiction only so far as its settlement is concerned, and does not deprive the county court of jurisdiction to appoint an administrator d. b. n. in place of an independent executor who has resigned. *Roy v. Whitaker*, 48 S. W. 892, 92 Tex. 346.

Will Conveying Spendthrift Trust—Estate Fully Administered.—Where a will created a spendthrift trust and vested the legal title to the property in the executor as trustee, who died after having fully administered the estate, in so far as his duties as executor were concerned, the county court has no jurisdiction to appoint an administrator with the will annexed, but the further administration of the trust should be accomplished through a trustee to be appointed by the district court. *McClelland v. McClelland*, 46 Tex. Civ. App. 26, 101 S. W. 1171.

An administrator with the will annexed could not, in view of the probate laws, administer the estate so as to effectuate the intention of the testator. The duties imposed could only be performed by a trustee who could exercise the same powers that were

conferred upon the deceased executor or trustee of such spendthrift trust and, he having died, the district court, in the exercise of its general jurisdiction, had the power to appoint a trustee. *McClelland v. McClelland*, 46 Tex. Civ. App. 26, 101 S. W. 1171, 1176, affirmed in 102 Tex. 587, no op., citing *Willis v. Alvey*, 30 Tex. Civ. App. 96, 69 S. W. 1035, affirmed in 97 Tex. 651, no op.

Conditions Precedent.—An administrator de bonis non may be appointed on the administrator's death without closing up the estate or accounting for funds belonging to it, though there be no claims against the estate. *Strickland v. Sandmeyer*, 52 S. W. 87, 21 Tex. Civ. App. 351.

County in Which Taken Out.—Administration de bonis non is not void because not taken out in the same county where the original letters were granted. *Grande v. Herrera*, 15 Tex. 533; *Brockenborough v. Melton*, 55 Tex. 493, 501. See *Wardrup v. Jones*, 23 Tex. 489, 495.

Where there had been an administration on an estate at the place of residence of the estate of the deceased, an administration de bonis non in a different county fourteen years later is illegal and void. *Wardrup v. Jones*, 23 Tex. 489, 495.

Application and Hearing Thereon.—It is not necessary to state in the application for appointment of an administrator de bonis non that debts were pending against estate. *Strickland v. Sandmeyer*, 21 Tex. Civ. App. 351, 354, 52 S. W. 87; *Williams v. Verne*, 68 Tex. 414, 4 S. W. 548. See, also, *Kleinecke v. Woodward*, 42 Tex. 211.

"In the case of *Williams v. Verne*, 68 Tex. 414, 4 S. W. 548, * * * it is said that it was sufficient 'to represent to the court that the estate is not fully administered, without the allegations named in the statute for an application for an original grant of letters.' See, also, *Kleinecke v. Woodward*, 42 Tex. 311."

Strickland v. Sandmeyer, 21 Tex. Civ. App. 351, 354, 52 S. W. 87.

Under Rev. St. art. 1959, which provides that "when the administrator of the estate not administered has been, or shall be hereafter, appointed, he shall succeed to all rights," etc., it is sufficient, in an application for letters as administrator de bonis non, merely to represent to the court that the estate is not fully administered, and the necessity for administration need not appear therein. *Williams v. Verne*, 68 Tex. 414, 4 S. W. 548.

Thus an application for letters of administration de bonis non is sufficient when it shows that former administrator died without winding up estate. *Williams v. Verne*, 68 Tex. 414, 416, 4 S. W. 548.

"The application before us alleges that John Barrick had been appointed and qualified as administrator of the estate, and had 'died before winding up the estate of A. M. Barrick aforesaid.' We are of opinion this is sufficient, even if it was essential to the validity of an administration that the necessity therefore should appear on the face of the application for letters. But it has been decided that this is not necessary; that proof may be made in the probate court of a fact not alleged in the pleading; and that the presumption should be indulged that the proper evidence had been offered to support the judgment. (*Kleinecke v. Woodward*, 42 Tex. 311, and cases there cited.)" *Williams v. Verne*, 68 Tex. 414, 417, 4 S. W. 548.

Time within Which Administration Granted.—Rev. St. art. 1827, which prescribes the time within which administration shall be granted on the estate of a decedent, has no application to the granting of an administration de bonis non. *Adams v. Richardson's Estate*, 5 Tex. Civ. App. 439, 27 S. W. 29.

An application for letters de bonis non, made 16 years after probate, by

one showing neither an interest in the estate nor that any debts remained unpaid, will be refused. *San Roman v. Watson*, 54 Tex. 254.

The appointment of an administrator de bonis non 15 years after the letters of the last administrator had been revoked, and nearly that time after his term would have expired by limitation, is a nullity, the administration having terminated. *Dodge v. Phelan*, 2 Tex. Civ. App. 441, 21 S. W. 309.

Even though an estate had not been fully administered by the original administrator, it was too late, after the lapse of 12 years, for the probate court to appoint an administrator de bonis non for the purpose of letting in a dormant judgment obtained against the original administrator shortly after he had been discharged, where there were no equities intervening. *McGreal v. Jones*, 36 Tex. 673.

Under Rev. St. art. 1829, providing that, where letters have once been granted, any person interested may proceed, "after any lapse of time," to compel settlement of the estate, it was proper to grant letters of administration de bonis non on an application made 19 years after the last order by the heirs of said purchaser; it being alleged that they had just learned that said lot was omitted from the sale. *Adams v. Richardson's Estate*, 5 Tex. Civ. App. 439, 27 S. W. 29; *Branch v. Hanrick*, 70 Tex. 731, 8 S. W. 539.

Oath.—See ante, "Oath," II, C, 2, b.

Persons Entitled to Contest Application.—A trustee, receiving property of an estate under a judgment of a competent court, still in force and unappealed from, is an interested party, such as is entitled, under the statute, to contest an unnecessary grant of letters of administration de bonis non. *San Roman v. Watson*, 54 Tex. 254.

In case of an application for the appointment of an administrator de bonis non, if there is no denial of the va-

cancy of the succession, there can be no opposition to the grant of administration to some particular person, without showing that another person has a superior claim to it; but any person interested may be heard in opposition to any grant at all. *Chandler v. Hudson*, 11 Tex. 32.

4. Operation and Effect.

The appointment of an administrator de bonis non is not the opening of a new administration upon the estate but merely a continuance of the former administration. *Strickland v. Sandmeyer*, 21 Tex. Civ. App. 351, 353, 52 S. W. 87, following *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803, and *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75, and distinguishing *Fisk v. Norvel*, 9 Tex. 13, 15, and *Withers v. Patterson*, 27 Tex. 491, in each of which the administration had been closed by the probate court.

"An administration de bonis non is in legal effect the continuance of the previous administration." *San Roman v. Watson*, 54 Tex. 254, 259; *White v. Downs*, 40 Tex. 225, 227; *Strickland v. Sandmeyer*, 21 Tex. Civ. App. 351, 354, 52 S. W. 87.

5. Collateral Attack of Appointment.

a. In General.

The appointment of an administrator de bonis non by the county court can not be collaterally attacked where the records of the court do not affirmatively show the appointment to be illegal. *Chapman v. Brite*, 4 Tex. Civ. App. 206, 23 S. W. 514; *Lyne v. Sanford*, 82 Tex. 58, 63, 19 S. W. 847; *Alexander v. Maverick*, 18 Tex. 179; *Hurley v. Barnard*, 48 Tex. 83, 87; *Guilford v. Love*, 49 Tex. 715; *Williams v. Ball*, 52 Tex. 603, 608; *Murchison v. White*, 54 Tex. 78, 83; *Heath v. Layne*, 62 Tex. 686, 691; *Rutherford v. Stamper*, 60 Tex. 447, 449; *Fleming v. Seeligion*, 57 Tex. 524; *Turner v. Wallace*, 99 Tex. 543, 92 S. W. 31, affirming 92 S. W. 31.

If the court has no jurisdiction of

the estate, the appointment of an administrator with the will annexed is void and can be attacked collaterally as well as directly. *Roy v. Whitaker*, 92 Tex. 346, 353, 48 S. W. 892, 49 S. W. 367.

The county court being a court of general jurisdiction, its order appointing an administrator de bonis non is not subject to collateral attack, where the record does not, on its face, disclose want of jurisdiction. *Strickland v. Sandmeyer*, 52 S. W. 87, 21 Tex. Civ. App. 351.

"Upon * * * collateral attack, we can not inquire into the question whether the administrator faithfully performed the duties of his trust. If not, he was liable on his bond to * * * the heirs of the estate; but it would not affect the validity of the administration or the title to the land sold thereunder. To do this, the proceedings must have been absolutely void for want of jurisdiction." *Brockenborough v. Melton*, 55 Tex. 493, 501.

Independent Will.—An independent executrix, under will, openly declared her purpose to have nothing to do with the estate, refused to return an inventory, and requested the county judge to appoint as administrator de bonis non her son. Held, that these facts tended to show that the county judge acted on sufficient evidence in declaring the estate vacant, and a purchaser of land, sold under order of court by the administrator de bonis non, was protected as against a collateral attack calling in question the legality of the administration. *Willis & Bro. v. Ferguson*, 59 Tex. 172; *Willis & Bro. v. Ferguson*, 46 Tex. 496, 504. See *Roy v. Whitaker*, 92 Tex. 346, 353, 48 S. W. 892, 49 S. W. 367.

b. Presumptions.

As to Jurisdiction.—A court granted letters of administration de bonis non, knowing that an administrator had been appointed in another county and had resigned. Held that, on a col-

lateral attack, the jurisdiction of the court would be conclusively presumed. *Brockenborough v. Melton*, 55 Tex. 493.

One who had resided elsewhere in Texas died in Galveston in 1844, where it did not clearly appear that he had a fixed domicile. Administration was granted on his estate to his wife in Galveston county. She qualified, and filed a partial inventory, but nothing more was done either by herself or that court touching the succession. Afterwards, in 1845, letters de bonis non were granted on the same estate to the brother of the deceased, in Bastrop county, where the decedent once lived and owned property. The jurisdiction of the court in Bastrop county was exercised on an application for letters, which recited the former grant of letters and that the administratrix intended to resign. Under the letters last granted a full inventory showing a large estate was filed, and the estate administered. The validity of the Bastrop administration was attacked in a suit brought in 1878. Held: (1) That in a collateral attack the jurisdiction of the Bastrop court being invoked on a contemplated resignation and abandonment of the Galveston administration, it will be conclusively presumed that the contingency happened which would validate the grant of letters by the Bastrop court. (2) That presumption is strengthened by an acquiescence for thirty years in the proceedings of the Bastrop court by all parties having an interest; by the further fact that it did not appear clearly that the deceased had a fixed residence in Galveston; by the fact that the inventory at Galveston was but a partial one, and by the fact that the widow, to whom letters in Galveston were granted, survived twenty-four years and made no complaint, though the administration was closed in Bastrop, and large interests sold under it. (3) The Bastrop administration was not void for want

of jurisdiction. *Brockenborough v. Melton*, 55 Tex. 493.

"Not to so presume would open a flood-gate of litigation, and, as said by Wheeler, justice, in *Burdett v. Silsbee*, would be attended with the most dangerous and alarming consequences. 15 Tex. 604, 619." *Brockenborough v. Melton*, 55 Tex. 493, 505:

As to Existence of Debts.—A recital, in an order appointing an administrator de bonis non, that the former administrator "had died without closing the business of the estate," implies the existence of debts against the estate, and is sufficient in a collateral attack on the order, in the absence of proof to the contrary, to justify the presumption that the court found that debts existed. *Corley v. Goll*, 8 Tex. Civ. App. 184, 27 S. W. 819.

It will not be presumed for the purpose of disproving the jurisdiction of the court granting letters de bonis non, from the duration of the administration of a decedent's estate that the debts against the estate have been settled or barred by limitations, as debts established against such an estate are not, pending the administration, subject to the statute of limitations. *Corley v. Goll*, 8 Tex. Civ. App. 184, 27 S. W. 819.

Fact of Abandonment.—"A resignation of the executrix or a removal of her by order of court would conclusively establish a vacancy in the administration of the estate. But it would not follow that a court of competent jurisdiction, called upon directly to act upon it, might not arrive at and determine the fact of abandonment upon other and different evidence of it; * * * ordinarily the act of granting letters of administration upon such an application might well raise the presumption that it had been determined upon some competent evidence, in the absence of proof to the contrary sufficiently apparent from the record to vitiate the proceedings." *Willis &*

Bro. v. Ferguson, 46 Tex. 496, 504; *Willis & Bro. v. Ferguson*, 59 Tex. 172, 175. See, also, *Roy v. Whitaker*, 92 Tex. 346, 358, 48 S. W. 892, 49 S. W. 367.

6. Revocation of Appointment.

Where there was no basis in the facts for the proper exercise of the jurisdiction of the court in granting administration de bonis non, the court has the power and is under the duty to revoke it upon timely application and a showing of the absence of necessity or jurisdiction for it. *Turner v. Wallace*, 99 Tex. 543, 92 S. W. 31, affirming 92 S. W. 31; *Fortson v. Alford*, 62 Tex. 576; *Heath v. Layne*, 62 Tex. 686, 694; *Vance v. Upson*, 64 Tex. 266; *Franks v. Chapman*, 61 Tex. 576.

B. DISCHARGE OR REMOVAL.

An order of the county court discharging an administrator de bonis non and closing the estate was not subject to collateral attack for invalidity, because the court erred in making such order without proof of service of citation thereon and before all of the debts and expenses had been paid. *Wallace v. Turner* (Civ. App.), 89 S. W. 432; *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325, affirming 33 S. W. 325.

C. POWERS AND DUTIES.

1. Powers.

In General.—The statutes (Rev. St., art. 1956), of this state give to administrators de bonis non powers, broader than such representatives have ordinarily been held to have under the English law as administered in the ecclesiastical courts. *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803.

The power of an administrator de bonis non extends only to property which has not been administered. *Cochran v. Thompson*, 18 Tex. 652; *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803.

"An administrator de bonis non succeeds to all the rights, powers and

duties of the former administrator, and has power to settle with, receive from, or sue for all property of whatever character remaining in the hands of the former administrator; and also he has 'power to bring suit on the bond of the former administrator in his own name, as administrator, for all the estate that has not been accounted for by such former administrator.' Hart. Dig., art. 1224." *Baldwin v. Dearborn*, 21 Tex. 446, 448; *Martel v. Martel*, 17 Tex. 391, 392; *Francis v. Northcote*, 6 Tex. 185; *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803; *Dwyer v. Kalteyer*, 68 Tex. 554, 558, 5 S. W. 75.

An administrator de bonis non becomes the representative of the estate, and trustee for the creditors and distributees alike; he takes his title from the deceased and not from his predecessor, and has just the same rights and powers as had his predecessor, and may do what he failed or neglected to do for the preservation of the estate. *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803.

Power to Become Party to Litigation.

—Under Rev. St., art. 1960, an administrator de bonis non could not only become a party to litigation against the former executors prior to the rendition of a judgment, but he could do so after judgment by instituting the proper proceedings to have the judgment revived. He could also make himself a party to any litigation necessary, after the rights of the parties had been finally settled by a judgment, to prevent an abuse or fraudulent use of the process through which the parties were authorized in good faith to enforce the judgment. *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803.

Power to Carry Out Conditions of Will.—A mere administrator d. b. n. c. t. a. can not exercise any of the discretionary powers conferred by the will on the executors. *Frisby v. Withers*, 61 Tex. 134.

Administrator de bonis non, ap-

pointed on death or resignation of executors named in will, may administer estate in accordance with the will, under order of the proper court. *Frishy v. Withers*, 61 Tex. 134.

Power to Repudiate Contract of Predecessor.—An administrator de bonis non will not be permitted to repudiate a contract of his predecessor without compensating the party injured for all loss induced by the contract. *Cock v. Carson*, 38 Tex. 284.

Administrator De Bonis Non with Will Annexed.—An administrator de bonis non with will annexed derives his powers from the law and not from the will, and is not authorized to execute trusts charged by the will upon the executor named therein. (*Tippett v. Mize*, 30 Tex. 361.) Therefore, a testatrix, having appointed an executor of her will, which bequeathed legacies to minors, and directed that the legacies be put at interest during the infancy of the legatees, and the executor having resigned without executing the will in this respect, whereupon an administrator de bonis non, with the will annexed, was appointed, and he loaned out the legacies on personal security and without the authority of the probate court—it is held that the sureties of the administrator are liable for the fund, with interest at eight per cent per annum since it came to the hands of the administrator. It is of no avail to the sureties that the administrator acted in good faith, and that he loaned the fund on personal security which was amply good at the time, but which had become worthless in consequence of the abolition of slavery, etc. *Varde-man v. Ross*, 36 Tex. 111; *Tippett v. Mize*, 30 Tex. 361.

2. Duties.

The provisions of arts. 1959-1961, Rev. Stat., regulating the appointment of an administrator de bonis non and declaring his duties and powers, are the same as those of Paschal's Digest, 1376, and it is evident that the

duties of such an administrator extend only to the estate not administered. *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803.

If property be not disposed of in due and proper course of administration, but in a manner and on terms operating as a fraud on creditors as well as on distributees, it is unadministered as against any person participating in the transaction or cognizant of it. *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803.

A sale of property under such an administration, through the act of an executor or under a decree against him by a court having jurisdiction to render it, would require the property of the estate so disposed of, to be considered as administered as fully as though it had been sold in an ordinary administration under an order of a probate court. In the one case as in the other, property would be said to be administered or unadministered under the same state of facts. *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803.

As to Collection of Assets.—It is the duty of an administrator de bonis non to collect and receive from his predecessor all the property of every description in his hands at date of his removal. *Mott v. Ruenbuhl*, 1 App. Civ. Cases, § 600.

Preservation and Recovery of Assets.—For the purposes of administration the title and right of an administrator de bonis non is superior to that of the heir, creditor or other distributee, and he can preserve or recover the estate when others seek to misapply it. *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803.

Where assets have been fraudulently alienated by an administrator, in collusion with the vendee, they may be recovered by the administrator de bonis non, notwithstanding such assets have become subject to the lien of a judgment of the vendee which was ob-

tained through fraud. *De Witt v. Miller's Adm'r*, 9 Tex. 239.

Where executors administering an estate without the control of the probate court under the terms of the will have fraudulently connived at a levy and sale of the property, under a judgment, at a grossly inadequate price, an administrator *de bonis non*, appointed by the court, after their removal, to succeed them, can, under Rev. St., §§ 1959-1961, petition or move to set aside such sale and cancel the deed; the property, by reason of the fraud, being deemed to be unadministered. *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803. See, also, *Cochran v. Thompson*, 18 Tex. 652, 657.

Administrator with Will Annexed.—

An administrator with the will annexed is chargeable with notice of the contents of the will though it be in a particular as to which the will has no direct legal effect. *Moore's Adm'r v. Minerva*, 17 Tex. 20.

3. Administrator with Independent Will Annexed.

Under Rev. St., art. 1995, authorizing a testator to provide in his will that his estate shall be settled out of court, except as to probating and recording the will, and the return of an inventory, etc., the court has no power to appoint an independent administrator with the will annexed on the death or failure to qualify of the executor, though the will so provides. The court must proceed under the general laws, and resume entire control of the administration. *In re Grant's Estate*, 53 S. W. 372, 93 Tex. 68.

Under art. 1924, Rev. Stat., in case of death of independent executor appointed under art. 1995, Rev. Stat., or his ceasing to perform his duties, court may appoint successor having plenary powers, except as to rights conferred upon predecessor by will, per art. 2012, Rev. Stat. *Roy v. Whitaker*, 92 Tex. 346, 352, 48 S. W. 892, 49 S. W. 367.

"In *Langley v. Harris*, 23 Tex. 564, the court say: 'The section of the statute which gives the testator the right to insert such a provision in his will contemplates that the executor named will accept the trust confided to him. It is a special trust, which can not be transferred to another by the trustee, nor delegated to another by the county court. It confides in the discretion and integrity of a particular person; and if that person should fail to accept, and exercise the trust, it is at an end; and, as in any other case, where there is a will without an executor, the county court must appoint an administrator with the will annexed.'" *In re Estate Grant*, 93 Tex. 68, 53 S. W. 372; *Roy v. Whitaker*, 92 Tex. 346, 48 S. W. 892, 49 S. W. 367. *Langley v. Harris*, 23 Tex. 564, is sustained by the following cases: *Willis & Bro. v. Ferguson*, 59 Tex. 172; *Frisby v. Withers*, 61 Tex. 134, 138; *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75.

"In *Langley v. Harris*, 23 Tex. 564, the executor failed to accept the trust, and it was held that the administrator, with the will annexed, was subject to the action and control of the court, the same as though no executor had been named in the will, with the special power of administering the estate prescribed in art. 1371, Pas. Dig." *Willis & Bro. v. Ferguson*, 46 Tex. 496, 503.

"The doctrine has been reaffirmed in the following cases: *Tippett v. Mize*, 30 Tex. 361; *Blanton v. Mayes*, 58 Tex. 422; *Frisby v. Withers*, 61 Tex. 134. See, also, *Roy v. Whitaker*, 92 Tex. 346, 48 S. W. 892, 49 S. W. 367. It is apparent from the cases cited that in case of a will which nominates an executor and provides for an independent administration of the estate, ordinarily, the appointment of an administrator does not confer upon him the power to settle the estate free of the control of the court." *In re Estate Grant*, 93 Tex. 68, 73, 53 S. W. 372.

"The powers given by the will to the executors were personal and could not be exercised by another, even though such other person on the resignation of the executors might be appointed to administer the estate under the will by the proper probate court. *Langley v. Harris*, 23 Tex. 564; *Tipsett v. Mize*, 30 Tex. 361, 362." *Frisby v. Withers*, 61 Tex. 134, 138.

In the case of *Frisby v. Withers*, 61 Tex. 134, 138, the testator appointed two executors, only one of whom qualified. Before the estate was finally settled, the executor who qualified resigned his trust and the probate court appointed an administrator de bonis non with the will annexed, who sold land of the estate without an order of court. Judge Stayton, delivering the opinion, said: "Under this (the appointment as administrator) he could administer the estate in accordance with the will under the order of the probate court, but such appointment did not carry with it the right to exercise the discretionary powers conferred alone upon the executors named in the will." *Roy v. Whitaker*, 92 Tex. 346, 353, 48 S. W. 892, 49 S. W. 367.

Power to Sue Representative of Deceased Independent Executor.—In the case of *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75, it was held that an administrator de bonis non, with the will annexed, might sue the representative of the deceased independent executor of the will. *Roy v. Whitaker*, 92 Tex. 346, 48 S. W. 892, 49 S. W. 367.

Suit to Set Aside Sale under Execution.—The executors under an independent will suffered judgment to be entered against them under which property was sold; thereafter, the executors were removed, and an administrator de bonis non with the will annexed was appointed. The administrator brought suit to set aside the sale of the property made under execution against the executors. It was held

that the management of the estate by the independent executors was an administration of it under the law, and that the administrator de bonis non with will annexed succeeded the executors and continued the administration, and might maintain the action, because the executors whom he succeeded could have maintained it. *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803; *Roy v. Whitaker*, 92 Tex. 346, 354, 48 S. W. 892, 49 S. W. 367.

D. PROPERTY AND RIGHTS PASSING TO ADMINISTRATOR DE BONIS NON.

An administrator, after acknowledging in his report a balance due certain heirs, was removed, and an administrator de bonis non appointed. Held, that the administrator was not liable to the heirs for the balance, but only to the administrator de bonis non, if at all. *Mott v. Ruenbuhl*, 1 White & W. Civ. Cas. Ct. App. § 601.

Title to property of an estate vests in the heirs when the estate is vacant by the removal of an administrator, and no debts remain unpaid. *Ward's Heirs v. Ward*, 1 Posey Unrep. Cas. 123.

E. ACTIONS—WHEN MAINTAINABLE.

1. In General.

The only cases in which an administrator de bonis non may maintain an action against a former administrator, are those provided by statute. (Hart Dig., art. 1224.) *Murphey v. Menard*, 11 Tex. 673, 677.

An administrator de bonis non could not sue except for the assets remaining unadministered, as shown in the administration. *Ward's Heirs v. Ward*, 1 Posey Unrep. Cas. 123; *Johnson v. Morris*, 45 Tex. 463, 464; *Martel v. Martel*, 17 Tex. 391, 396; *Baldwin v. Dearborn*, 21 Tex. 446; *Boulware v. Hendricks*, 23 Tex. 667; *Grant v. McKinney*, 36 Tex. 62.

An administrator de bonis non may

maintain an action only for specific property of the estate in the hands of a former administrator. *Johnson v. Hogan*, 37 Tex. 77, 80.

To Vacate Decree Obtained by Predecessor.—An administrator de bonis non can not maintain an action in the district court to vacate a decree obtained by his predecessor in the probate court. *McDonald v. Alford*, 32 Tex. 35.

Recovery of Proceeds Transferred by Former Administrator in Payment of Individual Indebtedness.—See ante, "Payment of Individual Indebtedness with Funds Estate," V, M, 5, c.

An administrator de bonis non has power to bring an action to recover the proceeds of a note which had been fraudulently disposed of by the first administrator. *Ullman v. Verne*, 68 Tex. 414, 4 S. W. 548, following *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803.

"In *Evans v. Oakley*, 2 Tex. 182, 184, it appeared that an administrator had pledged to the defendant, to secure a loan of money to himself, some of the property of the estate, and on suit brought by the heirs to recover the property, it was held that they could not maintain it; and, the administrator having died, that an administrator de bonis non would have the right to maintain the action. In this case, however, the title had not passed by a voidable conveyance, for the administrator had only sought to encumber the property with a lien." *Todd v. Willis*, 66 Tex. 704, 710, 1 S. W. 803.

2. Suit against Former Administrator for Maladministration.

The administrator de bonis non has no such interest in the estate as will enable him to maintain an action against the former administrator for maladministration; or as will authorize him to prosecute an appeal, or other proceeding to have the acts of the former administrator revised and corrected. *Murphey v. Menard*, 11 Tex. 673, 677.

An administrator de bonis non is "a successor of the former administrator and has no power or authority to attempt to impeach, set aside or undo what his predecessor may have done, however irregularly it may have been." *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803; *McDonald v. Alford*, 32 Tex. 35, 36.

An administrator de bonis non can not sue the representative of a former executor or administrator, at law or in equity, for assets wasted or converted by the first administrator or executor, but such suit must be brought directly by creditors, legatees, or distributees. *Ward's Heirs v. Ward*, 1 Posey Unrep. Cas. 123.

"In *Murphy v. Menard*, 11 Tex. 673, an administrator de bonis non brought suit against a former administrator to set aside the final settlement of his accounts as such administrator. In that case as in this, exceptions were taken to the capacity of the party plaintiff to institute suit. In that case but not in this, the exceptions were sustained by the district court. In that case the supreme court sustained the judgment of the district court. In that case Judge Wheeler says: 'The administrator de bonis non could have no interest in the settlement of the account of a former administrator. This duty only extends to effects left unadministered, and his interest is in them alone. He is a mere trustee, is chargeable only in so far as he receives assets, and has no such interest in the estate as will enable him to maintain an action against a former administrator for maladministration, or as will authorize him to prosecute an appeal or other proceeding to have the acts of the former administrator revised and corrected.'" *McDonald v. Alford*, 32 Tex. 35, 41.

An administrator de bonis non may bring an action against a previous administrator de bonis non of the same estate for the recovery of effects left

in his hands not accounted for. *Boulware v. Hendricks*, 23 Tex. 667.

An administrator de bonis non can not maintain an action against the former administrator to set aside an allowance and approval of an account against the estate made in the former administration. *Brown v. Franklin*, 44 Tex. 559.

3. Suit for Assets Unaccounted for.

An administrator de bonis non may maintain an action for the specific property of the estate in the hands of a former administrator. *Johnson v. Hogan*, 37 Tex. 77, 80.

The administrator de bonis non may recover from the former administrator, money received by him for the hire of slaves, though it has been judicially established that the negroes were manumitted by the will of the testator; it not appearing that such suit had either been brought, or decided, previous to the receipt of such money. And especially, where a petition of intervention by the negroes, claiming the hire, has been dismissed, and they have not appealed. *Boulware v. Hendricks*, 23 Tex. 667.

A judgment in such case, establishing the freedom of the negroes, does not, by relation back to the death of the testator, fix their status as free persons from that time. Whether it does so from the institution of the suit, or the date of the judgment, is not decided. The question has been variously ruled in different courts. *Boulware v. Hendricks*, 23 Tex. 667.

The only suit maintainable by an administrator de bonis non against his predecessor is a suit on the bond of the latter, for property or assets of the estate not accounted for by him. *McDonald v. Alford*, 32 Tex. 35.

The only action which an administrator de bonis non can maintain against a former administrator is an action on his bond, not for maladministration or devastavit, but to recover an amount shown to be due by the

settlement of the former administrator's final account. *Murphey v. Menard*, 11 Tex. 673.

An administrator de bonis non may maintain a suit on his predecessor's bond to recover a balance found due on the settlement. *Johnson v. Morris*, 45 Tex. 463.

Under the act of 1848 (Hart. Dig., art. 1228, § 119), an administrator de bonis non may institute proceedings in the county court, on complaint to the chief justice, to recover from a former administrator de bonis non papers belonging to the estate. *Miller v. Jasper*, 10 Tex. 513.

In suit by administrator de bonis non against predecessor and his sureties for money alleged to have been misappropriated, it is error to sustain exceptions to sureties' answer alleging that principal had advanced sums to heirs, that such sums were itemized and that estate and heirs are solvent. *Oglesby v. Forman*, 77 Tex. 647, 649, 14 S. W. 244.

4. Suit to Prevent Misapplication of Estate.

Title of an administrator de bonis non, for purposes of administrator, is superior to that of the heirs, creditors or distributees, and he may sue to prevent a misapplication of the estate. *Todd v. Willis*, 66 Tex. 704, 713, 1 S. W. 803.

5. Suit to Set Aside Fraudulent Sale by Former Administrator.

In *Brown v. Franklin*, 44 Tex. 559, it was held that an administrator de bonis non could not maintain an action against his predecessor to annul an order of sale and sale thereunder of real estate made by him on the ground of combination, collusiveness and fraud.

In *McDonald v. Alford*, 32 Tex. 35, it was held that an administrator de bonis non was not a person, "interested in the estate" of his intestate within the meaning of art. 1382, Pas. Dig.

which authorized persons so "interested" to institute suit in the district court to correct accounts of executors or administrators settled in the probate court.

The decision as laid down by these cases was reviewed in *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803, and it was there held that an administrator de bonis non has the power to maintain a proceeding to set aside a fraudulent sale made by a former administrator, even when such sale has been confirmed by the probate court. *Dewitt v. Miller*, 9 Tex. 239, 248; *Cochran v. Thompson*, 18 Tex. 652; *Giddings v. Steele*, 28 Tex. 732, 748; *Pearson v. Burditt*, 26 Tex. 157.

In a suit by an administrator de bonis non to set aside a sale under a judgment against the executors of the decedent it was alleged that the purchaser and one of the executors conspired to defraud the estate (setting out the fraudulent acts), and defrauded the estate by enabling the purchaser to buy the land for a nominal price, etc., and that shortly after the sale one of the executors died, and the two survivors "fraudulently failed and refused to have the fraudulent sale set aside." Held, that if the allegations of fraud were correct, the sale was voidable, and not void. *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803.

The administrator de bonis non of the estate of E. instituted proceedings against a purchaser at sheriff's sale to set aside the order of sale and sheriff's return, and cancel the sale and sheriff's deed, alleging that the purchaser and others recovered a judgment against three persons as the executors of the will of E., who were administering the estate without the control of the probate court under the terms of the will; that the judgment declared a vendor's lien on a valuable tract of land and ordered it sold; that the purchaser and one of the executors conspired to defraud the es-

tate (setting out the fraudulent acts), and did defraud the estate by enabling the purchaser to buy the land for a nominal price, etc.; that shortly after the sale one of the executors died, and the two survivors "fraudulently failed and refused to have the fraudulent sale set aside." Held that in this instance the administrator de bonis non practically came into the case under the judgment in which the sale was made, and asserted the right which the executor might have asserted, continuing the administration in one of its most important requirements. *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803.

The administrator de bonis non of the estate of E. instituted proceedings against a purchaser at sheriff's sale to set aside the order of sale and sheriff's return, and cancel the sale and sheriff's deed, alleging that the purchaser and others recovered a judgment against three persons as the executors of the will of E., who were administering the estate without the control of the probate court under the terms of the will; that the judgment declared a vendor's lien on a valuable tract of land and ordered it sold; that the purchaser and one of the executors conspired to defraud the estate (setting out the fraudulent acts), and did defraud the estate by enabling the purchaser to buy the land for a nominal price, etc.; that shortly after the sale one of the executors died, and the two survivors "fraudulently failed and refused to have the fraudulent sale set aside." Held, that if the averments of the petition were true, two of the executors, at least, had the right and power to maintain this proceeding, and it was their duty to do so, and the administrator de bonis non succeeded to all their rights and powers. *Todd v. Willis*, 66 Tex. 704, 1 S. W. 803.

In *Burdett v. Silsbee*, 15 Tex. 604, 605, and *Pearson v. Burditt*, 26 Tex. 157, it was held that in a collateral

action to recover land fraudulently sold the validity of an administration de bonis non could not be questioned, but that the plaintiff would be entitled to recover the land if the fraud alleged was proved, unless defeated by limitation based on adverse possession of the land. *Todd v. Willis*, 66 Tex. 704, 709, 1 S. W. 803.

6. Right to Sue Independent Executor.

An administrator de bonis non, who succeeds an independent executor, i. e. an executor free from the control of the county court, and excused by the terms of the will from giving bond, may sue his predecessor for property of the estate for which he has not accounted, notwithstanding there be no bond to sue upon. *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75.

In action by administrator de bonis non against independent executor, where defendant testified in support of claim for money paid for attorney fees, plaintiff has right to cross-examine him on necessity of services and reasonableness of charges. *Grothaus v. Witte*, 72 Tex. 124, 126, 11 S. W. 1032.

7. Jurisdiction.

District court having jurisdiction of suit by administrator de bonis non against predecessor and suitor, it has power to determine any question necessary or proper to be ascertained upon final settlement. *Oglesby v. Forman*, 77 Tex. 647, 649, 14 S. W. 244.

In an action against a former administrator to recover rents alleged to have been received and misappropriated, the district court having jurisdiction of the cause, such jurisdiction was coextensive with any issue necessary to a final settlement of the case. *Oglesby v. Forman*, 77 Tex. 647, 14 S. W. 244.

8. Parties.

In suit against former administrator by administrator de bonis non to recover proceeds of note belonging to the estate and transferred by former

administrator in payment of his individual debt, the maker of such note having subsequently executed, and paid to the transferee a new note in lieu of the note so transferred, neither sureties on official bond of former administrator nor maker of original note are necessary parties defendant. *Williams v. Verne*, 68 Tex. 414, 416, 4 S. W. 548.

In an action against a former administrator to recover for alleged misappropriations in which he claimed that certain persons, naming them, were heirs and that he had paid and advanced to them various sums, such persons might properly be made parties to avoid future complications. *Oglesby v. Forman*, 77 Tex. 647, 14 S. W. 244.

Proper Parties.—Administrator de bonis non, and not heir, is the proper party to sue for property of the estate wrongfully transferred by administrator. *Evans v. Oakley*, 2 Tex. 182, 183.

An intestate left a watch which his administrator pledged to secure the payment of borrowed money. After the death of the administrator the heirs sued the pledgee to recover the watch or its value. Held, that the action should have been brought by the administrator de bonis non. *Evans v. Oakley*, 2 Tex. 182.

9. Petition.

A petition by an administrator de bonis non, in an action against his predecessor for property of the estate not accounted for, which alleges the value of the estate which had come to the hands of defendant, as executor, as shown by the inventory, is sufficient, without setting out the entire inventory of the estate, where the amount paid over to creditors by defendant, and the value of the assets turned over to the plaintiff, are both alleged, and from these a balance appears not to have been accounted for. *Dwyer v. Kalteyer*, 68 Tex. 554, 5 S. W. 75.

10. Limitations.

Limitations commence to run against action by administrator de bonis non against predecessor when latter's final report is filed. *Mott v. Ruenbuhl*, 1 App. Civ. Cases, § 601.

11. Reference to Auditor.

Where estate administration which is under investigation in suit by administrator de bonis non against former administrator, involved a mercantile business where there were large transactions involved it is proper to appoint an auditor. *Dwyer v. Kaltyer*, 68 Tex. 554, 559, 5 S. W. 75. See the title REFERENCE.

12. Issue, Proof and Variance.

In an action by an administrator de bonis non against the executor, who had resigned his trust, for money alleged to belong to the estate, which it is alleged defendant has converted, evidence of payments and expenditures made by defendant for the estate is not admissible under a general denial, as such matter is in confession and avoidance, and must be specially pleaded. *Grothaus v. Witte*, 72 Tex. 124, 11 S. W. 1032.

So held in an action against an independent executor, who offered proof of payments in due order of administration under a general denial. *Grothaus v. Witte*, 72 Tex. 124, 11 S. W. 1032.

In an action against an administrator, plaintiff averred that he was entitled to a tract of land. The administrator answered that the deed of the plaintiff had never been recorded, and that credit had been given to the intestate on the faith of the same land. The heirs were not made parties to the action. Held that, the issues joined being wholly immaterial, nothing was determined by the decision upon them. *Barrett v. Barrett*, 31 Tex. 344.

13. Question of Law and Fact.

In suit against an administratrix for recovery of personal property, the question whether the property be-

longed to intestate at time of her death or had previously been given to her, is for the jury. *Gilkey v. Peeler*, 22 Tex. 663, 668.

XIII. Receivers.

Jurisdiction to Appoint.—Under const. art. 4, § 15, conferring on the district court original jurisdiction over executors, etc., that court has authority to appoint a receiver and temporarily suspend the authority of an executor. *Long v. Wortham*, 4 Tex. 381; *Smith v. Smith*, 11 Tex. 102, 105.

Thus the district court may suspend an executor and appoint a receiver with the power to sue and collect a note given to the executor in his representative capacity. *Long v. Wortham*, 4 Tex. 381, 382.

"In *Long v. Wortham*, 4 Tex. 381, it is said that the exercise of probate jurisdiction by the district courts would almost as a matter of course be by the appointment of a receiver." *Rogers v. Kennard*, 54 Tex. 30, 41.

Temporary Administrator Treated as Receiver.—Where plaintiff after appealing to the district court from an order of the county court refusing to appoint a temporary administrator, filed a bill for the appointment of a receiver, and the district court in vacation appointed M. temporary administrator, M. will be treated as a receiver. It is immaterial that the receiver was denominated a temporary administrator. *Long v. Richardson*, 26 Tex. Civ. App. 197, 62 S. W. 964, citing *Lyons-Thomas Hardware Co. v. Perry Stone Mfg. Co.*, 88 Tex. 486, 27 S. W. 100, affirming 27 S. W. 100.

If an administrator's sale of property be canceled on account of fraud, at the instance of the heir a receiver might be appointed and the property protected until a more faithful administrator can be appointed. *Giddings v. Steele*, 28 Tex. 732, 733; *Long v. Wortham*, 4 Tex. 381.

Bond in Lieu of Receiver.—Under

Rev. Stat., art. 1944, providing that an executor not having been required to give a bond may be required to give one on application, etc., in proceeding to take the property out of the hands of executors, the appointment of a receiver may be refused and a bond required in lieu of the receiver. *Harris v. Hicks*, 13 Tex. Civ. App. 134, 34 S. W. 983.

Refusal to Appoint.—In an action concerning land between devisees and parties deriving title under a sale based on a judgment against one of two executors, the court did not err in refusing to appoint a receiver or to compel the executor to intervene. *Bennett v. Riber*, 76 Tex. 385, 13 S. W. 220.

In an action against executors appointed by a testator without bond, brought by devisees under the will for their interest in the estate, and for partition, the court was not authorized to appoint a receiver pendente lite upon evidence that the executors had paid over money to the surviving wife of the testator, and that one of the executors had occasionally played cards, when it also appeared from the evidence that the surviving wife had elected not to take under the will; that the amount so paid her was probably much less than her community interest in the property; that she was without ready means and in need of the money for her present support; that the executor charged with gaming had ample means of his own and was a man of strict integrity, and that all three of the executors had been diligent and faithful in their duties as such. *Harris v. Hicks*, 13 Tex. Civ. App. 134, 34 S. W. 983.

XIV. Executor De Son Tort.

The office of executor de son tort has been abolished by statute in many states, while in others it is considered inconsistent with the system of administering estates. *Ansley v. Baker*,

14 Tex. 607; *Hunt v. Butterworth*, 21 Tex. 133; *Green v. Rugely*, 23 Tex. 539; 539; *Vela v. Guerra*, 75 Tex. 595, 12 S. W. 1127.

Status in Texas.—An executor de son tort does not exist under our laws. *Ansley v. Baker*, 14 Tex. 607, 612.

In Texas one who takes charge of property of a decedent can not be sued as an executor de son tort. *Vela v. Guerra*, 75 Tex. 595, 597, 12 S. W. 1127.

Suit can not be maintained against a party as an executor de son tort in his own wrong. *Green v. Rugely*, 23 Tex. 539, 542.

A husband enjoying the estate of his deceased wife subject to trifling liability can not be sued for the debt as administrator de son tort; the estate must be administered. *Ansley v. Baker*, 14 Tex. 607, 613.

Liability of Heir.—An heir is not liable as an executor in his own wrong. *Green v. Rugely*, 23 Tex. 539.

"It seems that an heir in Texas is not treated as an executor de son tort, as he was at common law, for the mere handling of the personal estate of the deceased." *Manchester v. Bursey*, 41 Tex. Civ. App. 271, 91 S. W. 817, citing *Blinn v. McDonald*, 92 Tex. 604, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931.

Since, under the statutes, personal as well as real property descends to the heir on the ancestor's death, subject to the payment of debts, an heir taking possession of personal estate and distributing the same among the distributees before the appointment of an administrator is not liable as an executor de son tort, and the administrator subsequently appointed must look to each of the heirs for the portion received by him. *Manchester v. Bursey*, 91 S. W. 817, 41 Tex. Civ. App. 271.

Liability of Fraudulent Vendee.—"It is shown that, at the common law, the fraudulent vendee might have been charged as executor de son tort. And

some of the modern cases hold that he must be so charged, and that that is the only remedy of the creditor. It was so held in New York in the case of *Osborne v. Moss*, 7 Johns. 161. But the statute has changed the rule in that state, so that 'no person shall be liable to an action as executor of his own wrong.' 2 Hill 185; 2 R. S. 449, S. 17. So the law in that state and in this are the same upon that subject, it having been settled by the case of *Ansley v. Baker*, 14 Tex. 607, that, by our law, no one can be charged as an executor de son tort. The effect of our law is the same as that of the New York statute, to take away the remedy of the creditor, at common law, to charge the fraudulent grantee as executor of his own wrong." *Hunt v. Butterworth*, 21 Tex. 133, 140.

Mere Possession of Property Not Sufficient.—Upon failure of the widow to qualify as survivor of the community a creditor, could have caused letters of administration to issue but if the widow had not qualified as the administratrix or if children survived he could not bring the suit directly against the widow, mere possession of property of a decedent not making the possessor an executor de son tort in Texas. *Vela v. Guerra*, 75 Tex. 595, 12 S. W. 1127.

Extent of Liability.—Widow who has taken into her possession property mortgaged to secure debt can not be charged with whole debt where property is of insufficient value. *Green v. Rugely*, 23 Tex. 539, 542.

Where suit is brought against a widow, charging that she has taken into her possession the property mortgaged to secure the debt sued for, and it is found by the verdict that the property is of less value than the debt, a judgment against her for the debt, to be discharged, however, upon delivery of the property, within a time fixed by the court, is erroneous. *Green v. Rugely*, 23 Tex. 539.

Where an administrator has converted property of the estate before obtaining letters of administration, his only liability is to account for it as administrator, or to pay the value thereof in a suit on his bond; but not to pay all the debts of the estate. *Lockhart v. White*, 18 Tex. 102.

Effect of Subsequent Grant of Letters.—A sale by one, afterwards appointed administrator, of some of the property of the estate, will not make him liable for payment of all the debts, or for anything beyond the amount of the property sold. *Lockhart v. White*, 18 Tex. 102.

Form of Remedy.—As under the probate law an estate of a decedent vests immediately in his heirs, subject to administration only, an heir taking possession is not liable as an executor de son tort at the suit of a creditor in the district court, but the proper remedy is by administration in the probate court. *Ansley v. Baker*, 14 Tex. 607.

Right to Set-Off.—"It seems to be the prevailing rule in the courts of this country 'that just debts of a decedent which have been paid by an executor de son tort according to their legal priority may be set off against the amount of damages for which his intermeddling has rendered him liable.' The reason given for this rule is that 'it is no detriment to the administrator de jure that such payments were made by the executor de son tort.'" *Manchester v. Bursey*, 41 Tex. Civ. App. 271, 91 S. W. 817, following *Blinn v. McDonald*, 92 Tex. 604, 46 S. W. 787, 48 S. W. 571, 50 S. W. 931, and quoting from *Ansley v. Baker*, 14 Tex. 607, 608.

XV. Curators.

See the title SUMMONS AND PROCESS. And see ante, "Curator or Administrator of Vacant Estate," III, F, 6.

XVI. Second or Additional Administration.

The cases "in which the subsequent grant of administration has been held void, belong to one of two classes; first, those in which there was no necessity for administration, as in *Fisk v. Norvel*, 9 Tex. 13; *Wardrup v. Jones*, 23 Tex. 489; *Duncan v. Veal*, 49 Tex. 603; second, those in which the former administration was still a subsisting one, as *Lovering v. McKinney*, 7 Tex. 521; *Grande v. Chaves*, 15 Tex. 550; *Burdett v. Silsbee*, 15 Tex. 604." *Brockenborough v. Melton*, 55 Tex. 493, 501.

An appointment of an administrator in one county, while a prior appointment of another person in another county is in full force, is a nullity. *Grande v. Chaves*, 15 Tex. 550; *Grande v. Herrera*, 15 Tex. 533, 535; *Brockenborough v. Melton*, 55 Tex. 493, 502.

Where administration was granted in county of residence and death of intestate, and subsequently in another county also, latter is void. *Grande v. Chaves*, 15 Tex. 550, 557; *Brockenborough v. Melton*, 55 Tex. 493, 502.

Where the succession was opened in the county where the deceased resided at the time of his death, and was in progress of administration in that county at the time, the probate court of another county had no jurisdiction to grant to another letters of administration on the same estate, and the letters so granted were therefore void. *Lovering v. McKinney*, 7 Tex. 521.

"The case of *Lovering v. McKinney* and *Williams*, wherein it was held that administration taken out in Matagorda county, while an administration of the same estate was legally pending in Shelby county, was null and void. (*Lovering v. McKinney*, 7 Tex. 521, 524.) It is to be remarked that in that case the question arose upon a plea of ne unques executor, and not collaterally." *Lewis v. Ames*, 44 Tex. 319, 335.

Upon removal of administrator his sureties can not compel a second administration to determine the extent of their liability. *Mott v. Riddell*, 2 Posey 107, 113.

Where an administratrix sold the personal property and obtained an order for sale of land, but did not sell, and subsequently presented an account showing approved claims, which was approved after notice and recorded, that account did not end the administration; and subsequent proceedings, consisting of the removal of an administratrix, appointment of a successor, and a sale by him of the land, were valid and passed a good title. *Howard v. Bennett*, 13 Tex. 309.

Grant of Administration after Estate Closed.—See ante, "Want of Jurisdiction," II, D, 2, b, (3), (a), dd, (aa).

In event of the executor's actual closing of the administration and the property's vesting in the heirs, all grants of administration thereafter and acts of the administration over such property are nullities, and can afford no protection, or confer no rights. *Hurt v. Horton*, 12 Tex. 285, 288.

In event of an actual closing of the administration by the property passing into the hands of the heirs, it is not necessary to grant a second administration (*Fisk v. Norvel*, 9 Tex. 13; *Chandler v. Hudson*, 11 Tex. 32), unless there are debts. *Mott v. Riddell*, 2 Posey 107, 112.

Administration was granted in 1839, and the administrator filed his final account in 1848, whereupon, it appearing to the court that the estate has been fully administered, it was ordered that the account be received and recorded and the succession closed, and that the administrator be fully discharged on his presenting to the court a receipt showing that the effects of the estate remaining in his hands had been passed over to the heirs of the deceased or their legal representatives. Held, that the succession, if open for any purpose was merely open for the

formal discharge of the administrator, on production of his receipts from the heirs; that the property of the succession vested immediately in the heirs and that the probate court had no jurisdiction to appoint an administrator. *Fisk v. Norvel*, 9 Tex. 13.

"In *Fisk v. Norvel*, 9 Tex. 13, 15, it appeared that the intestate died in 1839; that administration was granted on his estate in the same year, and that this was continued until the year 1848, when the final account of the administrator was approved and the estate closed. After this, administration was granted on the estate, and it was held that the estate having been administered, the last grant was void. After referring to the statutes applicable to the subject, the court said: 'These provisions show that when a succession has once been administered and closed the effects are by operation of law, restored to the heirs. In this case the power of the probate court over the estate had ceased. No such case could have been presented as would have authorized the grant; the estate had vested, or been restored to the heirs in full ownership; they were as much proprietors as was the intestate in his lifetime; their rights were exclusive, and incompatible with any power in the probate court to transfer their property to another, and any attempt to do so was beyond the jurisdiction of the court and a mere nullity.' *Withers v. Patterson*, 27 Tex. 491, 494, involved substantially the same facts as *Fisk v. Norvel*, 9 Tex. 13." *Martin v. Robinson*, 67 Tex. 368, 376, 3 S. W. 550.

"In *Wardrup v. Jones*, 23 Tex. 489, the facts were that the intestate died in 1837, and that in the county of his domicile letters of administration were taken out the year following. In 1852 administration was granted on his estate by the probate court of another county, and it was held that it would be presumed that the estate was ad-

ministered under the administration properly taken out, and that the later was granted without authority of law. It was shown that there were no debts due from or to the estate when the last administration was granted." *Martin v. Robinson*, 67 Tex. 368, 377, 3 S. W. 550.

XVII. Foreign Executors and Administrators.

A. EVIDENCE OF APPOINTMENT AND PENDENCY OF ADMINISTRATION.

Authenticated Copy of Appointment Presumed Regular.—A duly authenticated copy of administrator's appointment in another state will be presumed to be in good form in such state where so in Texas. *Abercrombie v. Stillman*, 77 Tex. 589, 592, 14 S. W. 196. See, also, *Green v. Rugely*, 23 Tex. 539, 545.

Receipt and Account Current Not Evidence of Pendency of Administration.—A receipt and account current dated in New York, purporting to pass between an executor having administration in Connecticut and the executor having administration in Texas, is not legal evidence as to the then pendency of the administration in Connecticut. *Grimes v. Smith*, 70 Tex. 217, 8 S. W. 33.

B. POWERS.

No Power beyond State of Appointment.—The legal representatives of a deceased person derive all their authority from the laws of the sovereignty from which they received their appointment, and hence the executor or administrator appointed in one state has neither authority nor liability as such in another; nor is there any privity between an administrator of an estate in one state and an administrator of a part of the same estate in another state, and this though the administrator in both states is the same person.

Clarke v. Webster (Civ. App.), 94 S. W. 1088.

May Designate Substitute Trustee.

—A trust deed on property within the state, given to secure a note, provided that, if the trustee named therein should for any reason fail or refuse to act, the cestui que trust or the legal owner of the note might appoint a substitute in writing. Thereafter both the trustee and the cestui que trust died in Kentucky, which was their domicile, and an administratrix was appointed by a Kentucky court to administer on their estates. Held, that the administratrix, as the legal holder of the note and deed of trust, had the right to designate a substitute trustee in Texas to sell the trust property, without having taken out letters of administration in the estate. *Peacock v. Cummings*, 78 S. W. 1002, 34 Tex. Civ. App. 431.

Power to Assign Note.—The holder of a note, to whom it has been assigned by a foreign administrator, may maintain a suit for the collection of the debt in Texas without further administration, in the absence of proof of any debts or other demands against the deceased in Texas, or of a statute of the foreign state denying to an administrator in that state the power to make such transfer. *Solinsky v. Fourth Nat. Bank*, 82 Tex. 244, 17 S. W. 1050.

A foreign administrator may assign by endorsement a negotiable promissory note the property of the estate, and the endorsee may maintain suit in this state in his own name upon such note. *Abercrombie v. Stillman*, 77 Tex. 589, 14 S. W. 196.

Where a foreign executor assigned a note belonging to the estate, the indorsee was entitled to maintain suit in Texas in his own name. *Keller v. Alexander*, 58 S. W. 637, 24 Tex. Civ. App. 186.

No Authority to Compromise Debt without Order of Court.—A foreign administrator of one who conveyed land retaining a vendor's lien has no

authority without an order of the probate court to compromise the debt due from the grantee to the estate, since the power of the administrator in such respect is controlled by Revised Statutes of 1895, article 1987. *Smith v. Pate* (Civ. App.), 43 S. W. 312, reversed on another point in 91 Tex. 596; *Perry v. Booth*, 7 Tex. 493; *Trammell v. Swan*, 25 Tex. 473, 474.

Can Not Convey Land by Deed unless Will Probated.—A foreign executor can not, without probating the will in this state, execute a deed to pass land of the estate here located. *Simpson v. Foster*, 46 Tex. 618.

A foreign executor can perform no act as such in Texas until he has complied with the statute in filing and recording such will. Until then, his conveyance of land in Texas, can not pass the title, nor can his subsequent compliance with the statute in filing and recording the will relate back and validate conveyances made without authority. But this rule does not apply when the executor is a devisee under the will; his conveyance as executor would be validated by a subsequent filing and recording of the will. *Mills v. Herndon*, 60 Tex. 353; *Holman v. Hopkins*, 27 Tex. 38; *Houze v. Houze*, 16 Tex. 598.

Validating Statutes as to Deeds of Foreign Executors.—Under Laws 1893, c. 79, validating all sales of real estate theretofore made by executors in pursuance of wills admitted to probate in other states, a deed so made in another state, in 1883, was not obnoxious to the objection that such executors had not qualified under the local law. *Simpson v. Johnson* (Civ. App.), 44 S. W. 1076.

Rev. St. 1895, art. 1879a, validating sales made under wills probated in other states, does not, in the absence of proof of administration and order of sale by a probate court, validate a deed made by an executor under such a will, where the will contains no provision exempting testator's estate from

administration by the probate court, and grants no power to the executor to sell the property described therein. *League v. Williamson*, 77 S. W. 435, 33 Tex. Civ. App. 647.

C. ACTIONS.

1. Capacity to Sue.

Can Not Maintain Suit by Virtue of Foreign Letters Alone.—It is well settled that an executor or administrator can not, as such, maintain a suit in one state by virtue of letters granted in another. *Davis v. Phillips*, 32 Tex. 564; *Simpson v. Foster*, 46 Tex. 618, 623; *Moseby v. Burrow*, 52 Tex. 396, 404; *Summerhill v. McAlexander*, 1 White & W. Civ. Cas. Ct. App. § 584; *Hynes v. Winston* (Civ. App.), 54 S. W. 1069.

Where a petition in trespass to try title shows that plaintiffs seek to recover as foreign executors, and also in their own right, their alleged right as executors should be stricken out on exceptions, but the suit should not be dismissed. *Hayden v. Kirby*, 72 S. W. 198, 31 Tex. Civ. App. 441.

To Maintain Suit on Foreign Letters Debt Must Be Vested in Administrator.—A suit can not be maintained in Texas by virtue of letters of administration issued in another state unless the debt in suit has been directly vested in the administrator, as when made payable to him or when judgment has been previously recovered in his name. *Terrell v. Crane*, 55 Tex. 81. See, also, *Cobb v. Norwood*, 11 Tex. 556; *Cherry v. Speight*, 28 Tex. 503; *Davis v. Phillips*, 32 Tex. 564; *Simpson v. Foster*, 46 Tex. 618; *Summerill v. McAlexander*, 1 App. Civ. Cases, § 584; *Clarke v. Webster* (Civ. App.), 94 S. W. 1088, 1089.

Must Obtain Letters in State Wherein Suit Brought.—To acquire the right of suing in a different state than that in which his original letters were granted, an executor or administrator must first obtain letters testamentary or of administration from the

proper authority within such different state, on his complying with the requirements of the local law, devised for the protection of local creditors of the estate, if any there be. *Davis v. Phillips*, 32 Tex. 564; *Carr v. Wellborn*, Dallam 624, 627.

Where one who sues as executrix by appointment in another state alleges and shows that she has filed the will in Texas, and taken out ancillary letters of administration there, as required by Sayles' Rev. St. art. 1856, she may proceed with the suit, although she did not file the will and take out such letters until after the suit had been begun. *Henry v. Roe*, 83 Tex. 446, 18 S. W. 806; *Simpson v. Foster*, 46 Tex. 618, 624.

May Sue on Judgment Rendered in Own State.—When judgment is obtained by foreign administrator in his own state, he may maintain personal suit against debtor in another state. *Carr v. Wellborn*, Dallam 624, 630. See, also, *Gayle v. Ennis*, 1 Tex. 184; *Lipscomb v. Ward*, 2 Tex. 277; *Clairborne v. Yoeman*, 15 Tex. 44, 45.

Where a party recovers judgment in another state, in the character of administrator, it becomes a debt of record in his favor, and, the legal right being in the plaintiff, he has the right of action, and describing himself "as administrator de bonis non" is only personal description. *Nelson v. Bagby*, 25 Tex. Supp. 305, 306.

2. Liability to Suit.

By Virtue of Probate of Foreign Will.—The filing and record of a foreign will in Texas, as authorized by Rev. St. 1895, art. 5353, does not ipso facto create an executrix in Texas of the person so named in the will, nor authorize her to be sued as executrix in Texas, without her having taken out ancillary letters and qualified as executrix. *Clarke v. Webster* (Civ. App.), 94 S. W. 1088; *Dew v. Dew*, 23 Tex. Civ. App. 676, 57 S. W. 926, affirmed in 94 Tex. 704, no op.

On Judgment Rendered upon Publication.—When a party is to be pursued in Texas for defalcation, or waste of an estate administered by him in some other state, the proper course is to institute suit on his bond, alleging breach and all necessary facts, upon proving which there need be no difficulty in recovering judgment. But a judgment of a probate court of the other state, rendered against him upon publication only, will not suffice either as a cause of action, or as evidence of the breach of his bond. *Easley v. McClinton*, 33 Tex. 288.

3. Suit against Domiciliary Representative Based on Judgment against Foreign Administrator.

A judgment rendered in another state against an administrator of a decedent will not support an action against a personal representative in this state, when it is not alleged that any assets formerly in the hands of the administrator in the other state had come into the hands of the representative in this state. *Cherry v. Speight*, 28 Tex. 503.

A judgment on a promissory note recovered against an administrator appointed in another state furnishes no right of action against an administrator, where it is not shown that assets of the former ever came into the latter's hands. *Carrigan v. Semple*, 72 Tex. 306, 12 S. W. 178. See, also, *Easley v. McClinton*, 33 Tex. 288; *Clarke v. Webster* (Civ. App.), 94 S. W. 1088.

A judgment against an administrator in another state furnishes no right of action against an administrator or heirs in this state, to affect property which was not assets in such other state; and it makes no difference that the testator or intestate had resided in such other state when the suit was commenced, and had been there duly served with process. *Jones v. Jones*, 15 Tex. 463; *Clarke v. Webster* (Civ. App.), 94 S. W. 1088, 1089.

Domiciliary Representative Not Individually Liable Thereon.—Since a judgment against a foreign administrator can not form the basis for a suit against another administrator of the same estate in this state, it can not form the basis for a judgment against the foreign administrator, and it could not support a judgment against one as an individual, whether devisee or heir of the estate or not. *East v. Dugan*, 79 Tex. 329, 15 S. W. 273; *Thompson v. Cragg*, 24 Tex. 582; *Caruth v. Grigsby*, 57 Tex. 259; *Downing v. Diaz*, 80 Tex. 436, 16 S. W. 49; *Beer v. Thomas*, 13 Tex. Civ. App. 30, 30 S. W. 1010, affirmed in 93 Tex. 679, no op.; *Clarke v. Webster* (Civ. App.), 94 S. W. 1088, 1089.

4. Limitation of Suit.

Where a foreign executrix presented a claim of her testator against a decedent to his executors before she had taken out ancillary letters of administration, and again after she had taken them out, and it was rejected both times, the 90 days during which, by Rev. St. art. 2028, suit might be brought on such claim, begins to run from the second rejection, since at the time of the first rejection she had no legal authority to act in the matter. *Henry v. Roe*, 83 Tex. 446, 18 S. W. 806.

D. ANCILLARY ADMINISTRATION.

Not Entirely Dependent upon Statute.—Ancillary administrations do not depend entirely upon statutory regulation. *Green v. Rugely*, 23 Tex. 539, 551.

When Granted upon Estate of Non-resident.—If a nonresident decedent leave property in jurisdiction ancillary administration is granted. *Green v. Rugely*, 23 Tex. 539, 545.

Ancillary administration can be granted on the estate of a nonresident only when there are assets to be administered, or some right or purpose to be subserved thereby, within the jurisdiction where such administration

is sought. *Cooper v. Gulf, C. & S. F. Ry. Co.*, 93 S. W. 201, 41 Tex. Civ. App. 596.

Administration in Foreign State Unnecessary.—It is not necessary to granting of ancillary letters of administration that there should have been administration in the foreign state. *Green v. Rugely*, 23 Tex. 539, 548.

An administration taken out on property the owner of which died in another state, and which had been brought into Texas subsequent to such death, is ancillary in its character, whether principal administration was taken out in such other state or not. *Green v. Rugely*, 23 Tex. 539.

Time of Granting Ancillary Letters.—Rev. St. arts. 1827, 1828, which provide that all applications for letters testamentary and of administration must be filed within four years after the death of the decedent, and that no will shall be admitted to probate after four years from the testator's death unless it be shown that the applicant is not in default, do not render void on collateral attack ancillary letters of administration, issued more than four years after the testator's death upon the estate of a man who died testate in another state, in which his will has been duly admitted to probate. *Henry v. Roe*, 83 Tex. 446, 18 S. W. 806.

Rev. St. 1895, arts. 1880, 1881, providing that all applications for letters testamentary or of administration must be filed within four years after the death of the testator or intestate, and that no will shall be admitted to probate after four years from the death of the testator unless the party applying for such probate was not in default, and that in no case shall letters testamentary be issued where a will is admitted to probate after the lapse of four years from the death of testator, apply to ancillary proceedings in the state for letters of administration c. t. a. and for the probate of a certified copy of a will which was probated in another state, and such proceedings

can not be maintained more than four years after the death of the testator. *Nelson v. Bridge*, 86 S. W. 7, 98 Tex. 523.

Ancillary Administration Governed by Law of State Wherein Granted.

—Where the jurisdiction of a court other than of the domicile has been invoked in the administration of a decedent's estate, such administration is governed in its proceedings by the laws of the country granting such letters. Therefore administration in Texas can not be controlled in its mode of collecting the assets of an estate by the courts of Alabama, the domicile of the decedent. *Simpson v. Knox*, 1 Posey Unrep. Cas. 569.

As to judicial notice that court of foreign state can not administer realty in Texas, see ante, "Jurisdiction of Administration," I, D.

XVIII. Insolvent Estates.

A. DETERMINATION OF INSOLVENCY.

Barred Claims Disregarded.—In determining the question of the solvency of an estate, claims barred by limitations will not be considered. *Haby v. Fuos* (Civ. App.), 25 S. W. 1121.

Statutory Exemptions Considered.—In determining the solvency or insolvency of the estate of a decedent the statutory exemptions, including a reasonable and probable allowance for a year's support to the widow and children, should be taken into consideration. *Lumpkin v. Nicholson*, 10 Tex. Civ. App. 108, 30 S. W. 568.

B. POWERS AND LIABILITIES OF EXECUTORS THEREOF.

No Power to Discharge Lien to Obtain Possession of Property.—An executor or administrator of an insolvent estate can not discharge a lien against personal property of the estate, in order to get possession of it, when the value and use of the property is not equal to sum paid to discharge lien. *Richardson v. Kennedy*, 74 Tex. 507, 511, 12 S. W. 219.

The final account of executors contained this item: "June 25, to O. J. Wiren, stable bill, \$188.84." The evidence showed that the bill was for keeping two horses belonging to the estate, and accrued partly before and partly after the death of the testator, and was a lien on the horses; that there was an immediate necessity for the use of these horses in preserving stock belonging to the estate, and, the party in possession refusing to release them, the debt was paid to get possession of them. The estate was insolvent, and there was no evidence as to the value of the horses. Held, that the facts did not show the release of the property to have been so much for the benefit of the estate as to make it proper for the executor to procure such release by paying the debt, making it a debt of the second class, whereas it was one of the third or fourth class. *Richardson v. Kennedy*, 74 Tex. 507, 12 S. W. 219.

Executors Liable for Misappropriation of Funds in Settlement.—Where decedent left an insolvent and exempt estate, which, with the former estate of himself and his first wife, was put into the hands of an executor, and the executor used part of the community estate to pay debts contracted by deceased after the death of his first wife, recovery must be had against the executor for misappropriation. *Redding v. Boyd*, 64 Tex. 498.

C. PRIORITY OF CLAIMS.

Rights of Creditors Prior to Heirs.—The estate being insolvent, the creditors have rights to the assets superior to that derived from heirship under the general laws of distribution. *Green v. Crow*, 17 Tex. 180, 187.

Resident and Nonresident Creditors Paid According to Rank.—A nonresident creditor is entitled to participate with resident creditors in the assets of an insolvent decedent's estate according to the rank and classification of his claim, where it does not appear

that he has received payment on such claim in any other state. *Tyler v. Thompson*, 44 Tex. 497.

Cestui Que Trust Entitled to Entire Proceeds.—Where trust is established against insolvent estate cestui is not to be remitted to pro rata with other creditors, but is entitled to entire proceeds of trust estate. *Vandever v. Freeman*, 20 Tex. 333, 338.

Vendor's Lien of Same Rank as Other Secured Claims.—The holder of a vendor's lien against land reserved in the deed of conveyance, on foreclosure of his lien in administration proceedings on the estate of the grantee, and failure of the tract to bring the amount of the debt and costs of foreclosure, was not entitled, where the estate was insolvent, to receive the whole of the proceeds upon his claim, leaving the costs of the foreclosure to be paid out of other property of the estate, to the detriment of holders of other secured claims whose security is postponed to the payment of costs of administration. *Greer, etc., Co. v. Riley*, 92 Tex. 699, 53 S. W. 578.

D. SETTING ASIDE SALE.

By Devisee for Fraud of Administrator's Attorneys.—The attorneys for the administrator d. b. n. c. t. a. of an insolvent estate procured an administrator's sale of land, the sale being for cash, and the administrator being ordered to make title only on payment. The attorneys had an understanding with the purchaser that he should pay nothing, and should hold the land subject to their order. An administrator's deed was given, but nothing was in fact paid. A final report of the administrator, verified by one of the attorneys, stated that the price of the land was received and expended in paying certain costs and an allowance to the widow. The costs were paid by the attorneys, but the allowance was not paid, the widow being in privity with the attorneys therein. The purchaser subsequently conveyed

one-half of the land to the attorneys, and gave the widow a deed, with grantee in blank, to the remaining half. The object of the sale was to free the land from the claims of the creditors. The administrator was not a party to such purpose. Held, that the transaction was fraudulent as to devisees, who could maintain an ac-

tion to charge the attorneys as constructive trustees. *McC Campbell v. Durst*, 40 S. W. 315, 15 Tex. Civ. App. 522.

XIX. Sales by Executors and Administrators.

See the title EXECUTORS' AND ADMINISTRATORS' SALES.

EXECUTORS' AND ADMINISTRATORS' SALES.

BY HOMER RICHEY AND A. P. WALKER.

I. Personality, 768.

- A. Generally as to Power to Sell, 768.
- B. Delegation of Power by Independent Executor, 769.
- C. Property Subject to Sale, 769.
 - 1. Land Certificates, 769.
 - 2. Notes, Bonds, etc., 769.
 - 3. Slave Property, 769.
- D. Conduct of Sale, 769.
 - 1. Time and Place, 769.
 - 2. Manner of Transfer, 770.
- E. Terms, Warranties, Conditions, 770.
- F. Payment, 770.

II. Real Estate, 770.

- A. Generally as to Power to Sell—Necessity for Order of Court, 770.
- B. Ante-Administration Sales and Contracts to Sell, 771.
- C. Power of Probate Clerk, 772.
- D. Powers of Temporary Administrator, 772.
- E. Sale by Widow, Heir, or Devisee; When Person Selling Is Also Representative of Estate, 772.
- F. Sales by Independent Executors, 773.
 - 1. Generally as to Power to Sell, 773.
 - 2. Implied Power, 773.
 - 3. Construction of Will, 774.
 - a. Words Held to Confer Power of Sale, 774.
 - b. Words Held Not to Confer Power of Sale, 774.
 - 4. Where Administration Taken Out of Probate Court Only in Part, 775.
 - 5. Execution of Power by Less than All, Where More than One Executor, 775.
 - 6. Delegation of Power, 776.
 - 7. Same; Exercise of Power by Administrator, d. b. n., c. t. a., etc., 778.
 - 8. Same; Deed of Trust with Power to Trustee to Sell, 778.
 - 9. Purpose for Which Land May Be Sold, 778.
 - a. Generally, 778.
 - b. Payment of Debts, 779.

- (1) Power to Sell to Pay Debts, 779.
- (2) For What Debts or Obligations Sale May Be Made, 779.
- c. For Partition, 779.
- d. For Payment of Legacies, 779.
- 10. Property Subject to Sale, 780.
 - a. Generally, 780.
 - b. Community Property, 780.
- 11. Duty to Sell; Right of Creditors to Compel Sale, 780.
- 12. Expiration of Power under Terms of Will, 780.
- 13. Effect of Death of Sole Beneficiary upon Power to Sell, 781.
- 14. Procedure, 781.
 - a. Necessity for Authority from Court, 781.
 - b. Procedure Follows Rules Governing Court Sales, 782.
 - c. Inventory, 782.
 - d. Confirmation, 782.
 - e. Deed, 782.
 - f. Payment, 783.
- 15. Right of Executor to Purchase at His Own Sale, 783.
- 16. Right, Title, Duties, and Liabilities of Purchasers, 783.
 - a. Bona Fide Purchasers, Generally, 783.
 - b. Notice of Want of Power, 784.
 - c. Under Sale for Unauthorized Purpose, 784.
 - d. Duty of Purchaser to See That Conditions Authorizing Sale Exist, 784.
 - e. Right of Purchaser to Rely upon Representations of Executor, 785.
 - f. Duty to See to Application of Purchase Money, 786.
 - g. Title or Interest Acquired, 786.
- 17. Validation of Invalid Sales, 786.
- 18. Action to Set Aside Sale by Independent Executor, 786.
 - a. Who May Attack Sale, 786.
 - b. Pleadings, 787.
 - c. Evidence, 787.
 - d. Effect of Vacating Sale, 788.
 - (1) In General, 788.
 - (2) Return of Purchase Money, Compensation for Improvements, etc., 789.
- 19. Operation and Effect of Sale as an Administration, 789.
- G. Court Sales, 790.
 - 1. Purpose for Which Sale May Be Made, 790.
 - a. Generally, 790.
 - b. Debts and Expenses of Administration, 790.
 - (1) Generally, 790.
 - (2) For What Debts and Claims Lands May Be Sold, 790.
 - (3) Duty of Representative to Apply for Order of Sale to Pay Debts, 791.
 - (4) Right of Creditors to Compel Sale, 791.
 - c. Partition, 791.
 - d. Sale of Property because Unproductive, Expensive or Inconvenient to Handle, etc., 791.
 - 2. Property Subject to Sale, 792.
 - a. Limited to Sale of Decedent's Interest, 792.
 - b. Wife's Land for Husband's Debts, 792.

- c. Community Estates, 792.
- d. Homestead, 792.
- e. Property Subject to Conflicting Claims, etc., 792.
- f. Equitable Interests, 792.
 - (1) Generally, 792.
 - (2) Title Bond, 792.
 - (3) Vendor's Lien, 792.
 - (4) Equity of Redemption, 792.
 - (5) Trust Estates, 793.
 - (6) Mortgaged Property for Debts of Mortgagee, 793.
- g. Interest in the Public Lands, 793.
 - (1) Unlocated Certificates, 793.
 - (2) Certificate Located in Part, 793.
 - (3) Located Certificate, 793.
 - (4) Headright Certificates, 794.
 - (5) Certificate of Foreign Volunteer, 794.
- h. Property Conveyed to Administrator by Widow, 794.
- i. Property Conveyed by Decedent in His Lifetime, 794.
- j. Property Previously Conveyed by Heirs, 794.
- k. Where Land Has Been Partitioned in Whole or in Part, 794.
 - l. Land Sold under Previous Order, or under Previous Administration, 795.
- m. Lands Devised, 795.
- 3. Amount to Be Sold, 795.
- 4. Necessity for Sale of Personalty before Realty, 795.
- 5. Proceedings in Case of Court Sales, 796.
 - a. Consent of Heirs, 796.
 - b. Consent of Secretary of War, 796.
 - c. Jurisdiction, 796.
 - (1) Of Probate Court, 797.
 - (2) Jurisdiction of District Court, 797.
 - d. Time in Which Application Must Be Made, 798.
 - e. Proceeding in Personam or in Rem., 798.
 - f. Parties, 799.
 - (1) Who May Apply for Order of Sale, 799.
 - (2) Parties Defendant, 799.
 - (3) Persons Entitled to Be Made Parties; Intervention, 799.
 - (4) Appointment of Attorney, or Guardian Ad Litem for Incompetent or Absent Parties, 799.
 - g. Notice or Process, 799.
 - (1) Necessity for Notice, 799.
 - (2) To Whom Notice to Be Given, 800.
 - (3) Appearance as Waiver of Notice, 800.
 - (4) Form and Requisites of Notice, 800.
 - (5) Want of Notice as Ground for Collateral Attack or Setting Aside Sale, 801.
 - h. The Petition or Application, 801.
 - (1) Necessity for Written Petition, 801.
 - (2) Necessary Averments, Exhibits, etc., 801.
 - (a) Generally as to Existence of Debts and Necessity for Sale, 801.
 - (b) Verified Exhibit of Property, Debts and Expenses, 801.

- (3) Form and Sufficiency of Averments, 802.
- (4) Amendment of Petition, 802.
- (5) Defective Petition as Ground for Collateral Attack, 802.
- i. Evidence, 802.
- j. The Order of Sale, 802.
 - (1) Necessity for Order of Sale, 802.
 - (2) Presumption as to Existence of Order, 803.
 - (3) Form and Sufficiency of Order, 803.
 - (a) Recital as to Reason or Purpose of Sale, 803.
 - (b) Description of Land, 803.
 - aa. Necessity for Description; Effect of Want of Sufficient Description, 803.
 - bb. Rejecting False Description, 803.
 - cc. Whether Description May Be Aided by Extrinsic Evidence, Reference to Other Parts of Record, etc., 803.
 - dd. Sufficiency of Description, 804.
 - (c) Designation of Person to Make Sale, 806.
 - (d) Directions as to Terms of Sale, 806.
 - (e) Signature of Judge, 806.
 - (4) Operation and Effect of Order of Sale, 806.
 - (a) As an Allowance of Claim, 806.
 - (b) As Authority for Sale, 807.
 - (5) Revocation of Order of Sale, 807.
- k. Inventory and Appraisal, 807.
- l. Manner, Conduct, and Terms of Sale, 807.
 - (1) Sale Judicial in Character, 807.
 - (2) Duty to Pursue Terms of Statute and Order of Sale, 808.
 - (3) Statute Liberally Construed, 808.
 - (4) By Whom Sale May Be Made, 808.
 - (5) Sale by Less than All, 808.
 - (6) Time and Place of Sale, 808.
 - (7) Private or Public, 809.
 - (8) In Parcels or in Gross, 809.
 - (9) Necessity for Possession of Land Certificate at Time of Sale, 809.
 - (10) Terms and Conditions of Sale, 809.
 - (a) In General; Power of Administrator to Prescribe, 809.
 - (b) Cash or Credit, 810.
 - (c) Duty with Respect to Securing Deferred Payments, 810.
 - (d) Vendor's Lien, 811.
 - (e) Bond for Title, 811.
 - (f) Statute of Frauds, 812.
- m. Who May Purchase at Sale, 812.
 - (1) Nonresident Aliens, 812.
 - (2) Attorney Holding Claims for Which Property Was Sold, 812.
 - (3) Right of Personal Representative to Purchase, 812.
- n. Bids, 813.
- o. Report of Sale, 813.
- p. Confirmation of Sale, 814.

- (1) Object and Purpose, 814.
 - (2) Necessity for Confirmation, 814.
 - (a) To Complete Title in Purchaser, 814.
 - (b) Purchaser Not Required to Complete Sale until After Confirmation, 815.
 - (3) Hearing and Determination, 816.
 - (a) Duty of Judge with Respect to Hearing, 816.
 - (b) Notice, 816.
 - (c) Evidence, 816.
 - (d) Considerations Affecting the Decision, 816.
 - (e) Discretion of Judge with Respect to Confirmation or Rejection, 816.
 - (4) What Constitutes and Sufficiency of Confirmation, 817.
 - (5) What Order of Confirmation Must Show, 818.
 - (6) Description of Property Sold, 818.
 - (7) Erroneous Recitals; Clerical Mistakes, etc., 819.
 - (8) To Whom Conveyance Directed to Be Made, 819.
 - (9) Entry of Order on Minutes, 819.
 - (10) Objections; Right and Remedies of Purchaser, 819.
 - (11) Appellate Proceedings, 820.
 - (12) Revocation of Order of Confirmation, 820.
 - (13) Costs, 820.
 - (14) Proof of Confirmation; Presumption, 820.
 - (15) Operation and Effect of Order of Confirmation, 821.
 - (a) As Curing Defects and Irregularities, 821.
 - (b) Vests Title, 821.
 - (c) Same; Relates Back, 821.
 - (d) As a *Lis Pendens*; Necessity for Recordation, 822.
 - (e) As Evidence, 822.
 - (f) Conclusiveness of Order of Confirmation, 822.
 - (16) Effect of Order Rejecting Sale, 823.
- q. The Deed, 823.
- (1) Necessity for Deed, 823.
 - (2) Right of Purchaser to a Conveyance, 823.
 - (3) By Whom Executed, 823.
 - (a) Generally, 823.
 - (b) Deed by Administrator after Office Has Expired, 824.
 - (c) Deed by Less than All, 824.
 - (4) Authority to Make Conveyance; Necessity for Order of Sale, Confirmation, etc., 824.
 - (5) Form and Requisites of Deed, 825.
 - (a) Deed of Female Representative; Assent of Husband, Privy Examination, etc., 825.
 - (b) Recitals in Deed, 825.
 - aa. Previous Proceedings, 825.
 - bb. Recital of Representative Capacity, 825.
 - (c) Description of Property Sold, 825.
 - aa. Certainty and Sufficiency in General, 825.
 - bb. Construction and Interpretation, 826.
 - cc. Extrinsic Evidence in Aid of Description, 826.
 - dd. Surplusage, Clerical Mistakes and Other Inaccuracies, 827.

- ee. Imperfect Description; Application of Doctrine of Caveat Emptor, 827.
- ff. Descriptions Held to Be Sufficient, 827.
- gg. Descriptions Held to Be Insufficient, 828.
- (6) Warranties and Representations, 828.
- (7) Operation and Effect of Deed, 829.
 - (a) As Color of Title; Defective Deeds, 829.
 - (b) Equitable Title Not Affected by Defective Deed, 829.
 - (c) Right, Title, and Interest Conveyed by Deed, 829.
 - (d) Operation and Effect of Deed as Evidence, 829.
 - aa. Admissibility, 829.
 - (aa) Laying the Foundation, 829.
 - aaa. Necessity for Proof of Authority to Sell and Convey, 829.
 - bbb. Facts Required to Be Proved to Show Authority, 830.
 - ccc. Same; How Shown, 830.
 - (aaa) Generally, 830.
 - (bbb) Variance; Idem Sonans, 830.
 - (ccc) Recitals in Deed as Evidence of Authority to Sell and Convey, 830.
 - (bb) Deeds Admissible under Statute; Evidence of What Facts, 831.
 - (cc) Deeds Executed by Attorney or Agent, 832.
 - (dd) Deed as Evidence of Contract for Location of Land, 832.
 - (ee) Estoppel to Object to Admission of Deed, 832.
 - bb. Weight and Sufficiency of Deed as Evidence, 832.
 - (aa) As Proof of Authority to Sell, 832.
 - (bb) As to Identification of Land, 833.
- r. When Title Vests, 833.
- s. Payment, 833.
 - (1) Mode and Medium, 833.
 - (2) Proof of Payment; Presumptions, 833.
 - (3) Proceedings to Enforce Payment, to Recover Land, to Resell in Case of Default, etc., 833.
 - (a) Rights and Remedies, 833.
 - aa. To Enforce Payment, 833.
 - bb. To Recover Land, Foreclose Lien, etc., 834.
 - cc. Resale in Case of Default, 834.
 - (b) Jurisdiction, 835.
 - (c) Administrator's Declaration or Other Pleading, 835.
 - (d) Defendant's Answer or Other Pleading, 835.
 - (e) Evidence, 835.
 - (f) Matters Pleadable in Defense, 835.
 - aa. That Sale Has Not Been Reported or Confirmed, 836.
 - bb. Failure of Administrator to Execute Deed, 836.
 - cc. That Sale Was Invalid, Defective or Irregular, 836.

- dd. That Title Is Defective; Failure of Title, 836.
- ee. Failure of Administrator to Extinguish Outstanding Liens as Per Agreement, 837.
- ff. Mistake and Fraudulent Representations, 837.
- gg. Breach of Covenant or Warranty, 838.
- hh. That Sale Was Illegal or Contrary to Public Policy, 838.
- ii. Tender, 838.
- jj. Failure of Administrator to Renew His Bond, 838.
- kk. Statute of Limitations, 838.
- ll. Defenses Available to Sureties, 838.
- mm. Counterclaim, Set-Off, etc., 839.
- (g) Judgment or Decree, 840.
- (h) Costs, 840.
- t. Disposition of Proceeds, 840.
- u. Review of Proceedings, 840.
 - (1) In the Same Court, 840.
 - (2) In Higher Court, 841.
 - (a) Who May Seek Review, 841.
 - (b) Mode of Review, 841.
 - (c) Parties, 841.
 - (d) Petition or Other Pleading, 841.
 - (e) Amendments, 841.
 - (f) Matters Reviewed and Determined, 841.
 - (g) Presumptions on Appeal, 841.
- 6. Right, Title, Duties and Liabilities of Purchaser, 842.
 - a. Bona Fide Purchasers, 842.
 - (1) In General; Who May Be Bona Fide Purchaser, 842.
 - (2) Purchaser from Original Purchaser, 842.
 - (3) Purchaser at Void Sale, 843.
 - (4) Same; Jurisdictional Defects Rendering Sale Void, 843.
 - (5) Same; Where Court, Having Jurisdiction, Transcends Same, 843.
 - (6) Effect of Defects Not Going to the Jurisdiction, 844.
 - (7) Same; Effect of Purchaser's Knowledge of Fraud, Defects, Irregularities, etc., 844.
 - (8) Same; Defects and Irregularities Not Going to the Jurisdiction, 845.
 - (9) The Record as Notice, 846.
 - (a) Right to Rely upon Order of Sale and Confirmation, 846.
 - (b) Same; Purchaser Must Look to the Jurisdiction, 847.
 - (c) Where Record Shows That Court Was without Power, or Has Transcended Its Jurisdiction, 847.
 - (d) Purchaser Not Bound to Notice Entire Record; Record Notice of What Matters, 848.
 - (10) Rights as against Recorded Conveyances, 849.
 - (11) Will Filed and Proved, as Notice to Purchaser, 849.
 - b. Warranties and Representations; Rule of Caveat Emptor, 849.
 - (1) Caveat Emptor the General Rule; No Implied Warranty, 849.

- (2) Duty of Purchaser to Ascertain Authority of Administrator, 850.
- (3) Duty of Administrator to Make Defects Known, 850.
- (4) Authority to Bind the Estate by Warranty or Representation, 850.
- (5) Duty to Give Personal Guaranty; Personal Liability of Administrator, 851.
- (6) Limitations of Rule of Caveat Emptor, 851.
 - (a) Does Not Necessarily Take as under a Quitclaim Deed, 851.
 - (b) Rule Extends Only to Matters Discoverable by Ordinary Diligence, 851.
 - (c) Not Affected by Secret Conveyances, Trusts or Equities, 851.
 - (d) Same; Where Purchaser Buys Mere Equity or Chance of Title, 853.
 - (e) Application of Rule in Case of Fraud, Misrepresentation, or Mistake, 854.
 - (f) Application of Rule in Case of Insufficient or Uncertain Description, 856.
 - (g) Illegal Sale of Rejected Land Certificate, 856.
- c. Title, Interest and Right Passing to Purchaser, 856.
 - (1) Right of Bidder to Enforce Performance of Contract, 856.
 - (2) Outstanding and Subsequently Acquired Interests, 857.
 - (3) Rights and Equities in Case of Excess or Deficiency in Land, 857.
 - (4) Administrator as Trustee for Purchaser and Vice Versa, 858.
 - (5) Right, Title, and Priority as against Third Persons, 858.
 - (a) Proceeding and Sale as a Lis Pendens, 859.
 - (b) Rights of Purchaser from Original Purchaser, 859.
 - (c) Rights of Purchaser Where Judgment Creditor Had No Notice, 859.
 - (d) Rights and Priorities in Particular Instances, 859.
 - (6) Right, Title and Interest in Particular Instances, 860.
 - (a) Under Sale of Land Conveyed by Debtor of Estate to Heir in Consideration of a Release, 860.
 - (b) Sale under Second Order Directing Sale of Only One-Half the Quantity, 861.
 - (c) Where Administrator Owned Life Interest; Deed Construed, 861.
 - (d) Operation of Deed to Husband, 862.
 - (e) Sale of Community Property, 862.
 - (f) Where Purchaser Also Held Vendor's Lien, 862.
 - (g) Where Mortgage for Purchase Money Is Taken Back, 862.
 - (h) Under Paschal's Digest, Article 1327, 862.
 - (i) Under Sale of Interests in Public Lands, 862.
 - (j) Under Sale by Commissioners Who Are Also Heirs, 864.
7. Collateral Attack, 864.
 - a. When Collateral; When Direct, 864.

- b. Who May Attack Sale, 865.
- c. When Lies; General Doctrine, 865.
- d. Particular Grounds of Attack Considered, 867.
 - (1) Sales under Void and Irregular Administrations, 867.
 - (a) Generally, 867.
 - (b) Effect of Recognition by Court, 867.
 - (c) After Authority Has Terminated or Lapsed; Second and Other Administrations, 867.
 - (d) Delay in Granting First Administration, 868.
 - (2) Absence of Valid Debts; Sale without Necessity or for Improper and Unauthorized Purpose, 869.
 - (3) Fraudulent Sales, 869.
 - (4) Sale of Property Not Subject to Sale, 871.
 - (5) Defects and Irregularities in Proceedings to Sell, 871.
 - (a) Disqualification of Judge, 871.
 - (b) Noncompliance with Statutes, Generally, 871.
 - (c) Preliminary Steps Defective, 871.
 - (d) Clerical Omissions and Misprisions, 872.
 - (e) Want of Petition or Application, 872.
 - (f) Defective Petition; Failure to Show Proper or Sufficient Grounds for Sale, 872.
 - (g) Want of Notice or Process, 873.
 - (h) Want of Exhibit Showing Condition of Estate; Defective Exhibit, 873.
 - (i) Want of Inventory and Appraisal, 874.
 - (j) Objections Going to the Order of Sale, Want of Order, etc., 874.
 - aa. Necessity for Order, 874.
 - bb. Defective or Insufficient Description in Order of Sale, 874.
 - (k) Violation of Statute or Order in Making Sale, 875.
 - aa. Sale and Report by Agent, 875.
 - bb. Sale at Wrong Time or Place, 875.
 - cc. Sale in Gross Instead of in Parcels, 875.
 - dd. Departure from Terms Prescribed by Statute or Order, 876.
 - (l) Inadequacy of Price, 876.
 - (m) Administrator Purchasing at His Own Sale, 877.
 - (n) Objections Going to the Report of Sale, 877.
 - aa. Return Not Made in Time, 877.
 - bb. Want of Verification, 877.
 - cc. Failure to Enter Report of Sale on Minutes, 877.
 - dd. Misdescription; Erroneous Recitals; Clerical Mistakes, etc., 877.
 - (o) Objections Going to the Order of Confirmation; Want of Confirmation, etc., 877.
 - aa. Want of Confirmation, 877.
 - bb. Confirmation at Same Term as Report, 877.
 - cc. Insufficient Description; Misrecitals; Clerical Mistakes, etc., 878.
 - dd. Failure to Enter Confirmation on Minutes, 878.
- e. Presumption and Proof, 878.

- (1) General Doctrine as to Presumptions in Favor of Validity, 878.
- (2) Where Transaction Ancient, Record Silent, etc., 879.
- (3) Where Matter Would Ordinarily Appear of Record; Necessity for Production, of Record, 879.
- (4) Presumption in Case of Erasures, Interlineations, etc., 879.
- (5) Recitals Not Enlarged by Presumption to Defeat Title, 880.
- (6) Presumptions Indulged in Absence of Proof, Not against the Record, 880.
- (7) Record Notice as to What Matters; to What Extent Record Prevails against Presumption, 880.
- (8) Presumption Rebuttable by Facts, 880.
- (9) Presumption and Proof of Particular Matters, 881.
 - (a) Appointment and Qualification of Administrator and Authority to Sell, 881.
 - (b) Presumption as to Whether Authority Has Terminated or Lapsed, 881.
 - (c) As to Execution of Bond, 881.
 - (d) As to the Petition or Application to Sell, 882.
 - (e) As to Existence of Facts Authorizing Sale, 882.
 - (f) As to Existence of Order of Sale and Its Sufficiency, 883.
 - (g) As to Confirmation, 883.
 - (h) Genuineness of Judge's Signature, 884.
 - (i) As to Property Sold, 884.
 - (j) Execution and Validity of Deed, 885.
 - (k) As to Payment or Performance by Purchaser, 885.
8. Proceedings to Set Aside Sales, 886.
 - a. Who May Attack Sale, 886.
 - (1) Generally, Parties in Interest, 886.
 - (2) Heirs and Devisees, 887.
 - (3) Devisee of Heirs, 887.
 - (4) Purchaser under Judgment against Heir, 887.
 - (5) Administrator De Bonis Non, 887.
 - (6) Persons Estopped to Attack Sale, 888.
 - (a) Applies to Parties; Not to Witnesses, 888.
 - (b) Estoppel of Heir Who Procures Sale or Accepts Benefits; Acquiescence, Laches, Ratification, etc., 888.
 - aa. Generally, 888.
 - bb. Where Heirs Procure Order and Sell Land as Commissioners, 889.
 - cc. Estoppel of Married Women, 889.
 - dd. When Infant Bound by Acts of His Guardian, 889.
 - ee. Where Heir Represented by Guardian Ad Litem, 889.
 - ff. When Estopped to Deny Capacity of Administrator but Not His Fraud, 889.
 - gg. Acceptance of Part Remaining Unsold, 890.
 - (c) Estoppel of Administrator, 890.
 - aa. Estoppel to Deny Fact of Sale, 890.

- bb. Estoppel of Administrator to Claim against His Own Deed, 890.
- cc. Estoppel by Agreement, Participation, Acquiescence, Laches, etc., 890.
- (d) Estoppel of Purchasers and Privies, 891.
- (e) Person Obtaining Injunction and Forcing Sale under Bond, 891.
- b. Grounds for Setting Aside Sale, 892.
 - (1) Setting Aside of Will, 892.
 - (2) Fraud, 892.
 - (3) Want of Necessity for Sale, 892.
 - (4) Sale at Wrong Time or Place, 892.
 - (5) Administrator Purchasing at His Own Sale, 892.
 - (6) Inadequacy of Price, 892.
 - (7) Objections Going to the Report, Delay in Making, etc., 892.
 - (8) Objections Going to the Confirmation, Want of Confirmation, etc., 893.
 - (9) Failure of Purchaser to Pay or Perform, 893.
- c. Jurisdiction, 893.
 - (1) Of District Court, 893.
 - (2) Of County Court, 894.
- d. Venue, 894.
- e. Parties, 895.
 - (1) Necessity for Proper Parties, 895.
 - (2) Parties Plaintiff, 895.
 - (3) Parties Defendant, 895.
- f. Joinder of Causes and Parties, 895.
- g. The Petition, 895.
 - (1) Necessary Averments, 895.
 - (2) Matters to Be Specially Alleged, 895.
 - (3) Form and Sufficiency of Averments, 896.
- h. The Answer, 896.
 - (1) Matters of Defense, 896.
 - (a) Counterclaim; Agreement for Set-Off, etc., 896.
 - (b) Plea of Bona Fide Purchaser, 897.
 - (c) Adverse Possession, Laches and Limitations, 897.
 - (2) Admissions and Issues, 898.
- i. Issues, How Tried, 898.
- j. Evidence, 899.
 - (1) Presumption and Burden of Proof, 899.
 - (a) As to Jurisdiction, 899.
 - (b) As to Identity of Land, 899.
 - (c) Absence of Payment as Presumptive of Fraud, 899.
 - (d) As to Disposition of Proceeds of Illegal Sale, 899.
 - (e) Burden to Prove Notice of Equitable Title, 899.
 - (2) Admissibility, 899.
 - (a) Record and Parts of Record, 899.
 - (b) Admissibility of Deed, 900.
 - (c) Variance, 901.
 - (d) Parol Evidence, 901.
 - aa. To Contradict Recitals in Deed, 901.
 - bb. Declaration of Administrator to Prove Fraud, 901.

- cc. To Prove Sale for Confederate Money, 901.
- dd. To Show Disposition of Proceeds, 902.
- ee. Reconveyance by Purchaser to Administrator, 902.
- (e) Evidence to Show Ratification, 902.
- (3) Weight and Sufficiency of Evidence, 902.
 - (a) To Authorize Submission of Issue, 902.
 - (b) To Prove Death of Decedent, Appointment and Qualification of Administrator, 902.
 - (c) To Prove That Administration Had Lapsed, 902.
 - (d) To Prove Debts, 902.
 - (e) To Prove Want of Debts, 903.
 - (f) To Rebut Presumption of Sufficient Evidence, 903.
 - (g) To Prove Fraud, 903.
 - (h) To Identify Land or Certificate, 903.
 - (i) Weight and Sufficiency of Deed as Evidence, 903.
 - (j) Held to Show No Equity, 904.
- k. Instructions, 904.
- l. The Verdict, 904.
- m. The Judgment, 904.
- n. Costs on Setting Aside Sale, 904.
- o. Effect of Setting Aside Sale, 904.
 - (1) Reverts Title; Land Falls Back into Administration, 904.
 - (2) Purchaser as Trustee for Persons Defrauded, 905.
 - (3) Return of Purchase Money, 905.
 - (4) Accounting for Rents, Profits and Improvements, 907.
 - (a) Lien of Plaintiff for Rents and Profits, 907.
 - (b) Accounting between Administrator and Estate, 907.
 - (c) Accounting for Improvements, 907.
 - (5) Liability of Bona Fide Purchaser from First Purchaser, to Estate upon Outstanding Negotiable Note, 907.
 - (6) Personal Liability of Administrator, 907.
- 9. Injunction against Sale, 907.
- 10. Liability of Administrator for Wrongful Sale, 907.
- 11. Administrator's Sale Compared with Sale under Execution, Sale by Heirs, etc., 908.

CROSS REFERENCES.

See the title EXECUTORS AND ADMINISTRATORS, ante, p. 364, and cross references there given.

I. Personality.

A. GENERALLY AS TO POWER TO SELL.

"An executor or administrator may lawfully sell the personal estate of the deceased, unless prohibited, at public or private sale without the order of the judge of probate, within the jurisdiction of the court where such property is assets in his hands for admin-

istration, and the purchaser will take good title thereto, provided the property was assets within the control and jurisdiction of the court where administration was granted. He can not make such sale, however, when he has not the right to enforce collection." *Solinsky v. Fourth Nat. Bank*, 82 Tex. 244, 246, 17 S. W. 1050.

Order of Court—Necessity.—"At common law, it is believed that an ad-

ministrator could sell without an order of court." *Erskine v. De La Baum*, 3 Tex. 406, 420.

Slaves.—See *Tippett v. Mize*, 30 Tex. 362.

B. DELEGATION OF POWER BY INDEPENDENT EXECUTOR.

See post, "Delegation of Power," II, F, 6; "Same—Exercise of Power by Administrator, d. b. n., c. t. a., etc.," II, F, 7.

C. PROPERTY SUBJECT TO SALE.

1. Land Certificates.

Land certificates, not merged in patent, are not real estate, and may be sold by an administrator as any other chattel. *Melton v. Turner*, 38 Tex. 81, 85; *Cox v. Bray*, 28 Tex. 247, 260; *Pleasants v. Dunkin*, 47 Tex. 343, 355; *Peevy v. Hurt*, 32 Tex. 146.

2. Notes, Bonds, etc.

An administrator, by virtue of his appointment, obtains the title in promissory notes or other written evidences of debt held by the intestate at his death and coming to administrator's possession, and may sell, transfer, and indorse the same. *Groce v. Herndon*, 2 Tex. 410, following *Gayle v. Ennis*, 1 Tex. 184.

A note payable to an individual as administrator is assignable, and an assignment by the administrator carries complete title to the purchaser. *Lipscomb v. Ward*, 2 Tex. 277; *McKinney v. Peters*, *Dallam* 545; *Gayle v. Ennis*, 1 Tex. 184.

Sale by Independent Executor.—

By the terms of her will testatrix expressed "full confidence in the integrity and honesty," of the executor therein named, whom she denominated "my friend," and to whom she gave full power to "handle, manage, and control" her estate, and to "sell, release, and convey, by deed or other conveyance," any and all her property, which property, or the proceeds of the sale thereof, were to be held by him

in trust for her daughter during the latter's life. Held, that the executor had power to bind the estate by giving his note for money borrowed to pay debts of the estate, and to secure such note by hypothecating a note given by the vendee of land belonging to the estate and sold by such executor. *Prieto v. Leonards*, 74 S. W. 41, 32 Tex. Civ. App. 205.

Indorsement of Administrator Transferring Mere Right of Action on Overdue Notes Payable to Decedent.—See the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 975.

Right of Indorsee of Note to Administrator to Sue.—See the title **BILLS, NOTES AND CHECKS**, vol. 2, p. 1040.

Power of Probate Court to Order Sale.—It may well be doubted whether the probate court could confer on an administrator authority to sell the notes and accounts belonging to the estate of his intestate. The statute (*Hart. Dig.*, art. 1182) does not in terms authorize the sale of claims for money due the estate, but enjoins their collection. *Perry v. Booth*, 7 Tex. 493, 497.

Actions—Pleading — Evidence.—In absence of plea denying under oath plaintiff's ownership of a negotiable note endorsed to plaintiff by one purporting to be administratrix, such endorsement with possession of the note will be sufficient evidence to recover upon such note and endorsement. *Abercrombie v. Stillman*, 77 Tex. 589, 14 S. W. 196.

Defense to suit by an administrator on note that he had no authority to sell must aver offer to restore goods received. *Claiborne v. Yoeman*, 15 Tex. 44, 46.

3. Slave Property.

See ante, "Generally as to Power to Sell," I, A.

D. CONDUCT OF SALE.

1. Time and Place.

Under the law in force April 2, 1844,

an administrator's sale of a land certificate was not regarded to be made at the courthouse door of the county in which the land on which the certificate was issued was situated, since before the issuance of a patent the interest of the owner was but a chattel interest, and might be sold as other personal property. *Melton v. Turner*, 38 Tex. 81.

Of Slave Property.—Under Act Feb. 4, 1841, providing that administrators' sales shall be governed by the statute regulating sales under execution; and under Act Jan. 27, 1842, providing that execution sales of land and negroes shall be at the court house of the county in which the sale takes place, unless the judge of probate designates a different place,—an administrator's sale of a slave at a different place than that designated is void, and conveyed no title to the purchaser. *Peters v. Caton*, 6 Tex. 554.

2. Manner of Transfer.

Of Promissory Notes.—The indorsement by an administratrix of a note belonging to the estate passes title without proof that the note was sold by her in accordance with the probate laws. *Abercrombie v. Stillman*, 77 Tex. 589, 14 S. W. 196.

E. TERMS, WARRANTIES, CONDITIONS.

Such part of an answer to suit on a promissory note as relies on administrator's warranty of soundness of slave is properly stricken out. *Able v. Chandler*, 12 Tex. 88, 92.

F. PAYMENT.

In Confederate Money.—Administrators who, during the Civil War, converted assets into Confederate money, are liable, at the present day, for a devastavit. *White v. Gardner*, 37 Tex. 407.

II. Real Estate.

A. GENERALLY AS TO POWER TO SELL—NECESSITY FOR ORDER OF COURT.

"The powers of an administrator re-

lating to the sale and conveyance of lands are wholly statutory. At common law he had no power to sell lands for any purpose, and in Texas he can only sell them when duly ordered to do so by the probate court, which sale must be reported to such court and confirmed. Rev. Stat., art. 2144." *Club Land, etc., Co. v. Dallas County*, 26 Tex. Civ. App. 449, 452, 64 S. W. 872, reversed in 95 Tex. 200. See, to the same effect, *Coy v. Gaye* (Civ. App.), 84 S. W. 441; *Collins v. Ball, etc., Co.*, 82 Tex. 259, 17 S. W. 614; *Gillenwaters v. Scott*, 62 Tex. 670, 672; *Williams v. San Saba County*, 59 Tex. 442; *Bartley v. Harris*, 70 Tex. 181, 7 S. W. 797; *Stone v. Ellis*, 69 Tex. 325, 7 S. W. 349; *McCown v. Terrell*, 9 Tex. Civ. App. 66, 29 S. W. 484; *Graham v. Hawkins*, 38 Tex. 628; *Barrett v. Barrett*, 31 Tex. 344, 346; *Matula v. Freytag*, 101 Tex. 357, 107 S. W. 536, reversing 104 S. W. 492; *Jones v. Lee*, 86 Tex. 25, 50, 22 S. W. 386, 1092, affirming 20 S. W. 863; *Ball v. Collins* (Sup.), 5 S. W. 622. See dictum in *Erskine v. De La Baum*, 3 Tex. 406, 420, where it is said that "at common law, it is believed that an administrator could sell without an order of court."

An agreement by an administrator, without order of court, to convey land to county in exchange for conveyance to an heir, is void. *Williams v. San Saba County*, 59 Tex. 442, 444.

To authorize the sale of land under the probate act of 1840, the administrator was required to obtain an order for sale, clear and specific in terms; and such order should be strictly pursued to pass title to the purchaser. *Graham v. Hawkins*, 38 Tex. 628.

Under the express provisions of Rev. St. 1895, art. 2113, an executor has no power to convey title to property of the estate by a sale unauthorized by the court. *Judgment Matulla v. Freytag* (Civ. App.), 104 S. W. 492, reversed. *Matula v. Freytag*, 101 Tex. 357, 107 S. W. 536.

Decedent having owned in common

with another a survey for league and labor, his administratrix took the location as real estate but as trustee and not as owner and it became her duty to recover and hold possession; not to abandon it or convert it into a different kind of estate. She could dispose of it for the purposes and in the manner prescribed by law and not according to her own judgment of what was to the estate's interest. *Jones v. Lee*, 86 Tex. 25, 50, 22 S. W. 386, 1092, affirming 20 S. W. 863.

When the vendor in an executory contract obtained a decree of foreclosure in 1873 he was thereby concluded from asserting that the superior title remained in him. After foreclosure his position was that of a lien creditor. If a foreclosure made in 1873 was decreed against the administrator of the vendee's estate, the vendor could have had the sale made under his decree, or by asserting his lien through the probate court, he could have obtained an order of sale. If the administrator assumed to sell at private sale, and convey the property in satisfaction of the decree of foreclosure, the recitals of his deed can not supply the place of an order of sale and confirmation of sale. The existence of these must be shown to pass title. *Bartley v. Harris*, 70 Tex. 181, 7 S. W. 797.

B. ANTE-ADMINISTRATION SALES AND CONTRACTS TO SELL.

See the titles EXECUTORS AND ADMINISTRATORS, ante, p. 364; SPECIFIC PERFORMANCE.

In trespass to try title by one claiming as devisee of a league of land, a contract entered into by S., claiming to be executor, and a third party, for the location, by such third party, at his own expense, of a certificate covering the land in question, and a subsequent location and grant by such executor to the third party of the land in question, is not admissible in evidence; it not

having been shown that S. had ever qualified as executor, and the will itself showing that, if he had qualified, he had no authority to sell the land. *Grimes v. Smith*, 70 Tex. 217, 8 S. W. 33.

Specht sued Collins for specific performance or for damages for the breach of the following contract: "I hereby give to H. Specht, of Galveston, the first right to purchase of the State school sections in Wichita county filed upon in the name of H. D. Collins as soon as administration is had upon the estate, said Specht to pay for said lands at rate of 50 cents per acre net as lands now stand. Denison, Feb. 20, 1886. (Signed) A. R. Collins." H. D. Collins was the wife of defendant and had been dead about eighteen months at the making of the contract. Held: 1. That A. R. Collins had no power in the absence of facts that would give him sole control of the estate to make a contract that would bind the estate and bind the court under whose orders the estate should be administered. 2. Defendant could not pledge the course of administration and the orders of the court. 3. The plaintiff knew this, and both parties are presumed to know that public policy and the policy of the law were opposed to such a contract. 4. The tendency of the contract was illegal; it contemplated a violation of it not a fraud upon the estate and the court. 5. The trial court properly refused damages for the breach of the contract. *Specht v. Collins*, 81 Tex. 213, 16 S. W. 934.

A wife owning as separate property a tract of land, made a will giving her estate to her daughter, appointing her husband independent executor with power to sell and reinvest the proceeds, the will designating the tract of land in controversy. Subsequently she executed a power of attorney, with privy acknowledgment, to her husband, under which he exchanged the

land for another tract. Soon afterwards the wife died and the will was probated. The land acquired by the exchange was inventoried as her property. Soon after her death the parties exchanged possession, the husband with his daughter, the legatee, residing upon the acquired land. The husband sold from this tract a part thereof, receiving the purchase money, the purchaser taking possession. Seven months after her majority the daughter sued in trespass to try title for the tract her father had disposed of in the exchange. No offer was made by plaintiff to reconvey that acquired, though she disclaimed ownership of it. The defendant did not ask a reconveyance, but set up improvements, which, however, were not insisted upon on the trial. Held: 1. The will, speaking from the death of the wife, evidences that the maker did not know of her husband's effort to exchange the land for other land, or that she regarded the effort as not affecting her estate in the land disposed of by the will. 2. The will did not authorize the ratification of the invalid conveyance. 3. While under the will the husband could have disposed of the land, yet he did not; nor were his acts in moving upon the acquired land, inventorying it, and keeping possession, etc., an execution of the power or an estoppel against the legatee. 4. It was not necessary to entitle plaintiff to recover that a reconveyance be tendered of the lands received in exchange for that sued for. 5. The defendant not having asked affirmative relief, can not complain that it was not granted. 6. The residence of plaintiff during her minority with her father as part of his family upon the land did not charge her with an approval of the exchange of the lands, but if she had so done, her suit, having been brought within reasonable time after reaching majority, would be an avoidance of such act if done while a minor.

Cardwell v. Rogers, 76 Tex. 37, 12 S. W. 1006.

C. POWER OF PROBATE CLERK
See the title PARTITION.

D. POWERS OF TEMPORARY ADMINISTRATOR.

An administrator pro tem has no right to sell and can give no title unless sale made under order of probate court. *Robinson v. Martel*, 11 Tex. 149, 154. See, also, the title EXECUTORS AND ADMINISTRATORS, ante, p. 364.

E. SALE BY WIDOW, HEIR, OR DEVISEE; WHEN PERSON SELLING IS ALSO REPRESENTATIVE OF ESTATE

See the title EXECUTORS AND ADMINISTRATORS, ante, p. 364.

A deed by the widow of deceased, as his legal representative in performance of his contract of sale of community property, she receiving the agreed consideration, estops one to claim an interest in the land as her heir, though the recited decree of the probate court, purporting to authorize the deed, is void. *Cope v. Blount*, 38 Tex. Civ. App. 516, 91 S. W. 615, affirmed in '101 Tex. 632, no op.

The property of a decedent having been partitioned between the widow and her son, who subsequently died unmarried, a deed signed by her, as the administratrix and sole heir of her husband, passes her title; and, even if it does not, it can not be questioned by one who claims title under a void sale of the property as that of the decedent. *Henderson v. Lindley*, 75 Tex. 185, 12 S. W. 979.

A testator devised to his wife a one-third interest for life in his real property, with remainder to his children, and made her independent executrix of his estate. In a sale of a part of the real property, the deed was signed by the widow individually, and by two adult children, but in the body of the

deed she was described as "relict of R. and executrix of the estate of the said R." The grantee paid full value. Held, that the deed conveyed all title vested in her either as devisee or executrix. *Rogers v. Jones*, 13 Tex. Civ. App. 453, 35 S. W. 812.

In trespass to try title, it appeared that after the death of plaintiff's ancestor his executor, who was one of the heirs, executed a deed to defendant's remote grantor, reciting that plaintiff's ancestor held the legal title in trust for defendant's remote grantor, who had never received a conveyance. Held, that such executor had power to execute the deed. *Sydnor v. Texas Savings & Real Estate Inv. Ass'n*, 42 Tex. Civ. App. 138, 94 S. W. 451.

Where the rights of creditors were not involved, and the executrix was the sole devisee under a will, the fact that the will was not an independent one, and that a sale by the executrix was made without an order of the county court, was not such an irregularity as to defeat the title of purchasers who purchased after the probate of the will as an independent one. *Glover v. Colt*, 81 S. W. 136, 36 Tex. Civ. App. 104.

A will was probated in 1854; executors acted under it until 1860, and in 1871, an administrator with the will annexed joined in a deed with the surviving widow of the deceased, in a conveyance to one of the heirs of land belonging to the estate in satisfaction of a debt due from the testator, the deed reciting that it was made "by virtue of authority contained in the will." No order of court was shown. Held, that the conveyance conveyed at least the interest in the land of the administrator, who was a distributee under the will, and of the widow, and this interest was sufficient to maintain an action for the land. *Frisby v. Withers*, 61 Tex. 134.

Powers of Life Tenant Where Executor Dies before Sale.—Where a

testator willed his life estate in all his property to his wife, authorizing his executors to sell a portion thereof if said wife should desire, the wife herself has no power to sell any of the property, although the executors die before the will is fully executed. *Box v. Word*, 65 Tex. 159, 165.

Death of an executor under a will leaving his life estate in testator's property to his wife, leaves the estate in the position of any estate without administration, and said wife is not empowered to sell land belonging to the estate even to raise money for the support of herself and children, except in the manner provided by law. *Box v. Word*, 65 Tex. 159, 165.

Power of Widow to Dispose of Community Estate.—See the title HUSBAND AND WIFE.

F. SALES BY INDEPENDENT EXECUTORS.

1. Generally as to Power to Sell.

The power of an independent executor to sell may be either express or implied. *Terrell v. McCown*, 91 Tex. 231, 254, 43 S. W. 2.

2. Implied Power.

Under a will authorizing an executor to administer and settle the estate independently of the probate court, where there are no terms of restriction upon his authority in the will, he may do whatever is necessary for the full and complete settlement of the estate which he might do under the authority and order of the court if charged with the administration subject to its control of the will. *McDonough v. Cross*, 40 Tex. 251.

In the absence of express power conferred by the will, to authorize a valid sale of realty by an independent executor, such facts must be shown to exist as would warrant a probate court, if the estate were being administered in it, upon an application disclosing the necessity of the sale, in granting an order to sell the property. *Freeman v.*

Tinsley (Civ. App.), 40 S. W. 835, 837.

Where a will appoints executors and provides that the estate shall be administered outside of the probate court, but confers no powers of sale, it may be that in order to raise the power by implication of law it is necessary under Texas decisions to show the existence of debts as one of the conditions necessary to the implication. *Terrell v. McCown*, 91 Tex. 231, 254, 43 S. W. 2. See, also, *Blanton v. Mayes*, 58 Tex. 422; *Mayes v. Blanton*, 67 Tex. 245, 3 S. W. 40; *Roberts v. Connellee*, 71 Tex. 11, 8 S. W. 626.

3. Construction of Will.

a. Words Held to Confer Power of Sale.

A will which provided that an independent executor should manage the testator's estate to the best advantage for the benefit of creditors, did not deny to, but impliedly conferred upon the executor a power to sell for the payment of debts. *Carlton v. Goebler*, 94 Tex. 93, 58 S. W. 829, distinguishing *Blanton v. Mayes*, 58 Tex. 422.

A will, authorizing an independent executor to take charge of the estate and manage it to the best advantage for the benefit of creditors, empowers such executor to pay debts and sell the property of the estate therefor. *Carleton v. Hausler*, 49 S. W. 118, 20 Tex. Civ. App. 275.

Where the testator expresses a desire that his estate be kept out of the probate court, his will will be construed so that the executor charged with the payment of debts has power to sell realty to pay debts, when such sale is necessary, and when a resort to the courts would result in ordering such sale. The purchaser of land from the executor is not bound to follow the money paid by him to see that it was applied to the payment of debts. *Cooper v. Horner*, 62 Tex. 356, 361. See *Sanger Bros. v. Moody*, 60 Tex. 96, 100.

A will herein construed and held to

authorize an executor, independent of probate court, to sell property of decedent for the payment of debts, and for the support and education of the minor children. *Cooper v. Horner*, 62 Tex. 356, 360.

A will executed in 1866 appointed two joint executors, expressed the desire that the county court should exercise no other control than the registration of the will, and that the executors should exercise the fullest and most absolute control of the estate of the person and property of the legatee, who was a minor, "that is accorded or permitted by law." Held that under the general powers conferred by the will the executors could sell real estate when necessary to pay debts or execute executory contracts of the decedent but beyond this there was no power to convey real estate. *Anderson v. Stockdale*, 62 Tex. 54.

Under an independent will, investing the executors with authority to make a settlement of the estate with a view of the best interest of the estate, they could have sold the property at any time for the payment of debts without the action of any court. *Howard v. Johnson*, 69 Tex. 655, 659, 7 S. W. 522; *McDonald v. Hamblen*, 78 Tex. 628, 633, 14 S. W. 1042.

See the opinion for a will containing a clause (article xi), giving to the executrix an independent and discretionary power to make sales of land, held not to be inconsistent with other portions of the will. *Rogers v. Jones*, 13 Tex. Civ. App. 453, 35 S. W. 812.

b. Words Held Not to Confer Power of Sale.

In *Blanton v. Mayes*, 58 Tex. 422, it was said: "The terms 'manage' and 'control,' standing alone and unaided by other considerations, could not be considered as conferring a power to sell." In that case the property was to be held together and managed for the benefit of the legatees. Dis-

tinguished in *Carlton v. Goebler*, 94 Tex. 93, 99, 58 S. W. 829.

The usual and ordinary signification of the word "control" is the same as the word "manage," which is to have authority over the particular matter, to check, to restrain, to govern with reference thereto. The language used in conferring the power is in legal effect the same as if it had been "entire control of my estate so far as is accorded and permitted by law." *Anderson v. Stockdale*, 62 Tex. 54, 61.

It is doubtful whether power granted by a will to independent executors to "settle the affairs," or to "settle up the estate" of a testator confers upon such executors power to sell and convey real estate. *Wright v. Dunn*, 73 Tex. 293, 295, 11 S. W. 330.

4. Where Administration Taken Out of Probate Court Only in Part.

Valid powers of sale given executors by will are not revoked by probate, but may be exercised, although the administration of the estate is not, by other provisions of the will, taken out of the probate court. *Smith v. Swan*, 2 Tex. Civ. App. 563, 567, 22 S. W. 247, affirmed in 93 Tex. 650, no op.

5. Execution of Power by Less than All, Where More than One Executor.

See, also, post, "Sale by Less than All," II, G, 5, 1, (5).

General Rule.—It seems to be well settled that when authority is given by will or otherwise to executors or trustees to sell land, and where one or more have qualified and are acting, all of them must join in the sale, or the execution of the power is invalid. *Crosby v. Huston*, 1 Tex. 203; *Giddings v. Butler*, 47 Tex. 535, 544; *Hart v. Rust*, 46 Tex. 556; *Wright v. Dunn*, 73 Tex. 293, 295, 11 S. W. 330; *Eskridge v. Patterson*, 78 Tex. 417, 14 S. W. 1000; *House v. Kendall*, 55 Tex. 40, 43; *Mayes v. Blanton*, 67 Tex. 245, 247, 3 S. W. 40; *Blanton v. Mayes*, 58 Tex. 422, 424; *Johnson v. Bowden*, 43

Tex. 670, 674; *Anderson v. Stockdale*, 62 Tex. 54.

This is true although the purchaser supposed the sale was made with the consent of the other executor, and that a deed would be executed by both of them. *Giddings v. Butler*, 47 Tex. 535, 544. See, also, *Hart v. Rust*, 46 Tex. 556.

Independent Executor.—This is the rule in case of coexecutors free from control of the probate court. *House v. Kendall*, 55 Tex. 40, 43; *Hart v. Rust*, 46 Tex. 556.

Where Some Fail to Qualify or Act.

—On the other hand, it is held that when one of two executors of an independent will refuses to qualify or to act, the other has power to convey the property of the estate for the purpose of paying debts, and in accordance with the powers granted in the will. *Bennett v. Kiber*, 76 Tex. 385, 13 S. W. 220; *Eskridge v. Patterson*, 78 Tex. 417, 419, 14 S. W. 1000; *Johnson v. Bowden*, 37 Tex. 621, 624; *Blanton v. Mayes*, 58 Tex. 422, 426; *Johnson v. Bowden*, 43 Tex. 670; *Anderson v. Stockdale*, 62 Tex. 54; *Roberts v. Connellee*, 71 Tex. 11, 16, 8 S. W. 626; *Mayes v. Blanton*, 67 Tex. 245, 246, 3 S. W. 40; *Blanton v. Mayes*, 72 Tex. 417, 418, 10 S. W. 452; *McDonald v. Hamblen*, 78 Tex. 628, 632, 14 S. W. 1042.

And this applies to executors acting independently of the probate court. *McDonald v. Hamblen*, 78 Tex. 628, 632, 14 S. W. 1042.

Power of Surviving Executor.

—When authority is given by will to executors to sell land, and two persons are nominated in the will as executors, but one of them dies, or fails to qualify or accept the trust, the power survives, and may be exercised by the party who qualifies and acts. *Hart v. Rust*, 46 Tex. 556, 574; *Johnson v. Bowden*, 37 Tex. 621; *Johnson v. Bowden*, 43 Tex. 670; *McCown v. Terrell*, 9 Tex. Civ. App. 66, 73, 29 S. W. 484.

Under the statute providing that a testator may, by will, direct that no action shall be had in the probate court in the administration of his estate, where a testator so directs, and gives a discretionary power of sale to two executors, the power survives on the death of one of them, in the absence of any language in the will indicating that one shall not act; especially where the will provides that, in case one of the executors refuses to act, the other need not give bond. Judgment, *McCown v. Terrell* (Civ. App.), 40 S. W. 54, reversed. *Terrell v. McCown*, 43 S. W. 2, 91 Tex. 231, citing *Johnson v. Bowden*, 43 Tex. 670; *Mayes v. Blanton*, 67 Tex. 245, 3 S. W. 40; *Roberts v. Connellee*, 71 Tex. 11, 6 S. W. 626; *Bennett v. Kiber*, 76 Tex. 385, 13 S. W. 220; *Eskridge v. Patterson*, 78 Tex. 417, 14 S. W. 1000.

The rule of law in such case was not changed by Gen. Laws 1870, p. 141, c. 81, § 160, providing that, when a will directs that no action be had in the probate court except to prove and record it, or to prove and record it, and return an inventory and appraisement, no other provisions of this act, except as declared in section 148, subd. 4, shall apply to such estate, but it shall become, like any other property to be administered under a power, chargeable in the hands of a trustee, and liable to execution, etc. Judgment, *McCown v. Terrell* (Civ. App.), 40 S. W. 54, reversed. *Terrell v. McCown*, 43 S. W. 2, 91 Tex. 231.

Where a testator appointed his wife and W. executors, and the wife died before the trust was executed, the power of sale given by the will survived in W., in the absence of anything indicating that testator intended that such power should lapse on the death of one of the executors. *McCown v. Terrell* (Civ. App.), 40 S. W. 54, reversed in *Terrell v. McCown*, 43 S. W. 2, 91 Tex. 231.

Evidence—Presumptions in Such Cases.—A testator died in 1851, nam-

ing W. and S. as executors, and authorizing them to administer his estate free from the control of the county court. Both entered upon their duties, but two years later W. married testator's widow, whereupon S. turned over to him the full control of the estate, and ceased to act as executor. In 1862, W., by his sole deed, conveyed part of the lands to defendant, who occupied, cultivated, and paid taxes on the land until suit was brought 27 years later by testator's heirs and their husband. Twenty years before suit brought, defendant, together with the heirs' husbands and with testator's sons, investigated the title, and it was agreed between them that the sale was valid. Held, that by reason thereof, and of the lapse of time, it must be presumed that S. renounced his office before the conveyance, and that defendant's title was good. *Eskridge v. Patterson*, 78 Tex. 417, 14 S. W. 1000.

Sale Authorized or Ratified by Co-executors.—A deed made by one of several executors, authorized by will to act independent of the control of the probate courts, if authorized by the coexecutors, and approved by them when made, is merely an irregular and imperfect execution of the power, which will be aided in equity. *Giddings v. Butler*, 47 Tex. 535.

6. Delegation of Power.

The discretionary power of an executor under a will to sell land can not be delegated. Judgment, *McCown v. Terrell* (Civ. App.), 40 S. W. 54, reversed. *Terrell v. McCown*, 43 S. W. 2, 91 Tex. 231; *Tippett v. Mize*, 30 Tex. 361, 362; *Langley v. Harris*, 23 Tex. 565, 569; *Smith v. Swan*, 2 Tex. Civ. App. 563, 22 S. W. 247, affirmed in 93 Tex. 650, no op.

While an executor can not delegate discretionary powers conferred upon him by a will, he may delegate power to execute deeds in accordance with terms satisfactory to him. *Terrell v. McCown*, 91 Tex. 231, 244, 43 S. W. 2.

Negotiations and arrangements for a sale in all its details having been made by the trustee himself, he may commit the execution of acts which are merely mechanical to another, and this includes the mere act of executing and delivering a deed of conveyance when everything else is done by the trustee. *Smith v. Swan*, 2 Tex. Civ. App. 563, 22 S. W. 247, affirmed in 93 Tex. 650, no op.

Where a will gives the executor a discretionary power of sale, he may authorize an agent to make conditional sales, and also empower him to execute valid conveyances of land thus sold, on compliance with the terms of sale, after ratification by the executor. *McCown v. Terrell* (Civ. App.), 40 S. W. 54; reversed *Terrell v. McCown*, 43 S. W. 2, 91 Tex. 231.

The mere act of executing a deed by an agent for an executor, with power of sale, is never sufficient alone to bind estate, but must be supplemented by exercise of executor's discretion in favor of transaction evidenced thereby. To bind estate all these acts are necessary, and the latter must be by an executor, but law does not prescribe that they shall be performed at same time, or in particular order. *Terrell v. McCown*, 91 Tex. 231, 245, 43 S. W. 2.

If an agent of an executor, with power to sell, negotiate sale and executes deed under power of attorney from latter, and latter subsequently approves agent's acts, he sufficiently exercises discretion conferred upon him, and estate is bound. *Terrell v. McCown*, 91 Tex. 231, 246, 43 S. W. 2; *Giddings v. Butler*, 47 Tex. 535.

Where an executor, who has a discretionary power to sell land, executes a power of attorney authorizing his attorney in fact to sell, and to execute conveyances, if the executor performs some of his discretionary acts before the agent executes the deed, and thereafter, with full knowledge of

all the facts, performs others, approving the sale, a deed by the agent binds the estate. Judgment, *McCown v. Terrell* (Civ. App.), 40 S. W. 54, reversed. *Terrell v. McCown*, 43 S. W. 2, 91 Tex. 231.

An executor with discretionary power to sell land exercised the power where he determined to sell particular land in small tracts, authorized an attorney in fact to negotiate sales and subdivide to suit purchasers, and considered the sales made by such agent to be advantageous to the estate, and assented thereto as they were made, and the facts concerning them were from time to time, as the business progressed, reported to him, though the deeds were executed by the attorney in fact. Judgment, *McCown v. Terrell* (Civ. App.), 40 S. W. 54, reversed. *Terrell v. McCown*, 43 S. W. 2, 91 Tex. 231.

Executors may employ agents to sell lands of the estate and became liable for reasonable commissions out of the funds of the estate. *Armstrong v. O'Brien*, 83 Tex. 635, 19 S. W. 268; *O'Brien v. Gilleland*, 79 Tex. 602, 604, 15 S. W. 681.

In an action against executors to recover commissions on the sale of lands under a contract made with them, an allegation that defendants are executors of the will of A., independent of the control of the county court, and that there is no restriction in the contract as to the sale of the lands "save that it was requested by defendants that they should be sold as soon as practicable for cash, as provided by the will of defendants' testator, at a fair price," is sufficient on general demurrer as to the power of the executors to make the contract. *O'Brien v. Gilleland*, 79 Tex. 602, 15 S. W. 681.

Proof of Proper Exercise of Discretionary Powers.—Upon question as to whether certain land sales made by an agent of an independent executor were made with proper exercise by latter

of his discretionary powers, statements made by him to witness tending to support affirmative of question are admissible as direct evidence. *Terrell v. McCown*, 91 Tex. 231, 251, 43 S. W. 2.

Where an executor has a discretionary power of sale, and deeds of land sold, are executed by the executor's attorney in fact, in an action by heirs to recover the land the power of attorney is admissible to show authority to make the deeds, if accompanied by proof that, although full discretionary powers were conferred on such attorney by the instrument, he in fact exercised no discretion, but merely acted as agent in executing the deeds. *McCown v. Terrell* (Civ. App.), 40 S. W. 54, reversed in *Terrell v. McCown*, 43 S. W. 2, 91 Tex. 231.

Evidence to Show Acquiescence or Ratification.—In trespass to try title against persons claiming under deeds given by an executor's attorney in fact, who sold a large tract of land in small parcels, and executed a deed for the same to each purchaser, judgments in suits by the executor against various persons for parts of the purchase money for portions of the land in controversy were admissible as circumstances tending to show the executor's acquiescence in, and consent to, the sales, and the manner in which the purchasers paid for the land. Judgment, *McCown v. Terrell* (Civ. App.), 40 S. W. 54, reversed in *Terrell v. McCown*, 43 S. W. 2, 91 Tex. 231.

It was not error to admit evidence of the attorney in fact that he sold the land in parcels to various persons, taking part cash and the balance in vendor's lien notes payable to the executor; that he remitted the proceeds to him from time to time; that the executor acknowledged the receipt of said money "sometimes by letter and several times by personally saying so;" that his letters to witness uniformly stated that he was well satisfied with the sales and payments; and that, when

witness ceased to act as agent and attorney in fact, he turned over his papers, together with itemized statements of the transactions. Judgments, *McCown v. Terrell* (Civ. App.), 40 S. W. 54, reversed. *Terrell v. McCown*, 43 S. W. 2, 91 Tex. 231.

7. Same; Exercise of Power by Administrator, d. b. n., c. t. a., etc.

The power given by the 64th section of the act relating to estates of deceased persons, Pas. Dig., art. 1324, note 496, respecting the sale of estate property must be exercised by the executor himself, and can not be delegated to the administrator with the will annexed. *Langley v. Harris*, 23 Tex. 565; *Tippett v. Mize*, 30 Tex. 362.

An administrator with the will annexed derives his power to sell property from the general law, and not from the will. Pas. Dig., arts. 1269, 1274. *Wooten v. Dunlap*, 20 Tex. 183; *Tippett v. Mize*, 30 Tex. 362.

Where an administrator with the will annexed sold a slave belonging to the estate in the manner and at the place prescribed by the will, but without a decree of the court authorizing such sale, held, that no title passed to the purchaser of such sale, because that section of the statute (Pasch. Dig., art. 1324), which directs that, "when any particular directions are given by a testator in his will respecting the sale of any property belonging to his estate, the same shall be followed," contemplates that the executor named will accept the trust confided to him, and such trust can not be confided to another party. *Tippett v. Mize*, 30 Tex. 361.

8. Same; Deed of Trust with Power to Trustee to Sell.

See the title EXECUTORS AND ADMINISTRATORS, ante, p. 364.

9. Purpose for Which Land May Be Sold.

a. Generally.

An executor with power to adminis-

ter uncontrolled by the probate court may sell property for the payment of debts of the estate, or the discharge of any other trust directly or exclusively committed to him by the will. *McDonough v. Cross*, 40 Tex. 251.

An executor acting independently of probate court can only sell property necessary to pay debts, and his conveyance for any other purpose passes no title. *Anderson v. Stockdale*, 62 Tex. 54, 62.

Where a wife takes under the husband's will an absolute life estate in the property, with power to manage, sell, and dispose of the fee for her own benefit, she has not the right to dispose of the property merely for the purpose of defeating the rights of the residuary legatees and devisee under the will. *Gibony v. Hutcheson*, 20 Tex. Civ. App. 581, 50 S. W. 648.

b. Payment of Debts.

(1) Power to Sell to Pay Debts.

"The independent executor has authority, without an order of the court, to sell any property of the estate for the payment of debts, whether the will expresses such power or not. *McDonald v. Hamblen*, 78 Tex. 628, 633, 14 S. W. 1042; *Howard v. Johnson*, 69 Tex. 655, 7 S. W. 522." *Roy v. Whitaker*, 92 Tex. 346, 355, 48 S. W. 892, 49 S. W. 367.

Power of an executor to sell land belonging to the estate may be implied from the existence of debts when the administration is withdrawn from the probate court by the terms of the will. *Masterson v. Stevens* (Civ. App.), 37 S. W. 364, reversed in 90 Tex. 417.

But if no debts exist, the executor can not sell under a will which only authorizes a sale to pay debts. *Roberts v. Connellee*, 71 Tex. 11, & S. W. 626.

(2) For What Debts or Obligations Sale May Be Made.

Taxes.—Taxes due on the death of testator and those subsequently ac-

curring constitute debts of the estate for which the executor might sell property and if he borrow money on the credit of the estate to pay taxes, such indebtedness would entitle him to sell property. *Blanton v. Mayes*, 72 Tex. 417, 10 S. W. 452.

Debts Owning to Executor.—The claim of an independent executor is insufficient to establish an indebtedness against the estate that would authorize a sale of land. *Freeman v. Tinsley* (Civ. App.), 40 S. W. 835.

Claims for Services Rendered Executor.—Where a will declared that it was the wish of testatrix that the court should have no control over the estate except to probate the will and cause the executor to return an inventory, and empowered the executor to gather and collect all the property, collect all the debts, sell and convey any property, etc., he had power, without an order of court, to convey land belonging to the estate in payment for services rendered to him as executor. *Baker v. Hamblen* (Civ. App.), 85 S. W. 467, citing *Callaghan v. Grenet*, 66 Tex. 236, 238, 18 S. W. 507; *Armstrong v. O'Brien*, 83 Tex. 635, 636, 19 S. W. 268; *Dyer v. Winston*, 33 Tex. Civ. App. 412, 77 S. W. 227.

Agreements to Convey Land.—An unexecuted parol agreement to convey land creates against the promisor no debt or liability for the payment of which his executor will have implied power to sell land belonging to the estate. (Civ. App.) *Masterson's Heirs v. Stevens*, 37 S. W. 364, reversed in part and affirmed in part in *Stevens v. Masterson's Heirs*, 39 S. W. 292, 90 Tex. 417.

c. For Partition.

It is doubtful whether an independent executor can partition real estate or sell land to effect partition. *McDonough v. Cross*, 40 Tex. 251, 280.

d. For Payment of Legacies.

Power conferred by a will to sell real estate to pay legacies is as full

and comprehensive as a power to sell for the payment of debts. *Thomson v. Shackelford*, 6 Tex. Civ. App. 121, 24 S. W. 980.

10. Property Subject to Sale.

a. Generally.

Will empowering independent executor to sell any property of estate except such as is specially devised, empowers him to sell any of the property, with exceptions named, to pay legacies. *Thomas v. Shackelford*, 6 Tex. Civ. App. 121, 130, 24 S. W. 980, affirmed in 93 Tex. 697, no op.

A will directed the executor to pay testator's debts, gave his widow certain property and a specific legacy, and provided that she was to have the use of the dwelling house during life, and also the income from the remainder of the property, and after her death the property was to be divided among testator's children. A subsequent clause authorized the executor to sell the estate to pay debts and legacies, except that part specifically devised. Held that, to pay debts and the legacy, the executor had power to sell the entire estate not specifically devised, during the life of the widow. *Holmes v. Sanders* (Civ. App.), 51 S. W. 333.

b. Community Property.

Where a testator's will appointed an executor, with a direction that no other action should be had in the county court in relation to the settlement of his estate than the probating and recording of his will and the return of an inventory, the executor had authority to sell community property of testator and his deceased wife for the payment of community debts. *Carleton v. Goebler*, 58 S. W. 829, 94 Tex. 93.

Especially is this the case where the estate is insolvent and the executor is directed to manage it to the best advantage for the benefit of creditors. *Carlton v. Goebler*, 94 Tex. 93, 58 S. W. 829.

Partition and Sale of Community Estate.—A purchaser of part of a tract

of land which belonged to the community estate of the husband and wife, under a contract with the husband's executor which required them to proceed to have the land partitioned according to the wife's will, can not refuse a title dependent on such partition in the absence of anything to show unfairness, illegality, or irregularity therein, although the distributees under the wife's will would not be bound by the partition of the land between the two estates unless the same was fairly made and their substantial rights were protected. *Livingston v. Koenig*, 20 Tex. Civ. App. 393, 50 S. W. 463, affirmed in 93 Tex. 645, no op.

11. Duty to Sell; Right of Creditors to Compel Sale.

Where payment of a creditor's claim which had been allowed by the executrix was refused by the probate court on the ground that the claim was barred by limitations, the fact that the testator had empowered the executrix to pay the testator's just debts, and to sell real estate for that purpose, without order of court, did not entitle the claimant to maintain a suit in the district court to compel the exercise of such power, after his objections to the executrix's account had been overruled by the probate court. *Millican's Ex'x v. Millican*, 15 Tex. 460.

12. Expiration of Power under Terms of Will.

In a will was the following clause: It is my will and desire that when my son Robert Hallum shall arrive at the age of twenty-one years any balance which may remain of my estate after the payment of my debts and the sale of so much of my estate as shall be sufficient in the opinion of my executor to support and educate my children as above provided, be divided as follows, to-wit: One equal portion in value to each of my children then living at the time of the division; or if my son Robert Green Hallum shall

die before he arrives at the age of twenty-one years, then the division of my estate, if any remain, shall be at the time of his death." A sale made by the executor after Robert Hallum had reached the age of twenty-one years was legal and should be sustained. The power to sell for the purposes indicated in the will did not expire upon Robert Hallum's majority. *Hallum v. Silliman*, 78 Tex. 347, 14 S. W. 797.

13. Effect of Death of Sole Beneficiary upon Power to Sell.

The fact that the sole beneficiary under a will dies before the executor has sold property of the estate to pay the debts, as directed by the will, does not deprive the executor of that power. *McCown v. Terrell*, 9 Tex. Civ. App. 66, 29 S. W. 484.

14. Procedure.

a. Necessity for Authority from Court.

See, also, ante, "Power to Sell to Pay Debts," II, F, 9, b, (1).

Where will gives executor power to sell land, order of sale is unnecessary to make valid a conveyance from the executor, executed by him under the power conferred by the will. *De Zbrankov v. Burnett*, 10 Tex. Civ. App. 442, 444, 31 S. W. 71, affirmed in 93 Tex. 638, no op.; *Smith v. Swan*, 2 Tex. Civ. App. 563, 22 S. W. 247, affirmed in 93 Tex. 650, no op.

Under the statutes in force in 1871, executors authorized by will to sell, could sell lands without any previous order of court, it not appearing that the estate owed any debts; and such sale would not be void, though not made in strict conformity with the mode prescribed for administration sales, when made under order of court. *Wright v. Heffner's Executors*, 57 Tex. 518.

An independent executor, not restricted by the order of appointment, can sell community property without an order of court. *Carlton v. Goebler*,

94 Tex. 93, 97, 58 S. W. 829.

R. was named as executor of the will of S., who died in 1847. The will gave R. power to sell certain realty, but did not exempt the executor from the control of the probate court. Both the act of 1846 and 1848 authorized the exercise by executors of power of sale conferred by will; confirmation was only necessary to such sales as had to be authorized by the court. Valid powers of sale given to executors by will are not revoked by the probate of the will, but may be exercised though the administration of the estate is not by other provisions of the will taken out of the probate court. R. therefore had power to sell and convey the land without the sanction of the court. *Smith v. Swan*, 2 Tex. Civ. App. 563, 22 S. W. 247, affirmed in 93 Tex. 650, no op.

"The case of *Teal v. Terrell*, 48 Tex. 491, 509, relied on by the plaintiff, was where an administrator attempted to convey the land without an order of the court to pay an attorney for services rendered an estate, and is easily distinguished from *Murrell v. Wright*, 78 Tex. 519, 524, 15 S. W. 156. It is clear that the administrator in that case had no authority to make the deed without an order of the court, or to bind the estate to pay an attorney for services in lands which would deprive the court of its control of the estate and surrender it to the administrator. There was no error in the judgment of the court below, and it will be affirmed." *Baker v. Hamblen* (Civ. App.), 85 S. W. 467, 468.

Adjudication of Right to Sell without Order of Court.—Where an order admitting a will to probate and appointing an executor recited that the will provided that no further action should be taken by the court other than the probate of the will, the appointment of the executor, and the filing and approving of an inventory and list of claims, the recital was not

a part of the judgment, and no adjudication of the executor's rights to dispose of the land of the estate without an order of court. *Gray v. Russell*, 91 S. W. 235, 41 Tex. Civ. App. 526, distinguishing *Orr v. O'Brien*, 55 Tex. 149, 156, and *Halbert v. De Bode* (Civ. App.), 28 S. W. 58, 59.

b. Procedure Follows Rules Governing Court Sales.

Where a will empowers executors to sell land for the payment of debts only, in making sales the executors must follow the laws governing the sales of lands of decedents by and under order of courts, so far as they are applicable. *McCown v. Terrell* (Civ. App.), 40 S. W. 54, reversed in *Terrell v. McCown*, 43 S. W. 2, 91 Tex. 231.

But such a sale is not void, though not made in strict conformity with the mode presented for administration sales when made under order of court. *Wright v. Heffner*, 57 Tex. 518.

c. Inventory.

An inventory is not essential to the validity of a sale made by an independent executor in all cases. *Connellee v. Roberts*, 1 Tex. Civ. App. 363, 366, 23 S. W. 187; *Cooper v. Horner*, 62 Tex. 356.

Incomplete Inventory.—Where an inventory is apparently full and complete save for a statement in the affidavit thereto that it was not complete, such latter statement will not affect a sale by an independent executor of land fully and completely described in such inventory. *Connellee v. Roberts*, 1 Tex. Civ. App. 363, 367, 23 S. W. 187.

d. Confirmation.

Confirmation is only necessary to such sales as have to be authorized by the court. *Smith v. Swan*, 2 Tex. Civ. App. 563, 22 S. W. 247, affirmed in 93 Tex. 650, no op.

The statute, in general terms, empowers the probate court to order and confirm sales of land, but this gives

it no such power over the estates in the hands of independent executors. It has been held that an order of confirmation in such a case was a nullity, and that the executors received no authority from the probate court to make partition of the estate. *Holmes v. Johns*, 56 Tex. 41; *Roy v. Whitaker* (Civ. App.), 50 S. W. 491, 493, affirmed in 93 Tex. 649, no op.

Testator directed that his executors should settle all claims against his estate, and make partition of it, with no action by the court, except to probate the will, grant letters testamentary, and receive the inventory. Held that, after the executors had qualified and filed the inventory, the probate court had no jurisdiction over them so long as they continued to discharge the trust, and conveyances made by the executors to pay debts needed no approval of the court, and, in case of such approval, the record thereof charged no one with notice of the same, since the court had no jurisdiction. *Holmes v. Johns*, 56 Tex. 41; *Runnels v. Runnels*, 27 Tex. 515, 521; *McDonough v. Cross*, 40 Tex. 251.

e. Deed.

By One of Several Executors.—It is not necessary to the validity of a deed of an executrix, who is authorized by the will to convey property only when advised so to do by other persons named in the will, and for the payment of debts, that the consent of the executory advisors appear on the face of the deed. It may be proved by parol; and when with their consent the sale was made to pay debts, the equitable title vests in the purchaser. The heirs have no such vested right in the homestead as would invalidate a sale of it by the widow, executrix, under such circumstances. *Brown v. McConnell*, 56 Tex. 229. See *Giddings v. Butler*, 47 Tex. 535.

"In the well-considered case of *Giddings v. Butler*, 47 Tex. 535, the above distinction between the relief afforded

by a court of law and that by a court of equity, in such cases, is clearly recognized, and it is there held, that when a trust is executed by one of several joint executors, with the consent and approbation of the others, or when the others subsequently ratify a sale made by one under the trust, the act of the single executor will be regarded in equity as binding upon the estate. And that a deed made by one of several executors, authorized by will to act independently of the control of the probate court, if authorized by the coexecutors, and approved by them when made, is merely an irregular and imperfect execution of the power, which will be aided in equity." *Brown v. McConnell*, 56 Tex. 229, 231.

Signature.—Where the only indication that the grantor in a deed acted as an executor is the signature, "A., Executor for C., Deceased," the deed passes all of A.'s interest in the land. *Mills v. Herndon*, 60 Tex. 353.

The mere fact that a grantor appends "executor of C. P. Green, a deceased" to his signature to a deed, does not make it the deed of himself as executor only. *Mills v. Herndon*, 60 Tex. 353, 356.

f. Payment.

Notes in Lieu of Money.—Where testator made his widow executrix and trustee for the children, with power to manage the estate for them till the youngest child became of age, and to sell any part thereof at her discretion, and distribute the proceeds in accordance with the provisions of the will, the executrix was authorized to sell real estate, and take notes payable to herself for the price; the time for distribution not having arrived. *Rogers v. Jones*, 13 Tex. Civ. App. 453, 35 S. W. 812.

Same; Offsets.—In an action by executors on a note executed to them by defendants for land which plaintiffs had sold pursuant to directions in the will, it appeared that the purchaser,

one of defendants, executed a note for a certain amount to the mother of one of the minor legatees, which was not agreed to by plaintiffs, and that it had never been paid. Held, that such note could not be allowed as a credit to defendants. *Wright v. Heffner's Ex'rs*, 57 Tex. 518.

Other Defenses.—Where all legatees, personally or through guardians, assent to sale, a purchaser from an executor can not defeat a suit on a note by latter after ten years, on ground that he had no right to sell. *Wright v. Heffner*, 57 Tex. 518, 523.

Even if no title passed by the sale, the purchaser, who would make that defense to an action for the purchase money, should aver a restoration of the property, or offer to restore it, and to account for rents. *Wright v. Heffner*, 57 Tex. 518.

Vendor's Lien.—Executor has vendor's lien for purchase money. *Wright v. Heffner*, 57 Tex. 518, 523, overruling *Autrey v. Whitmore*, 31 Tex. 623, 627. See, also, *Hicks v. Morris*, 57 Tex. 658, 661.

15. Right of Executor to Purchase at His Own Sale.

See post, "Right of Personal Representative to Purchase," II, G, 5, m, (3).

16. Right, Title, Duties, and Liabilities of Purchasers.

See, also, post, "Right, Title, Duties and Liabilities of Purchaser," II, G, 6, et seq.; "Collateral Attack," II, G, 7, g, et seq.; "Proceedings to Set Aside Sales," II, G, 8, et seq.

a. Bona Fide Purchasers, Generally.

See, also, post, "Bona Fide Purchasers," II, G, 6, a, et seq.

Purchasers from an independent executor, having failed to prove an actual payment of money, can not be regarded as bona fide purchasers for value without notice. *Freeman v. Tinsley* (Civ. App.), 40 S. W. 835.

Where an independent executor makes an unauthorized sale of land,

a conveyance by the vendee to his wife in consideration of an antecedent debt, and the assumption of a community debt does not constitute the wife a bona fide purchaser for value without notice. *Freeman v. Tinsley* (Civ. App.), 40 S. W. 835.

b. Notice of Want of Power.

Persons purchasing land from an executor who has no authority under the will to make the conveyance must take notice of such want of power, and hence are not "innocent purchasers," within Rev. St. 1895, art. 1879, which declares that the acts of an executor or administrator done in conformity with his authority and with law shall be valid as to innocent purchasers from him of property belonging to the estate; such provision referring only to acts that are prima facie valid. (Civ. App.) *Masterson's Heirs v. Stevens*, 37 S. W. 364, reversed in part and affirmed in part *Stevens v. Masterson's Heirs*, 39 S. W. 292, 90 Tex. 417.

c. Under Sale for Unauthorized Purpose.

A conveyance made by an executor for any purpose not authorized by the will passes no bill. It would not stand upon the same footing as one based upon a defective or irregular execution of a power, which equity would aid or time cure. *Connolly v. Hammond*, 51 Tex. 635. While such a conveyance might be made the basis for the defense of limitations, no facts are alleged which show that appellant is barred from asserting his rights as against such deed. And as his is a legal title, the doctrine of stale demand can not be invoked against him. *Anderson v. Stockdale*, 62 Tex. 54, 62. See, also, *McCown v. Terrell*, 9 Tex. Civ. App. 66, 78, 29 S. W. 484 (see 87 Tex. 470); *Blanton v. Mayes*, 72 Tex. 417, 418, 10 S. W. 452; *Mayes v. Blanton*, 67 Tex. 245, 246, 3 S. W. 40; *Roberts v. Connelley*, 71 Tex. 11, 16, 8 S. W. 626; *Terrell v. McCown*, 87 Tex. 470, 29 S. W. 467.

Where a will gives the power to sell for maintenance of minors, a sale not made for that purpose passes no title and land may be recovered by heirs. *Wells v. Petree*, 39 Tex. 419, 429.

d. Duty of Purchaser to See That Conditions Authorizing Sale Exist.

Where the power to sell is expressly conferred by the will, so that it is not necessary to resort to implication to raise the power, it can not be necessary for the claimant thereunder to establish by proof any of the conditions upon which the law would raise such implication. *Terrell v. McCown*, 91 Tex. 231, 254, 43 S. W. 2.

"If the executor was invested, by the terms of the will, with the power and authority to give his promissory note and deposit the note given for the land as collateral security for the payment of the note executed by him, the duty did not devolve on the payee of the note to inquire as to the existence of debts, or to concern himself as to the manner in which the money was appropriated. *Blanton v. Mayes*, 72 Tex. 417, 10 S. W. 452; *Terrell v. McCown*, 81 Tex. 231, 254, 43 S. W. 2; *Stevenson v. Roberts*, 25 Tex. Civ. App. 577, 64 S. W. 230." *Prieto v. Leonards*, 32 Tex. Civ. App. 205, 208, 74 S. W. 41, affirmed in 97 Tex. 644, no op.

Where an independent executor had power to mortgage property belonging to the estate to pay debts, a mortgage executed pursuant to such power was not void, nor were creditors and purchasers in good faith affected by the executor's abuse of discretion in determining the necessity to mortgage the property, or in selecting property to be mortgaged. *Stevenson v. Roberts*, 25 Tex. Civ. App. 577, 64 S. W. 230.

Neither the devisees, nor a purchaser from them, nor the executor, are chargeable with knowledge of the debts of the estate, or the means in

the executor's hands for their payment. *McDonough v. Cross*, 40 Tex. 251.

When a will empowers the executor to sell land for the sole purpose of paying debts, the purchaser under the sale must show that debts then existed against the estate. *McCown v. Terrell*, 9 Tex. Civ. App. 66, 29 S. W. 484, discussing *Blanton v. Mayes*, 72 Tex. 417, 418, 10 S. W. 452; *Mayes v. Blanton*, 67 Tex. 245, 246, 3 S. W. 40, and *Roberts v. Connellee*, 71 Tex. 11, 16, 8 S. W. 626, and distinguishing and overruling dicta in *Cooper v. Horner*, 62 Tex. 356. See, also, *Terrell v. McCown*, 87 Tex. 470, 29 S. W. 467.

Where a will empowers the executor to sell land only for the purpose of paying debts, the burden is on persons claiming under deeds from the executor to show that debts existed when the deeds were made. (Civ. App.), *McCown v. Terrell*, 40 S. W. 54, reversed *Terrell v. McCown*, 43 S. W. 2, 91 Tex. 231.

The burden is upon the purchaser of land at a sale by an independent executor, without an express power to sell conferred by the will, to prove the existence of such indebtedness at the time of sale as would authorize a probate court to order a sale were the administration pending. *Freeman v. Tinsley* (Civ. App.), 40 S. W. 835. See, also, *McCown v. Terrell*, 9 Tex. Civ. App. 66, 77, 29 S. W. 484.

The court of civil appeals held that in order to sustain the validity of a sale of land by an executor under a will which empowers him to administer the estate free from the control of the county court, and to sell land in order to pay debts, the existence of debts against the estate must be proved. In *Cooper v. Horner*, 62 Tex. 356, 363, the court said: "The purchaser of real estate under a power of sale to pay debts is not bound to investigate whether there are debts, nor to see to the application of the purchase money." Held, that it appearing in the latter

case that there were debts existing at the time of the sale, the announcement of the proposition was not necessary to the decision of the case and the two decisions were not conflicting. *Terrell v. McCown*, 87 Tex. 470, 29 S. W. 467.

e. Right of Purchaser to Rely upon Representations of Executor.

"Let it, however, be conceded, *pro hac vice*, that a sale of an independent executor stands upon the same plane with one made in the regular administration of an estate through the probate court, still in equity the purchaser will be protected against the consequences of having been misled by the fraud or mistake of the executor or administrator, so far as he had a right to rely on his representations." *Altgelt v. Mernitz*, 37 Tex. Civ. App. 397, 83 S. W. 891.

Where the vendor, as independent executor, knows, or may reasonably be supposed to know, material facts concerning the title which are unknown to the vendee, and which can not otherwise be ascertained by him at the time and place of sale, and the vendee informs the vendor that he relies solely on the truth of his statements and representations respecting the title, and the vendor makes such statements relative thereto, which, if true, would constitute a good title, and the vendee, relying on the truth of such statements, buys, and the statements prove untrue, the vendee may, to the extent of the failure of title, surrender the property and defend an action for the purchase money, and it is immaterial whether the vendor knew such representations were false. *Altgelt v. Mernitz*, 37 Tex. Civ. App. 397, 83 S. W. 891, citing *Ward v. Williams*, 45 Tex. 617; *Mitchell v. Zimmerman*, 4 Tex. 75, 76; *Crayton v. Munger*, 9 Tex. 285, 287; *Hays v. Bonner*, 14 Tex. 629, 630; *York v. Gregg*, 9 Tex. 85; *Coombs v. Lane*, 17 Tex. 280; *Able v. Chandler*, 12 Tex. 88.

f. Duty to See to Application of Purchase Money.

Where an executor has the power to make sale to pay debts, the purchaser is not bound to see that purchase price paid is applied on payment of debts. *Blanton v. Mayes*, 72 Tex. 417, 421, 10 S. W. 452.

Where husband's will required the widow, as executrix, to manage the estate for the children and apply the proceeds as directed, there was no obligation on one purchasing land from her without collusion to see that she applied the proceeds as directed by the will. *Rogers v. Jones*, 13 Tex. Civ. App. 453, 457, 35 S. W. 812.

g. Title or Interest Acquired.

See, also, post, "Title, Interest and Estate Passing to Purchaser," II, G, 6, c.

Testator devised to his wife, whom he made executrix, a life interest in one-third of his real estate, with remainder to his children, who were the devisees of the residue; directing her to manage the estate until the youngest child became of age, and to sell any part of the property, at her discretion, and distribute the proceeds in accordance with the provisions of the will. A subsequent deed of a portion of the realty was signed by the widow and two adult children, the widow signing and acknowledging the same individually, but describing herself, in the granting clause, as the relict of testator, and executrix of his estate. Held, that the purchaser, who paid full value for the land, acquired complete title thereto, and not merely the life interest of the widow. *Rogers v. Jones*, 13 Tex. Civ. App. 453, 35 S. W. 812.

17. Validation of Invalid Sales.

See, also, post, "Evidence to Show Ratification," II, G, 8, j, (2), (e).

Constitutionality of Validating Act.

—Act of May 2, 1893, validating sales which had been made by executors

under wills probated in other states, and which gave power to sell, was not unconstitutional. *De Zbrankov v. Burnett*, 10 Tex. Civ. App. 442, 445, 31 S. W. 71, affirmed in 93 Tex. 638, no op.

Evidence to Show Ratification.—In trespass to try title against persons claiming under void deeds given by an executor's attorney in fact, evidence of the receipt of purchase money by the administrator of testator's wife was not admissible to show ratification as against testator's heirs and such administrator's wife, who was an intervening claimant. (Civ. App.), *McCown v. Terrell*, 40 S. W. 54, reversed *Terrell v. McCown*, 43 S. W. 2, 91 Tex. 231.

Ratification of Acts of Agent or Attorney by Independent Executor.—See ante, "Delegation of Power," II, F, 6.

18. Action to Set Aside Sale by Independent Executor.

As to ante-administration sales and contracts to sell, see ante, "Ante-Administration Sales and Contracts to Sell," II, B.

a. Who May Attack Sale.

See, also, post, "Who May Attack Sale," II, G, 7, b; "Who May Attack Sale," II, G, 8, a, et seq.

Where realty is conveyed by executors under an independent will in discharge of debts, one not an heir nor a creditor, nor having any interest in the estate, can not object to the conveyance on the ground that the debts were barred by the statute of limitations when the conveyance was made. *McDonald v. Hamblen*, 78 Tex. 628, 14 S. W. 1042.

Where a husband dies, leaving as the only constituent member of his family his wife, in whom by law and by her husband's will the homestead rights vest, a child, who is a devisee of a portion of the remainder, can not question the power of the executor to sell the homestead unless it affirmatively appears that the sale was not to

pay debts and legacies. *Holmes v. Stone* (Civ. App.), 51 S. W. 518.

Estoppel to Deny Validity of Sale.—See, also, ante, "Ante-Administration Sales and Contracts to Sell," II, B; post, "Persons Estopped to Attack Sale," II, G, 8, a, (6).

Neither an estate, nor its administrator, is estopped from claiming land sold by a former executor to carry out a compromise entered into between the executor and contestants of the will, to which neither the creditors nor legatees were parties, where none of the money received for the sale was paid into court or accounted for in any way, or expended for the benefit of the estate or any one having an interest in or any claim against it. *Coy v. Gaye* (Civ. App.), 84 S. W. 441.

Where a surviving partner deeds an undivided half of land owned by the firm to the heirs of his deceased partner, and at the same time a certain person, as attorney in fact of the executors of deceased's estate, deeds to such surviving partner an undivided half of the same land, such heirs, while claiming under the deed to them, can not deny the validity of the deed by such attorney in fact. *Cox v. Rust* (Civ. App.), 29 S. W. 807.

b. Pleadings.

If the suit be brought to recover back the property, a general allegation that debts existed to authorize the sale, without specifying them, is good on general demurrer. If it were objectionable it could only be reached by specific exception. *Cooper v. Horner*, 62 Tex. 356, citing *Williams v. Warnell*, 28 Tex. 610; *Frosh v. Swett*, 2 Tex. 485, and *Warner v. Bailey*, 7 Tex. 517, 519.

c. Evidence.

Admissibility of Deed or Bond for Title.—Where the deeds to the purchasers reserved a vendor's lien, a deed executed after the executor's death, by the attorney in fact of certain heirs of the testator, to a pur-

chaser of part of the land in dispute, "in consideration of \$180 in gold, being balance of purchase money of said land," was admissible to show payment of the purchase money, and also ratification by said heirs. Judgment, *McCown v. Terrell* (Civ. App.), 40 S. W. 54, reversed. *Terrell v. McCown*, 43 S. W. 2, 91 Tex. 231.

Since the discretionary power of an executor to sell can not be delegated, where defendants in trespass to try title claim under a deed executed by an attorney under a power from an executor, and plead limitations, the deed is admissible only in support of the pleas of limitation. (Civ. App.), *McCown v. Terrell*, 40 S. W. 54, reversed *Terrell v. McCown*, 43 S. W. 2, 91 Tex. 231.

The power of persons to convey an interest in one's headright certificate may be inferred, after a lapse of 60 years, from the recitals in their bond for title authorizing the inference that they purported to act as his administrators. *Lynch v. Pittman*, 73 S. W. 862, 31 Tex. Civ. App. 553.

"A power of attorney would have no more force as authorizing the execution of a deed than, in the present case for instance, the fact that J. S. Sydnor held only the legal title in trust for Cyrus. Under the application of these principles, it would seem clear, not only that the recitals in the deed of J. B. Sydnor, executor of J. S. Sydnor, were admissible as evidence of the existence of the facts recited, but that, those facts being established, the power of the executor to execute the deed would follow. *Johnson v. Shaw*, 41 Tex. 434; *Storey v. Flanagan*, 57 Tex. 649, 654; *Johnson v. Timmons*, 50 Tex. 521, 535. The recitals in the executor's deed of the existence of the facts which authorized its execution are the equivalent of the recitals, in a deed purporting to have been executed under a power of attorney, of the existence of the power, and, in the one case as well as the other, such re-

citals, if the deed is an ancient instrument, are admissible to establish the existence of the facts recited." *Sydnor v. Texas Sav., etc., Ass'n*, 42 Tex. Civ. App. 138, 94 S. W. 451, affirmed in 101 Tex. 661, no op.

Source from Which Purchase Money Derived.—When a husband's will gave a widow his life estate in all the property, with power to dispose of it for her own benefit, and residuary legatee sued her as executrix, and her grantee to cancel deed executed by her, she was competent to testify that the land sold was purchased by her with her separate funds derived from income of her life estate. *Gibony v. Hutcheson*, 20 Tex. Civ. App. 581, 584, 50 S. W. 648.

That Proceeds Did Not Accrue to Benefit of State—Validity of Will.—Where the defendant recovered the land any error in the admission or excluding of testimony, tending to show that the proceeds of the sale did not accrue to the benefit of the estate, would be immaterial. The power to sell would arise from the existence of debts against the estate. *Blanton v. Mayes*, 72 Tex. 417, 10 S. W. 452.

Whether a will is invalid, and is not such as can be admitted to probate under the laws of the state, is immaterial, in a suit by the administrator to set aside a sale made by the executor named in the will, when the will contains no power of sale. *Coy v. Gaye* (Civ. App.), 84 S. W. 441.

Proof of Existence of Debts and Insufficiency of Personalty.—When a will provides that the estate shall be administered outside of the probate court, and gives the executor discretionary power to sell land to pay debts, the burden of proof is on the heirs, claiming the land as against bona fide purchasers and grantees of the executors to show that there were no debts when the deeds were made. Judgment, *McCown v. Terrell* (Civ. App.), 40 S. W. 54, reversed. *Terrell v. McCown*, 43 S. W. 2, 91 Tex. 231.

Where an independent executor empowered by a will to sell the land of an estate for payment of debts, has made sale, it will be presumed in support of title of purchasers thereat, that debts existed authorizing sale. *Terrell v. McCown*, 91 Tex. 231, 254, 43 S. W. 2.

There can be no presumption that a debt did not exist in the face of a recital on a sale by independent executors that the sale was made for the purpose of discharging the debt. *McDonald v. Hamblen*, 78 Tex. 628, 14 S. W. 1042.

A will gave an executor no express power to sell real estate. Personalty was sold for approximately the amount of testator's debts. Held, that it would be assumed that the proceeds of the sale of the personalty were applied in discharging the debts of the testator as directed in the will, so that conveyances of real estate executed by the executor were invalid. *Johnson v. Short*, 43 Tex. Civ. App. 128, 94 S. W. 1082.

Oral evidence that the personal property of an estate was sufficient to pay the debts is objectionable as opinion evidence. *McCown v. Terrell* (Civ. App.), 40 S. W. 54, reversed in 9 Tex. 231.

Question for Jury.—Where the evidence is conflicting, question is properly submitted to jury whether at time of executor's sale, there were outstanding debts of estate. *Terrell v. McCown*, 91 Tex. 231, 252, 43 S. W. 2.

d. Effect of Vacating Sale.

(1) In General.

See, also, post, "Effect of Setting Aside Sale," II, G, 8, o, et seq.

If an administrator's sale of property be canceled on account of fraud, the property thereby becomes unadministered assets of the estate, and falls back into the hands of the administrator for disposition in due course of the administration. If necessary for the protection of parties con-

cerned, the administrator who made the fraudulent sale can be removed and an administrator, *de bonis non*, be appointed; or a receiver might, perhaps, be appointed at the instance of the heirs, for the protection of the property of the estate until the appointment of a more faithful administrator. *Giddings v. Steele*, 28 Tex. 732; *Evans v. Oakley*, 2 Tex. 182; *Burdett v. Silsbee*, 15 Tex. 604; *Long v. Wortham*, 4 Tex. 381, 382.

(2) Return of Purchase Money, Compensation for Improvements, etc.

Where there is a total failure of title in the vendors, the vendee may, if the contract be executory and unfulfilled, refuse to perform it and reclaim any portion of the purchase money which he may have advanced. The same rule applies in an action against a coexecutor, who, acting alone, has agreed to convey land to which the estate had no title, and who has received a portion of the purchase money, the will requesting the executors to act jointly in the settlement of the estate. *House v. Kendall*, 55 Tex. 40. See, also, post, "Return of Purchase Money," II, G, 8, o, (3); "Accounting for Rents, Profits and Improvements," II, G, 8, o, (4).

The fact that a coexecutor, in such case, executed the contract to convey in the qualified character of coexecutor, does not relieve him from the personal obligation to refund money obtained without consideration; nor would his special plea under oath denying that the contract to convey bound him individually, require of the plaintiff a replication in order to admit evidence of the issue involved, when the petition alleged the facts on which the liability was claimed. *House v. Kendall*, 55 Tex. 40.

In an action questioning validity of sale of property by an executor, a purchaser may set up good faith as basis for the recovery of the price of the property if the property be denied him. *Blanton v. Mayes*, 72 Tex. 417, 420, 10 S. W. 452.

But where the defendant gained the land an error committed upon the alternative plea asking the repayment of the purchase money would be immaterial. *Blanton v. Mayes*, 72 Tex. 417, 10 S. W. 452.

Subrogation to Rights of Creditors.

—Where an executor sold real estate for the payment of debts, without order of the probate court, and without any power in the will, and the purchase price was used to pay the debts of the decedent, the purchaser is entitled to be subrogated to the rights of creditors, and to retain possession of the land until the amount paid for the land, with interest, has been repaid to him, though the sale was void. *Stone v. Crawford's Heirs*, 1 Posey Unrep. Cas. 605.

Compensation for Improvements.—

An independent executrix remarried, and, her husband joining, mortgaged land left to her for life, with remainder to plaintiffs, to secure testator's debts. On the foreclosure sale her husband furnished the purchaser half the money, and afterwards received a deed from such purchaser of one-half the land. Held, that a purchaser from such husband, who knew of his connection with the mortgage and sale, but who purchased in good faith, believing he acquired a good title, was entitled to compensation for his improvements on being ejected at the suit of plaintiffs. *Stevenson v. Roberts*, 25 Tex. Civ. App. 577, 64 S. W. 230.

19. Operation and Effect of Sale as an Administration.

The management of the estate of a deceased person and the disposition of property by an executor under a will which withdraws an estate from the control of a probate court is deemed by the law an administration as fully as though sold under order of court in an ordinary administration. *Todd v. Willis*, 66 Tex. 704, 707, 1 S. W. 803; *Freeman v. Tinsley* (Civ. App.), 40 S. W. 835, 837.

G. COURT SALES.**1. Purpose for Which Sale May Be Made.****a. Generally.**

See, also, ante, "Purpose for Which Land May Be Sold," II, F, 9, et seq.

The county court has no general power to order the sale of lands of an estate. It can order such sale for no other purpose than the payment of debts and expenses of administration, or to raise the amount of the allowance for the surviving wife and children, or, in certain cases, for the purpose of partition and distribution among the heirs. *Withers v. Patterson*, 27 Tex. 491; *Merriweather v. Kennard*, 41 Tex. 273, 277; *Flanagan v. Pierce*, 27 Tex. 78, 79; *Anderson v. Lockhart*, 2 Posey 63, 68.

An executor has no authority to sell real estate, in the absence of a power contained in the will, unless it is needed to pay debts or legacies, in which case he must obtain an order from the court of probate authorizing the sale, and the purchaser must see that the order is regularly obtained and is properly complied with. *Coy v. Gaye* (Civ. App.), 84 S. W. 441.

Real property of estate, may, under order of court, be sold, if it is necessary to pay debts or to partition it among heirs, or for some other purpose made sufficient by statute. *Gillenwaters v. Scott*, 62 Tex. 670, 672; *Flanagan v. Pierce*, 27 Tex. 78, 79.

b. Debts and Expenses of Administration.**(1) Generally.**

The probate court has power to sell land in the course of administration to pay debts due by the estate. *Webb v. Sellers*, 27 Tex. 423, 427.

The probate court has no jurisdiction to order a sale of land of estate for any other purpose than for the payment of estate's debts. *Merriweather v. Kennard*, 41 Tex. 273, 278.

Expenses of Administration.—Property belonging to an estate may be

sold for the payment of expenses of administration. *Storer v. Lane*, 1 Tex. Civ. App. 250, 256, 20 S. W. 852.

The court may order land to be sold to defray expenses of administration; e. g., to satisfy a claim for expenses incurred in locating lands of estate. *Casseday v. Norris*, 49 Tex. 613, 617.

(2) For What Debts and Claims Lands May Be Sold.

A bond for title presented to administrator is a claim for land and not for money, and the real property of the estate will not be sold to pay it. *Gregory v. Hughes*, 20 Tex. 345, 348. See, also, ante, "For What Debts or Obligations Sale May Be Made," II, F, 9, b, (2).

An order of the probate court directing the administrator to convey the land patented under a conditional headright certificate in name of the deceased to the holder of the assignment of the conditional certificate which had been transferred by the intestate in his lifetime is void for want of jurisdiction. *Merriweather v. Kennard*, 41 Tex. 273.

Sale to Satisfy Encumbrances.—An administrator's sale of land is not rendered invalid by the fact that it was made to satisfy a debt, secured by mortgage, which was not due when the sale was made. *Hurley v. Barnard*, 48 Tex. 83; *Tinsley v. Boykin*, 46 Tex. 592.

The right of a creditor and debtor's administrator to subject land of debtor's estate to the payment of a mortgage debt is not less than was right of debtor in his lifetime. *Cooper v. Loughlin*, 75 Tex. 524, 528, 13 S. W. 37.

The administrator, in applying for the sale of lands, subject to a lien for a debt allowed and approved, may recognize that fact, and ask for such an order as would authorize him to apply the proceeds of the sale to the discharge of the secured debt. *Davis v. Touchstone*, 45 Tex. 490, citing *Alexander v. Maverick*, 18 Tex. 179, and *Allen v. Clark*, 21 Tex. 404.

Unproved Claims.—County court sitting as probate court could not order sale of property for payment of account which had never been established as claim against estate, and which was not shown to be valid claim against estate. *Marx v. Freeman*, 21 Tex. Civ. App. 429, 431, 52 S. W. 647.

That an indebtedness of the estate for which sale is ordered had not been presented to the administrator at the making of the order of sale will not vitiate such order. *Lyne v. Sanford*, 82 Tex. 58, 19 S. W. 847.

(3) Duty of Representative to Apply for Order of Sale to Pay Debts.

"The administrator is required, so soon as he shall ascertain that it is necessary, to apply for an order to sell property to pay debts of the estate. Pas. Dig., art. 1314, note 488." *Ryan v. Flint*, 30 Tex. 382, 384. See, also, ante, "Duty to Sell; Right of Creditors to Compel Sale," II, F, 11.

(4) Right of Creditors to Compel Sale.

See, ante, "Duty to Sell; Right of Creditors to Compel Sale," II, F, 11.

Where the creditor alleges that the claim has been presented and approved by the executrix and probate judge, this suit can not be sustained against the administrator or executor, because the grounds on which an administrator or an executor can be sued is their denial of the demands. If, as stated, the demand and acceptance had been made, the plaintiff could have had his claim set up in his petition to the probate court satisfied by the sale of a portion of the property of the estate. *Millican v. Millican*, 15 Tex. 460, 463.

The fact that an administrator, under probate act of 1848 waived a copy of citation, and accepted service in proceedings seeking the sale of land belonging to the estate for the payment of debts, will not authorize the conclusion that the court was on that account without jurisdiction to order the

land sold. *Hurley v. Barnard*, 48 Tex. 83.

Administrator's Plea of Payment.—

A decree enforcing the vendor's lien on appeal to the supreme court was affirmed against an administrator. An application was made in the probate court for the issuance of an order of sale under decree. To this application the administrator answered, pleading a partial failure of the title to the land sold; the want of proper parties, in that the heirs of the intestate were not made parties to the proceeding; and part payment in cotton delivered by the administrator to the holder of judgment. Held: 1. That the administrator could not again litigate the validity of the decree. 2. That the heirs were not necessary parties to such proceeding. 3. That the administrator could not defeat or postpone the issuance of the order of sale by merely pleading such payment. 4. The remedy of the administrator against the enforcement of a judgment partially satisfied, would be by petition under oath and bond for injunction. *Heath v. Garrett*, 50 Tex. 264.

c. Partition.

See the title PARTITION.

d. Sale of Property because Unproductive, Expensive or Inconvenient to Handle, etc.

A petition for sale of a decedent's lands, which merely shows that the sale will be advantageous to the estate, without showing any of the statutory reasons therefor, as that it is necessary to pay debts, is defective. *Gillenwaters v. Scott*, 62 Tex. 670.

Where a petition of an administrator for leave to sell land averred that a sale was sought for convenience and to enable the administrator to settle the estate and to satisfy all the heirs, confirmation of a sale was properly refused; the court not being authorized to decree a sale, except to pay debts or for the purpose of partition, when,

by report of the commissioners in partition, it is shown that the land can not be equitably divided. *Flanagan v. Pierce*, 27 Tex. 78; *Anderson v. Lockhart*, 2 Posey 63, 68.

2. Property Subject to Sale.

See, also, ante, "Property Subject to Sale," II, F, 10, et seq.

a. Limited to Sale of Decedent's Interest.

The probate court can only order a sale of the interest which the intestate had, which is all that executor can sell. *Herrington v. Williams*, 31 Tex. 448, 462.

b. Wife's Land for Husband's Debts.

The title to a deceased mother's separate land can not pass by an order of the probate court in administration of deceased father's estate. *Bradley v. Love*, 60 Tex. 472, 477.

c. Community Estate.

See the title HUSBAND AND WIFE. See, also, ante, "Community Property," II, F, 10, b.

d. Homestead.

See, also, the title HOMESTEAD EXEMPTIONS.

An administrator can not have leave to sell property reserved as a homestead by the decedent, for payment of his debts. *Yarboro v. Brewster*, 38 Tex. 397; *Stephenson v. Marsalis*, 11 Tex. Civ. App. 162, 33 S. W. 383.

Nor would a purchaser at such sale take any right against the minor children. *Yarboro v. Brewster*, 38 Tex. 398.

Where the land of a decedent constituted a homestead, the county court has no jurisdiction of proceedings to sell the same for the payment of debts of the estate. *Dignowity v. Baumblatt*, 85 S. W. 834, 38 Tex. Civ. App. 363.

Where a homestead had been set apart to the family of a deceased person, it is no longer subject to administration, and the sale thereof under order of the probate court for the

support of the widow and minor children is a nullity. *Cummins v. Denton*, 1 Posey Unrep. Cas. 181.

Where an administrator of a widow, entitled to a homestead exemption, sold such homestead to pay debts of the widow, the purchaser acquired no title as against an unmarried daughter of the widow, who had always resided with her, to whom such homestead descended free from debts. *Trammell v. Neal*, 1 Posey Unrep. Cas. 51.

Under the probate law of 1848 a sale of the homestead ordered and made upon the report of commissioners that partition was impracticable passed the title. *Singletary v. Hill*, 43 Tex. 588.

e. Property Subject to Conflicting Claims, etc.

The fact that there are conflicting claims to the land sold by an administrator under order of court at the time of the sale does not affect the right of the administrator to sell. *Evans v. Ashe*, 50 Tex. Civ. App. 54, 108 S. W. 1190.

f. Equitable Interests.

(1) Generally.

It is doubtful whether probate court can order sale of an equity in land which is a mere chose in action. *Herrington v. Williams*, 31 Tex. 448, 463.

(2) Title Bond.

It may be well doubted whether a mere bond for title is the subject of sale under an order of the probate court. *Herrington v. Williams*, 31 Tex. 448.

(3) Vendor's Lien.

A vendor's lien is not an asset which is the subject of sale to pay debts. *O'Conner v. Vineyard*, 44 S. W. 485, 91 Tex. 488.

(4) Equity of Redemption.

Where all the title of the deceased has been conveyed away prior to his death, nothing remains in his estate subject to the orders of the probate court, and the equity of redemption

of the purchasers can not be foreclosed in this manner, and the purchaser, under such an attempted foreclosure, acquire no title whatever. *Schmeltz v. Garey*, 49 Tex. 49; *Jackson v. Butler*, 47 Tex. 423; *Hanrick v. Gurley*, 93 Tex. 458, 472, 55 S. W. 119, 54 S. W. 347, 56 S. W. 330, affirming in part and reversing in part 48 S. W. 994.

(5) Trust Estates.

In order to enable plaintiff to raise the purchase price of land which he had agreed to buy of several cotenants, they conveyed to one of their number under a parol trust to procure a loan of the required amount, and then to convey to plaintiff, subject to the mortgage. She procured the loan, but died before executing a deed to plaintiff. Held, that the land was subject to administration as her estate for the purpose of paying the mortgage debt, though all the other tenants, who were her heirs, had conveyed to plaintiff, also an heir, in accordance with the original agreement. *Cooper v. Loughlin*, 75 Tex. 524, 13 S. W. 37.

(6) Mortgaged Property for Debts of Mortgagee.

Administrator's sale of mortgaged property as assets of mortgagee passes no title. *McCamant v. Roberts*, 87 Tex. 241, 245, 27 S. W. 86.

g. Interests in the Public Lands.

(1) Unlocated Certificates.

A probate sale not yet located under land certificate conveys no title. *Harwood v. Wylie*, 70 Tex. 538, 543, 7 S. W. 789.

Where it appears, after the sale of land by order of court, that no certificate severing the land from the public domain was located or filed thereon until eight months after the sale, the purchaser will acquire no title. *Harwood v. Wylie*, 70 Tex. 538, 7 S. W. 789.

(2) Certificate Located in Part.

"The case presented is not one

where a land certificate was sold after it had become merged into land. It appears to have been to some extent located, and the order authorized the sale of realty as well as personalty, and the warrant, with the right to the location, was the subject of the sale. *Farris v. Gilbert*, 50 Tex. 350." *Corley v. Anderson*, 5 Tex. Civ. App. 213, 219, 23 S. W. 839.

(3) Located Certificate.

An administrator's sale of land certificate after location does not pass the title to land. *East v. Dugan*, 79 Tex. 329, 330, 15 S. W. 273.

Though a national road certificate is a chattel until it has been located and the land appropriated under it, yet, when that is done, it is merged in the land, and a sale of the certificate after the patent is issued, under an order of the probate court, to pay debts of the estate, will not operate as a conveyance of the lands covered thereby. *East v. Dugan*, 79 Tex. 329, 15 S. W. 273.

Decedent and J. owned in common a survey for league and labor in F. county. J. and the administratrix lifted the certificate and located it upon lands in C. county. Subsequently, the administratrix under probate orders, sold the C. county location, J. purchasing a part thereof, and J. obtained a duplicate of the certificate and relocated it upon the land in F. county. Held, that since the administratrix could not abandon the original location and relocate the certificate, the certificate was not detached from the land in F. county and could not be located upon the land in C. county and hence, the sale to J. did not vest in him the right to decedent's estate in the certificate and the relocation by J. inured to the estate's benefit. *Jones v. Lee*, 86 Tex. 25, 22 S. W. 386, 1092.

Where a patent to a land issued on April 24, 1855, and administrator's sale of headright certificate was made on

first Tuesday in March, 1855, but was not confirmed until May 6, 1855, it will be presumed that headright certificate was unlocated, and consequently was personalty, at date of administrator's sale. *Edwards v. Gill*, 5 Tex. Civ. App. 203, 206, 23 S. W. 742.

(4) Headright Certificates.

A conditional headright certificate to public lands is not susceptible of sale under order of the probate court for the payment of the grantee's debts after his death, and the purchaser of such certificate at probate sale acquires no title to the lands entered thereunder. *Turner v. Hart*, 10 Tex. 438.

The sale of a headright in this case held to pass the location with the certificate. *Baker v. De Zavalla*, 1 Posey 621, 638, following *Simpson v. Chapman*, 45 Tex. 560, 566.

(5) Certificate of Foreign Volunteer.

See post, "Consent of Heirs," II, G, 5, a; "Consent of Secretary of War," II, G, 5, b.

h. Property Conveyed to Administrator by Widow.

Where a decedent left a wife and child, and the inventory of the estate contained only a house and three acres of land which the wife sold to the administrator, and then removed with her child to another state, such property was liable to sale under order of the probate court for the payment of debts, which order should be made without prejudice to the rights of the wife and child. *Edmiston v. Long*, 17 Tex. 135.

i. Property Conveyed by Decedent in His Lifetime.

See ante, "Equity of Redemption," II, G, 2, f, (4). See, also, post, "Parties Defendant," II, G, 5, f, (2).

An administrator's sale of realty, which has been sold and paid for in the intestate's lifetime, and which has not been inventoried, conveys no title as against such vendee, where he was

not a party to the proceeding ordering the sale. *Miller v. Rogers*, 49 Tex. 398, citing *Preston v. Breedlove*, 45 Tex. 47; *Byler v. Johnson*, 45 Tex. 509. See the titles EXECUTORS AND ADMINISTRATORS, ante, p. 364; FRAUDULENT AND VOLUNTARY CONVEYANCES.

j. Property Previously Conveyed by Heirs.

The sale by heirs of intestate's property which is subject to administration, is invalid as against a purchaser in administration proceedings upon property. *Cooper v. Loughlin*, 75 Tex. 524, 13 S. W. 37.

Such a conveyance does not affect a conveyance of the same lands made in due course of administration. *Cooper v. Loughlin*, 75 Tex. 524, 528, 13 S. W. 37.

In order to enable an administrator to sell, as assets, real estate which has been sold by the heirs, previous to the granting of the administration, it must appear that the property belonged to the estate of deceased at the time the order was applied for; and there existed a necessity to sell the title of the heirs to pay the debts of the ancestor and that there were not other sufficient assets in the hands of the administrator to pay off the remaining unpaid debts. *Morris v. Halbert*, 36 Tex. 19.

k. Where Land Has Been Partitioned in Whole or in Part.

Land Remaining after Partial Partition.—A partial partition having been made, and the lot in controversy not having been included in the actual partition, the probate court had the right to order its sale in due course of administration. *Lee v. Henderson*, 75 Tex. 190, 12 S. W. 981.

Effect of Bond Having Been Reduced.—That the bond of an administrator had been reduced by order of the probate court, upon the assumption that all the lands belonging to the estate had been partitioned and deliv-

ered to the heirs, did not affect the status of the lands not in fact partitioned. *Lee v. Henderson*, 75 Tex. 190, 12 S. W. 981.

A representation by an administrator, in an application to have his bond reduced, that all the estate was distributed except the money in his hands, does not, where in fact the land sought to be sold was not distributed in partition proceedings had, deprive the court of power to order its sale. *Lee v. Henderson*, 75 Tex. 190, 12 S. W. 981.

1. Land Sold under Previous Order, or under Previous Administration.

See, also, post, "After Authority Has Terminated or Lapsed—Second and Other Administrations," II, G, 7, d, (1), (c).

Where a valid sale has been made under the order of a probate court, which divested both the heirs and creditors of the deceased of any further claim upon it through the probate jurisdiction of the court, any order made afterwards to sell the same land would not have the support of a rightful jurisdiction. *Lindsay v. Jaffray*, 55 Tex. 626.

If an administrator has previously sold and conveyed by order of the court all of the land except a locative interest, as to the interest thus sold the court has lost its jurisdiction to order a new sale, and a purchaser is chargeable with constructive notice of the want of jurisdiction in the court to order the sale. *Brockenborough v. Melton*, 55 Tex. 493; *Withers v. Patterson*, 27 Tex. 491, 500; *Lindsay v. Jaffray*, 55 Tex. 626.

In the case of *Hurt v. Horton*, 12 Tex. 285, the property was legally sold, and the administration finally closed and settled. Nearly two years after the final settlement and discharge of the administrator, he again applied for and obtained a grant of administration on the estate, without showing any necessity for a renewal of his admin-

istration; and proceeded again to sell the same property to another purchaser. The first purchaser protested, but the court proceeded, notwithstanding, to confirm the sale to the second purchaser. It was held, and rightly, that the estate having been fully administered, and closed, a second administration upon the same estate, and the same property which had already been administered upon, was a nullity, and the second sale void. *Alexander v. Maverick*, 18 Tex. 179, 197.

m. Lands Devised.

An executor can not sell, for payment of debts, a specific devise, so long as he has other assets sufficient for that purpose. *Chubb v. Johnson*, 11 Tex. 469, 475.

3. Amount to Be Sold.

The probate court having jurisdiction may lawfully order an administrator's sale of all the land of an estate, and of all interest of the estate in a particular grant, and such intention, when ascertained, will uphold a sale thereunder, provided the language of the order is sufficient. *Macmanus v. Orkney*, 91 Tex. 27, 31, 40 S. W. 715.

Administrator's power under order of court, to sell lands to raise specified sum is exhausted when such sum is realized and any further sales under it are invalid. *Wells v. Mills*, 22 Tex. 302, 305.

Where one heir is adjudged to have a share of real property claimed by others heirs, and is also given a lien on defendants' shares for an amount found due him on an accounting, a sale to satisfy the lien should be ordered of defendants' interests alone, and not of the entire property. *Kalteyer v. Wipff* (Civ. App.), 49 S. W. 1055.

4. Necessity for Sale of Personalty before Realty.

Act 1840, regulating the duties of probate courts in the settlement of successions, section 29, did not require that the perishable and personal property, other than slaves, should be sold

before obtaining an order for the sale of slaves or real estate, but it was the duty of the administrator as soon as he ascertained by sale or otherwise that the personal property was insufficient to pay the debts and the expenses of the administration to apply for an order for the sale of slaves or real estate, and if the personalty had not been sold the court could include in the same order directions for the sale of the personalty and as much of the real estate or slaves as would be necessary to pay the debts and expenses of administration. *Lynch v. Baxter*, 4 Tex. 431.

5. Proceedings in Case of Court Sales. a. Consent of Heirs.

Under Act Jan. 14, 1841 (Hart. Dig. art. 1054), providing that, where administration has been granted of the estates of deceased soldiers to others than their heirs, it shall not be lawful for the administrator to sell lands without the consent of the heirs, evidenced by a document to be recorded with the probate judge, the probate court has no jurisdiction to decree a sale of the land of a deceased soldier to be made by an administrator who is not an heir to decedent, unless such document is first recorded with the probate judge. *Harris v. Graves*, 26 Tex. 577.

No administrator's sale of the lands of a volunteer soldier from any foreign country serving the republic of Texas could be made on administration taken before the passage of Act 1841 (Pasch. Dig. art. 1398, 1399) except on the consent of the heirs given and recorded as the statute provides. *Chinn v. Taylor*, 64 Tex. 385.

An agreement of decedent's heirs made subsequent to the court's order for sale of decedent's property, is insufficient to validate order and sale made without prior consent of next of kin as required by act of January 14, 1841, respecting estates of foreign volunteers who served in Texan army. *Mc-*

Master v. Childress, 10 Tex. Civ. App. 92, 95, 30 S. W. 843, citing *Harris v. Graves*, 26 Tex. 577. *Duncan v. Veal*, 49 Tex. 603, 612; *Martin v. Robinson*, 67 Tex. 368, 377, 3 S. W. 550.

One who had enlisted in the army of Texas and who was an immigrant and died in Texas in 1839 was a "citizen soldier" who died after the war and not a "volunteer from a foreign country" when he died, so as to render void a sale of land by his administrator without the consent of his heirs. *Shirley v. Warfield*, 12 Tex. Civ. App. 449, 34 S. W. 390.

Act of congress of the republic of Texas, January 14, 1841, prohibiting the probate court from ordering a sale of land belonging to a decedent's estate, where such decedent was at the time of his death, a volunteer from a foreign country serving in the army of Texas, unless the administrator of the estate was the next of kin of the deceased or unless the next of kin gave in writing their consent for an order of sale was applicable to and prohibited a sale of land certificates. *McMaster v. Childress*, 10 Tex. Civ. App. 92, 30 S. W. 843, citing *Harris v. Graves*, 26 Tex. 577; *Duncan v. Veal*, 49 Tex. 603, 612; *Martin v. Robinson*, 67 Tex. 368, 377, 3 S. W. 550.

b. Consent of Secretary of War.

Act May 18, 1838, and Act Dec. 24, 1838, requiring the assent of the secretary of war to the sale of land belonging to the estate of a deceased soldier, and 60 days' notice thereof, had no application to the estates of citizen soldiers. *Templeton v. Ferguson*, 89 Tex. 47, 33 S. W. 329.

c. Jurisdiction.

(1) Of Probate Court.

The probate court may, upon application of administrator, order a sale of the real property of an intestate, and such sale is valid. *Allen v. Clark*, 21 Tex. 404, 405; *Lee v. King*, 21 Tex. 577; *Van Alstyne v. Bertrand*, 15 Tex. 177,

179; *Alexander v. Maverick*, 18 Tex. 179, 196; *Key v. Craig*, 21 Tex. 491.

Ordinary power, authority and duty to order sales of property of an estate is vested in the probate court, whether or not it shall be exercised by court depends on the construction of the will. *Stone v. Crawford*, 1 Posey 605, 609.

The county court has jurisdiction to order the sale of land of a decedent to pay debts, where such land has been inventoried and appraised as belonging to the estate, but it has no jurisdiction to pass on the question of title to the land raised by a third person who claims to be the owner. *Hamm v. Hutchins*, 19 Tex. Civ. App. 209, 46 S. W. 873; *Miers v. Betterton*, 18 Tex. Civ. App. 430, 45 S. W. 430, and authorities there cited; *Wadsworth v. Chick*, 55 Tex. 241, 242. See, also, *Key v. Craig*, 21 Tex. 491.

Jurisdiction of Sale for Purpose of Enforcing Vendor's Lien, Mortgage, etc.—See post, "Vendor's Lien," II, G, 5, 1, (10), (d).

Jurisdiction Special and Limited.—The county court has no general power to sell land of an estate except as expressly provided by statute. Its jurisdiction is special and limited. *Withers v. Patterson*, 27 Tex. 491, 495; *Lynch v. Baxter*, 4 Tex. 431; *Marks v. Hill*, 46 Tex. 345, 351; *Finch v. Edmonson*, 9 Tex. 504. See, also, the title COURTS, vol. 5, p. 319.

Act Jan. 16, 1843 (Hart. Dig., art. 1067), provided that an administrator should not be required to sell the property of the estate, or to render and settle his account, except on petition of creditor, heir, legatee, or next friend of a ward, does not prohibit a probate court from ordering a sale of the lands on motion of the administrator. *Alexander's Heirs v. Maverick*, 18 Tex. 179; *Allen v. Clark's Heirs*, 21 Tex. 404; *Lee v. King*, 21 Tex. 577, distinguishing and overruling dicta in *Miller v. Miller*, 10 Tex. 319. See to the same

effect *Lynch v. Baxter*, 4 Tex. 431, 445; *Finch v. Edmonson*, 9 Tex. 504, 513.

Act of 1848.—The fact that a sale of land belonging to an estate was ordered, on the petition of the administrator, to enforce a lien thereon, under the probate law of 1848, does not affect the title of the purchaser. *Davis v. Touchstone*, 45 Tex. 490.

Constitution of 1869.—Though the constitution of 1869 abolished the probate jurisdiction of county courts, a purchaser under a probate sale approved in 1870, prior to April 16th, acquired valid title. *Daniel v. Hutcheson*, 86 Tex. 51, 22 S. W. 933.

Act of 1876.—An act of August, 1876, relating to estates did not repeal right of court to empower administrators to sell land, and such an order made by the district court prior thereto was not invalidated thereby. *Halbert v. Martin* (Civ. App.), 30 S. W. 388, 389.

Jurisdiction in Vacation.—The probate law of February 5, 1840, conferred no authority upon the probate judge to make partition of an estate or to decree a sale of land in vacation; hence where, in 1845, an administrator applied for the sale of land of the estate, which was ordered to be sold by the probate judge, by an order entered by him in vacation, and the sale was in vacation, by an order entered by the probate judge, decree to be approved and confirmed, and that the administrator make title to the purchaser, it was held that the decree was an utter nullity, which could not serve as a foundation upon which to build up title in the purchaser. *Hunton v. Nichols*, 55 Tex. 217.

(2) Jurisdiction of District Court.

Common-Law and Chancery Jurisdiction.—The district courts of Texas, under the exercise of common-law and chancery jurisdiction, have no power to exercise probate jurisdiction in ordering the sale of lands of an intestate estate to pay indebtedness. *Rogers v. Kennard*, 54 Tex. 30.

In no case has the district court, under its chancery powers conferred by § 10, art. 4, const. 1845 been allowed, in the exercise of original power, to order the sale of land for the payment of debts of an estate on which administration had been begun in the probate court. *Rogers v. Kennard*, 54 Tex. 30.

The district (probate) court was not given jurisdiction to sell the lands of an estate to pay indebtedness thereof by any statute passed under § 15, art. 4, const. 1845. *Rogers v. Kennard*, 54 Tex. 30, 39, distinguishing *Chevallier v. Wilson*, 1 Tex. 161, and quoting from *Newson v. Chrisman*, 9 Tex. 113. 116, and explaining *Long v. Wortham*, 4 Tex. 381, in which the jurisdiction of the district court should have placed upon § 10, instead of § 15, art. 4, const. 1845.

In 1876.—An order for the sale of land, granted an administrator by the district court in 1876, before the adoption of the constitution of 1876, was not rendered invalid by the fact that that instrument transferred jurisdiction in probate matters from the district to the county court. *Halbert v. Martin* (Civ. App.), 30 S. W. 388.

The right to sell land, granted an administrator by order of the district court in April, 1876, under the law then existing, was not taken away by act Aug. 9, 1876, which repealed the law under which the order was granted, but continued the right of the court to empower an administrator to sell land. *Halbert v. Martin* (Civ. App.), 30 S. W. 388.

Appellate Jurisdiction.—On an appeal to the district court from an order of the county court removing an administrator, the district court acquired no jurisdiction to order a sale of the property of the estate. *Levy v. W. L. Moody & Co.* (Civ. App.), 87 S. W. 205.

d. Time in Which Application Must Be Made.

See, also, post, "After Authority

Has Terminated or Lapsed; Second and Other Administrations," II, G, 7, d, (1), (c); "Delay in Granting First Administration," II, G, 7, d, (1), (d).

An administrator's sale of land to pay debts, ordered and made about 15 years after the first administrator qualified, was not void, under the probate law of 1840, which removed the five-years limitation on the duration of an estate, fixed by the law of Louisiana, and simply required an order of court to continue the administration longer than one year, without prohibiting its continuance by such order for a longer period than five years. *Moody v. Looscan* (Civ. App.), 44 S. W. 621.

Where an intestate died in 1836 and there was no administration on his estate from 1841 to 1856, appointment of an administrator de bonis non in 1856 was void, hence the sale by such administrator passed no title. *Dodge v. Phelan*, 2 Tex. Civ. App. 441, 447, 21 S. W. 309.

Where an administratrix filed an inventory of the estate, consisting of personal property and a league of land, and obtained an order directing the sale of the land as necessary to pay debts, and thereafter filed an account without selling the land, which account showed debts against the estate still unpaid, which the court indorsed as "examined and approved," and ordered recorded, the estate was not closed by the filing of such account, so as to deprive the probate court of jurisdiction to revoke the letters of the administratrix and appoint a creditor of the estate as administrator de bonis non for the purpose of selling the land and paying the remaining debts. *Howard v. Bennett*, 13 Tex. 309.

e. Proceeding in Personam or in Rem.

An administrator's sale is judicial and operates in rem. *Lynch v. Baxter*, 4 Tex. 431; *Heath v. Layne*, 62 Tex. 686, 692, stating that *Finch v. Edmonson*, 9 Tex. 504, is overruled; *George v. Watson*, 19 Tex. 354, 369.

Proceedings in probate to sell property of a decedent are quasi in rem, to which the devisees are parties. *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325; *Murchison v. White*, 54 Tex. 78, 83.

f. Parties.

(1) Who May Apply for Order of Sale.

A creditor may, in a proper case, apply to the court for an order to sell property of an estate for the purpose of paying his debt. *Emmons v. Williams*, 28 Tex. 777, 779.

Owner of Unapproved Claim.—A creditor, who has not obtained both an allowance of his claim by the administrator and an approval by the probate judge, can not maintain a proceeding in the probate court for the sale of land; and it seems that a proceeding commenced before such approval can not be cured by a subsequent approval. *Danzey v. Swinney*, 7 Tex. 617.

(2) Parties Defendant.

Purchasers of real estate from the owner's widow are not proper parties to proceedings in the probate court for the sale of the land for payment of debts. *Nix v. Mayer* (Sup.), 2 S. W. 819. See, also, *Paxton v. Meyer*, 67 Tex. 96, 2 S. W. 817.

Vendee of Decedent.—Where a mortgagor has sold all his title to the mortgaged property and died, the rights of the purchaser in possession under the deed duly recorded are not affected by an administrator's sale under proceedings in the probate court in the nature of foreclosure, to which he has not been made a party. *Schmeltz v. Garey*, 49 Tex. 49, citing *Lockhart v. Ward*, etc., Co., 45 Tex. 227; *Byler v. Johnson*, 45 Tex. 509, and *Morrow v. Morgan*, 48 Tex. 304. See *Jackson v. Butler*, 47 Tex. 423; *Hanrick v. Gurlley*, 93 Tex. 458, 472, 55 S. W. 119, 54 S. W. 347, 56 S. W. 330, affirming in part and reversing in part 48 S. W. 964.

Where a decedent in his lifetime, conveyed lands, a sale of the lands under order of court, on application of a mortgagee in proceedings to which the vendee was not a party, is not aided by the fact that the mortgagee is also a judgment creditor, whose lien antedates the conveyance, as, even if the proceedings had been for a sale to satisfy the judgment, the purchaser would have been a necessary party. *Schmeltz v. Garey*, 49 Tex. 49.

(3) Persons Entitled to Be Made Parties; Intervention.

"The right of any one interested in the estate to intervene in a proceeding of this kind after an appeal from the county to the district court was expressly recognized and enforced in the cases of *Phelps v. Ashton*, 30 Tex. 344, 347, and *Elwell v. Universalist General Convention*, 76 Tex. 514, 13 S. W. 552." *Harrell v. Traweck*, 49 Tex. Civ. App. 417, 108 S. W. 1021.

Where land belonging to a decedent's estate was mortgaged in separate parcels to different persons, the mortgagee of one parcel had a right upon application by the administrators for an order authorizing the sale of all the land for the payment of debts to require that the sale of lands other than that covered by his mortgage should be properly and regularly ordered. *Texas Land & Loan Co. v. Dunovant's Estate*, 87 S. W. 208, 38 Tex. Civ. App. 560.

(4) Appointment of Attorney, or Guardian Ad Litem for Incompetent or Absent Parties.

A probate decree of a sale in Louisiana would not be an absolute nullity by reason of an omission to appoint an attorney to represent absent heirs. *Pleasants v. Dunkin*, 47 Tex. 343, 356.

g. Notice or Process.

(1) Necessity for Notice.

When the law requires that notice shall be given to the parties in interest

before a judgment or decree shall be pronounced in the probate court, it is as essential to its jurisdiction as to that of any other tribunal in which notice is required to be given to the adverse party. *Littlefield v. Tinsley*, 26 Tex. 353, 357.

The orders of the county court having jurisdiction of an estate which direct a sale of land belonging to it without the notice required by law, are not void, but voidable and such orders may be set aside by those interested in the estate by direct proceedings before the tribunal, and in the time prescribed by law. *Heath v. Layne*, 62 Tex. 686, stating that *Finch v. Edmonson*, 9 Tex. 504, is overruled; *George v. Watson*, 19 Tex. 354, 369. And see *Lynch v. Baxter*, 4 Tex. 431, holding that in collateral proceedings the only objection allowed is want of jurisdiction. *Barnes v. Hardeman*, 15 Tex. 366, 367, distinguishing *Finch v. Edmonson*, 9 Tex. 504. But see *Littlefield v. Tinsley*, 26 Tex. 353.

Before an order of sale of real estate could be made for partition under the enactment of 1846, it was necessary that notice should be given to the heirs; by personal service if they were residents of the state, or by publication if they were nonresidents. *Littlefield v. Tinsley*, 26 Tex. 353; *Anderson v. Lockhart*, 2 Posey 63.

Where the record of the proceedings of a probate court at its May term 1848, showed an order of sale of lands for partition to have been granted without notice to the heirs, the record was not admissible as evidence of title under the sale, nor was the title bond of the administrator to the purchaser at the sale admissible. *Littlefield v. Tinsley*, 26 Tex. 353.

Such notice was essential to the jurisdiction of the probate court to order the sale; and to the validity of the sale itself. *Littlefield v. Tinsley*, 26 Tex. 353; *Brown v. Christie*, 27 Tex. 73; *Giddings v. Steele*, 28 Tex. 732, 733.

(2) To Whom Notice to Be Given.

Upon the application for license to sell real estate for the payment of debts, it is not necessary that notice should be given to the heirs at law of deceased. *George v. Watson*, 19 Tex. 354. See, also, as to notice to heirs and persons interested, ante, "Proceeding in Personam or in Rem," II, G, 5, e.

Persons who are distributees of an estate are parties to its administration and bound by orders of the probate court ordering the land of the estate to be sold to pay a mortgage debt thereon. *Cooper v. Loughlin*, 75 Tex. 524, 527, 13 S. W. 37.

(3) Appearance as Waiver of Notice.

Under the statute requiring notice of an application by administrators for an order authorizing the sale of lands to be publicly given, appearance in such a proceeding does not waive failure to give notice. *Texas Land & Loan Co. v. Dunovant's Estate*, 87 S. W. 208, 38 Tex. Civ. App. 560.

Appearance of Representative in Dual Capacity.—Where one who is sued individually and as executrix upon a note and to foreclose a deed of trust answers as executrix, but alleges that she has no separate estate for homestead purposes, and prays for judgment that the property described in the petition be ordered "sold by defendant as executrix, and that she be authorized to retain out of the proceeds of such sale such allowances as may be made for herself and children in lieu of homestead and exempt property not owned by the estate, and for one year's support for herself and children," she appears both individually and as executrix. *Wooley v. Sullivan* (Civ. App.), 46 S. W. 861; *Wooley v. Sullivan* (Civ. App.), 43 S. W. 919.

(4) Form and Requisites of Notice.

"The failure of the notice of sale to properly describe the property was a mere irregularity, and did not deprive the probate court of jurisdiction to

make the sale. *Davis v. Touchstone*, 45 Tex. 490; *Robertson v. Johnson*, 57 Tex. 62, 64." *Fitzwilliams v. Davie*, 18 Tex. Civ. App. 81, 85, 43 S. W. 840, affirmed in 93 Tex. 683, no op.

(5) Want of Notice as Ground for Collateral Attack or Setting Aside Sale.

See post, "Want of Notice of Process," II, G, 7, d, (5), (g).

h. The Petition or Application.

(1) Necessity for Written Petition.

Jurisdiction of the probate court is brought into exercise, directly upon the property, by filing petition for order of sale. *Lynch v. Baxter*, 4 Tex. 431, 445. See, also, *Alexander v. Maverick*, 18 Tex. 179.

The statute of 1843 did not require that the application to the court for the sale of property should be by petition in writing. *Alexander v. Maverick*, 18 Tex. 179, 193, distinguishing *Finch v. Edmonson*, 9 Tex. 504.

Under act of 1848 a written petition is not essential to give the court jurisdiction under the statute of 1848 to order a sale of the land for the payment of debts. *Hurley v. Barnard*, 48 Tex. 83, 87, distinguishing *Finch v. Edmonson*, 9 Tex. 504. See to the same effect *Guilford v. Love*, 49 Tex. 715, 736; *Alexander v. Maverick*, 18 Tex. 179, 193; *Heath v. Layne*, 62 Tex. 686, 692; *Lyne v. Sanford*, 82 Tex. 58, 64, 19 S. W. 847.

Want of Petition as Ground for Collateral Attack.—See post, "Want of Petition or Application," II, G, 7, d, (5), (e).

(2) Necessary Averments, Exhibits, etc.

(a) Generally as to Existence of Debts and Necessity for Sale.

In a proceeding by an administrator for leave to sell land to pay debts, the existence of valid debts must be shown. *Hamblin v. Warnecke*, 31 Tex. 91.

Where an application for the sale

of land of an estate made under act of August 15, 1870, was silent as to necessity for sale, though it appeared that at the time debts against the estate existed, held that the sale was not void. *Gillenwaters v. Scott*, 62 Tex. 670, 673.

(b) Verified Exhibit of Property, Debts and Expenses.

The statutory requirement that the application for sale shall exhibit a list of the debts and expenses, together with the property available to pay the same, is directory only, and the failure to make such showing does not render the application insufficient to support an order of sale. Objection for the want of such an exhibit must be by exceptions taken at the proper time and can not be urged as ground for a collateral attack. *Texas Land, etc., Co. v. Dunovant*, 38 Tex. Civ. App. 560, 87 S. W. 208; *Lyne v. Sanford*, 82 Tex. 58, 64, 19 S. W. 847; *Kleinecke v. Woodward*, 42 Tex. 311, 316; *Robertson v. Johnson*, 57 Tex. 62, 64; *Gains v. Barr*, 60 Tex. 676, 679; *Jackson v. Houston*, 84 Tex. 622, 19 S. W. 799; *Fisher v. Wood*, 65 Tex. 199, 204.

Where a sworn appraisal and inventory showing the condition of the estate was made before sale, a failure to attach to the application for sale an exhibit showing the condition of the estate, and what debts had been allowed, would not invalidate the sale. *Lyne v. Sanford*, 82 Tex. 58 19 S. W. 847, stating that *Finch v. Edmonson*, 9 Tex. 504, contra is questioned in *Hurley v. Barnard*, 48 Tex. 83, 87, and impliedly overruled in *Heath v. Layne*, 62 Tex. 686, 692, and that *Miller v. Miller*, 10 Tex. 319, 333 is explained by *Allen v. Clarke*, 21 Tex. 404, 405, and the expressions in the opinion to the contrary are disapproved.

Want of Verified Exhibit as Ground for Collateral Attack.—See post, "Want of Exhibit Showing Condition of Estate; Defective Exhibit," II, G, 7, d, (5), (h).

(3) Form and Sufficiency of Averments.

Although, merely because a petition or application in the probate court for an order to sell decedent's land fails to set out all the facts necessary to entitle the party to relief, exceptions to it ought not to be sustained, yet, if the facts and exhibits set out in the petition or application show *prima facie* that the party is not entitled to relief, the probate court may properly dismiss the proceeding at once. *Danzey v. Swinney*, 7 Tex. 617.

Averments as to Debts.—An application for an order of sale, which states that the notes evidencing petitioner's claim are secured by a trust deed, describing such deed and notes, and that the claim had been allowed by the administrator, is sufficient, without setting forth the instruments verbatim, and need not allege that the trust deed was allowed by the administrator and approved by the court. *Henry v. Drought*, 10 Tex. Civ. App. 379, 30 S. W. 584.

As to Property or Interest to Be Sold.—In an application for a probate sale and in the order of sale the land was described as an undivided interest of 75 acres in and to the 320 acre survey of a person named. Held, that the application fully and accurately describes the 320 acres. *West v. Keeton*, 17 Tex. Civ. App. 139, 42 S. W. 1034.

An application by an administrator for an order of court to sell "all the property" of the estate in his hands, where the only property mentioned, besides certain town lots, was described as "a certificate calling for 320 acres of land, No. 88, third class, which had been located in M. county and patented," is, as to such latter property, an application to sell land, and not a land certificate or mere chattel. See opinion for probate proceedings held sufficient to identify the land sold, and to sustain the validity of the sale and administrator's deed thereof. *Odell*

v. Kennedy, 26 Tex. Civ. App. 439, 64 S. W. 802, affirmed in 95 Tex. 683, no op., citing *East v. Dugan*, 79 Tex. 329, 15 S. W. 273.

(4) Amendment of Petition.

Objections that an amended application for an order of the sale failed to state that it was filed in lieu of an original of certain date must be raised by special exception. *Henry v. Drought*, 10 Tex. Civ. App. 379, 381, 30 S. W. 584.

(5) Defective Petition as Ground for Collateral Attack.

See post, "Defective Petition; Failure to Show Proper or Sufficient Grounds for Sale," II, G, 7, d. (5), (f).

i. Evidence.

Where a claim against a decedent's estate was verified the affidavit stating that the notes evidencing the claim were secured by a trust deed, and was allowed by the administrator and approved, such affidavit, notes, allowance, and approval are admissible on an application for an order of sale. *Henry v. Drought*, 10 Tex. Civ. App. 379, 30 S. W. 584.

Where the judgment of the county court, approving a claim against decedent's estate, declares that it was secured by a trust deed duly recorded, such recital is an adjudication that the claim was so secured, and, in the absence of objection on the ground that the record itself should be introduced, the original deed of trust is admissible, on the hearing of an application for an order of sale, to aid the recitals of the judgment. *Henry v. Drought*, 10 Tex. Civ. App. 379, 30 S. W. 584.

j. The Order of Sale.**(1) Necessity for Order of Sale.**

A sale by an administrator, even though afterwards confirmed by the court, is invalid, unless an order of sale was previously entered. *Ball v. Collins* (Sup.), 5 S. W. 622, 624, explain-

ing *Gillenwaters v. Scott*, 62 Tex. 670, and *Terrell v. Martin*, 64 Tex. 121, 125.

Want of Order as Ground for Collateral Attack.—See post, "Necessity for Order," II, G, 7, d, (5), (j), aa.

(2) Presumption as to Existence of Order.

See post, "As to Existence of Order of Sale and Its Sufficiency," II, G, 7, e, (9), (f).

(3) Form and Sufficiency of Order.

(a) Recital as to Reason or Purpose of Sale.

A recital in the order of sale that "it was more advantageous to sell the land" does not show that the sale was ordered for the reason that it would be advantageous to the estate. *Louder v. Schluter*, 78 Tex. 103, 14 S. W. 205, 207.

(b) Description of Land.

aa. Necessity for Description; Effect of Want of Sufficient Description.

The provision of statute requiring an order for the sale of a decedent's land to describe the property is merely directory. *Davis v. Touchstone*, 45 Tex. 490.

The absence of particular description in the proceedings ordering and approving the sale is at most an irregularity, and does not render the proceedings void. *McBee v. Johnson*, 45 Tex. 634; *Perry v. Blakey*, 5 Tex. Civ. App. 331, 336, 23 S. W. 804; *Norwood v. Snell* (Civ. App.), 69 S. W. 642; *Wells v. Polk*, 36 Tex. 120, 121; *Wells v. Mills*, 22 Tex. 302; *Kleinecke v. Woodward*, 42 Tex. 311; *Davis v. Touchstone*, 45 Tex. 490.

Defective Description as Ground for Collateral Attack.—See post, "Defective or Insufficient Description in Order of Sale," II, G, 7, d, (5), (j), bb.

bb. Rejecting False Description.

When words of description in order of probate sale are shown to be false, they should be rejected and order construed as if those words were not em-

bodied in it. *Macmanus v. Orkney*, 91 Tex. 27, 33, 40 S. W. 715; *Cartwright v. Trueblood*, 90 Tex. 535, 39 S. W. 930.

cc. Whether Description May Be Aided by Extrinsic Evidence, Reference to Other Parts of Record, etc.

"In a proper case the order of sale or other parts of the record might be aided by reference to the inventory, or that the whole record in reference to the sale or any part thereof might be looked to in case of uncertain or conflicting descriptions of the land in the record, in order to identify the property thereby conveyed. Likewise, in case of latent ambiguity, where the proceedings refer to other records, deeds, or writings, etc., resort could then be had to such extrinsic evidence. *Hurley v. Barnard*, 48 Tex. 83, 88; *Davis v. Touchstone*, 45 Tex. 490; *Lindsay v. Jaffray*, 55 Tex. 626, 642." *Collins v. Ball, etc., Co.*, 82 Tex. 259, 266, 17 S. W. 614. See to the same effect *Perry v. Blakey*, 5 Tex. Civ. App. 331, 23 S. W. 804.

An application in probate court for an order to sell property may be looked to to explain the order made upon it. *Farris v. Gilbert*, 50 Tex. 350.

Vagueness of description in an order of sale made by the probate court, can be cured by reference to the inventory and other matters of record pertaining to the administration. *Hurley v. Barnard*, 48 Tex. 83; *Davis v. Touchstone*, 45 Tex. 490.

An order of sale may refer to the application, for description of land ordered to be sold. The order reciting that such description existed, followed by return of sale and confirmation, it will be presumed that the description was contained in such application when lost or destroyed. *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325, affirming 33 S. W. 325.

An order of a probate court, under the law of 1836 for the sale of property, though indefinite because referring to the property as that described in an

application, may be made definite, though the application for sale be lost from the records, by reference to the inventory, a prior application, and the confirmation of the report of sale. *Ferguson v. Templeton* (Civ. App.), 32 S. W. 148.

Where an order for the sale of a decedent's lands to pay debts improperly describes the land, but the decree of confirmation properly describes it, and states that the description in the order of sale is a clerical error, and that it was intended to apply to the land described in the decree, and the title derived from the sale has long been recognized without question, the error will not be considered on a collateral attack. *Corley v. Goll*, 8 Tex. Civ. App. 184, 27 S. W. 819, distinguishing *Collins v. Ball, etc., Co.*, 82 Tex. 259, 266, 17 S. W. 614.

Where an administrator sold land under order of the court and subsequently foreclosed a vendor's lien thereon and decree identified the land by specific description, insufficiency of description in orders for and in confirmation of administrator's sale did not affect title of administrator's vendee's vendee as against strangers. *Spaulding v. Anders* (Civ. App.), 35 S. W. 407, 408.

Same—Evidence Held Inadmissible.—"Extraneous testimony would not be admissible to identify land which was given no identity by the orders of the probate court. *Kingston v. Pickins*, 46 Tex. 99, 101; *Brown v. Chambers*, 63 Tex. 131; *Wooters v. Arledge*, 54 Tex. 395, 397; *Harris v. Shafer*, 86 Tex. 314, 315, 23 S. W. 979, and 24 S. W. 263; *Smith v. Crosby*, 86 Tex. 16, 23 S. W. 10, affirming 22 S. W. 1042. The order of the probate court formed the basis for the sale of the land, and a good description in the administrator's deed would not atone for a lack of description in such orders." *Macmanus v. Orkney* (Civ. App.), 39 S. W. 614, 618, reversed in 91 Tex. 27.

In *Collins v. Ball, etc., Co.*, 82 Tex. 259, 266, 17 S. W. 614, the land conveyed by the administrator was not described in either the order of sale or of confirmation, or in any part of the proceedings, and it was held that the record could not be contradicted to show that the court intended to sell the land which the administrator conveyed. There was no order of any kind in reference to the land deeded. *Corley v. Goll*, 8 Tex. Civ. App. 184, 187, 27 S. W. 819, affirmed in 93 Tex. 703, no op.

Words in order for a probate sale stating reason for sale can not be construed as part of the description of the land to be sold. *Macmanus v. Orkney*, 91 Tex. 27, 33, 40 S. W. 715.

Same—Idem Sonans.—Probate records authorizing sale of "S. Burks" survey, can not be said to authorize conveyance of "S. Banks" land. *Collins v. Ball, etc., Co.*, 82 Tex. 259, 17 S. W. 614.

It was irrelevant to the issue of title to the S. Banks survey to show proceedings in the administration ordering and confirming sale of the S. Burks survey. It was error to admit testimony that the S. Banks survey was advertised for sale and cried out at the sale by the administrator. So also was it error to admit testimony that no survey in name of S. Burks was in McLennan county. Banks and Burks are not idem sonans, nor are they the same name. *Collins v. Ball, etc., Co.*, 82 Tex. 259, 17 S. W. 614.

It was the duty of the court to charge the jury that the records authorizing the sale, etc., of the S. Burks survey did not operate as a conveyance of the S. Banks land. *Collins v. Ball, etc., Co.*, 82 Tex. 259, 17 S. W. 614.

dd. Sufficiency of Description.

An intestate had owned the entire eleven-league survey granted to G. and had sold various tracts out of it. The

inventory of his estate described among its lands, "a claim to about six or seven leagues of land, more or less, situated partly in W. and partly in M. county, Texas, being a part of an eleven-league tract of land originally granted G., the said claim consisting of detached and separate parcels of land within the tract." An application to sell "all the lands belonging to the estate" for the payment of large debts contained the same description, adding, "Whose several contents are unknown." Order was granted to sell all the right, title and interest of J. C., deceased, to about six or seven leagues of land, more or less, situated partly in W. and partly in M. county, Texas, being part of an eleven-league tract of land originally granted G. As the said land consists of detached and separate parcels, of various sizes and located in different places, within the said tract, whose several contents are unknown, the administrator shall sell the whole right, title and interest to the same at once." Other large tracts embraced in the order were directed to be divided and sold in separate parcels. The report of sale followed the description contained in the order, and the deed that in the application, adding, "It being intended and understood that the whole and entire interest of said J. C., deceased, in said eleven-league tract is hereby conveyed." Held: (1) The proceedings evinced a determination to sell all the lands of the estate, including all its interest in the eleven-league survey in the name of G. (2) The words "six or seven leagues, more or less," are to be taken as a description of the quantity therein, and did not refer to separate surveys. (3) The language in the order, "as the land consists of separate and detached parcels," etc., expressed the reason for selling in one body the entire interest of the estate in the eleven-league grant, and did not constitute a part of the description of the land. (4) If considered a part of the

description it could be rejected as false. (5) The certainty of description required in a conveyance is that, by the use of extraneous evidence, it may be applied to the property so as to identify it. (6) Rejecting from the order the language last quoted, there still remained sufficient to identify the land. (7) The proceedings conveyed to the purchaser the entire interest of the estate in the eleven-league grant, as against a collateral attack. *Macmanus v. Orkney*, 91 Tex. 27, 40 S. W. 715, reversing 39 S. W. 614.

An order for the sale of a decedent's land to foreclose a vendor's lien, which describes the property as 320 acres "bought from J.," is sufficient to enable a person to identify the property, where the inventory shows but one tract, described as "372 acres." *Davis v. Touchstone*, 45 Tex. 490.

An order in administration proceedings for the sale of "one-third of a league of land the headright certificate of deceased" and report and confirmation of a sale of "one-third of a league of land granted to the heirs of J. R., deceased, by the board of Land Commissioners of Harrisburg county, No. 396, dated February 3, 1838," sufficiently identified the land ordered sold. *Boslet v. Thomas*, 35 Tex. Civ. App. 144, 80 S. W. 115, affirmed in 98 Tex. 611, no op.

Description of land sold under probate order was sufficient, where the application and order of sale described it as an undivided interest of seventy-five acres in and to the three hundred and twenty acre James De Armon survey, and fully describes the three hundred and twenty acres. *West v. Kee*, 17 Tex. Civ. App. 139, 142, 42 S. W. 1034.

An order for the sale of an intestate's property, describing it as the "Flenner headright," sufficiently identifies land located by certificate purchased as intestate's headright. *Flenner v. Walker*, 5 Tex. Civ. App. 153, 23 S. W. 1029.

An order of the probate court that the administrator have authority to make "title to three hundred and twenty acres of land located as headright of decedent, in favor of, etc.," is not void for want of sufficient description of the land. *Buchanan v. Park* (Civ. App.), 36 S. W. 807, 808; *Flanagan v. Bogges*, 46 Tex. 330.

The "probate minutes" of H. county, in the matter of the estate of G., directed the sale by the administrator of the conditional and unconditional headright certificate of deceased issued by the land commissioners of H. county, and the land to be located thereby. The same description was contained in the order confirming the sale. Held that, since but one headright was authorized to be issued to a person, the subject matter of the sale was sufficiently identified. *Grant v. Hill* (Civ. App.), 44 S. W. 1027.

Same—Orders for Sale of More than One Estate.—The "probate minutes" of a certain county contained (1) an order granting administration; (2) an order for the sale of the headright certificate of deceased, and the land on which it should be located; (3) an order confirming the sale; and (4) an order closing the estate. In the body of the orders the estate was referred to only as "this estate." Held, that such orders were sufficient to show that title passed to the purchaser of the headright certificate of G., deceased, and land on which it was located, at a sale by the administrator of G.'s estate, though each order had at its head the names of from two to ten different estates, including G.'s, and in the application for order of sale the name of the G. estate appeared in the center of the list of estates. *Grant v. Hill* (Civ. App.), 44 S. W. 1027, affirmed 93 Tex. 708, no op. See, also, *Templeton v. Ferguson*, 89 Tex. 47, 56, 33 S. W. 329, affirming 32 S. W. 148.

Description Held Insufficient.—An order of a probate court for the sale of "so much land lying in R. county,

and west of the T. river, as would pay the debts of the estate, amounting to about \$1,500," held void for uncertainty. *Graham v. Hawkins*, 38 Tex. 628.

Instance of description in probate sale held insufficient to identify the lands. *Greer v. Bringham*, 23 Tex. Civ. App. 582, 584, 56 S. W. 947, affirmed in 94 Tex. 700, no op.

(c) Designation of Person to Make Sale.

An executor's sale for satisfaction of a mortgage against the estate, made on petition of the mortgagee, is not rendered void by a direction in the order of sale that the sale be made by "petitioner," instead of by the executor, where it appears to have been a clerical mistake, and the sale was in fact made by the executor. *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325, affirming 33 S. W. 325.

(d) Directions as to Terms of Sale.

The failure to specify at length the terms of sale, where the intention is plain that the sale should be made on the usual terms, are at most mere irregularities, which can not be held to make the orders and proceedings nullities. *McBee v. Johnson*, 45 Tex. 634, 643.

(e) Signature of Judge.

It was not essential to the validity of orders of sale of land in administration, appearing in the minutes of the county court in 1868, that the presiding judge should have approved and signed the minutes of the term at which they were rendered; the statute requiring such signature is directory merely. 1 Pasch. Dig. Laws, arts. 1236, 1383. *Norwood v. Snell*, 95 Tex. 582, 68 S. W. 773.

(4) Operation and Effect of Order of Sale.

(a) As an Allowance of Claim.

Where the application for order of sale set out a claim, and asked that a land certificate be sold for the purpose of paying the debt, and the court

granted the order of sale, it was tantamount to an allowance of the claim by the administrator, and an approval by the court. *Lyne v. Sanford*, 82 Tex. 58, 19 S. W. 847; *Allen v. Clark*, 21 Tex. 404.

(b) As Authority for Sale.

Where an application by an administrator asked for an order to sell the unsold lots belonging to an estate situated in a certain county, known as the north half of the town of P., patented to the decedent, and the order of sale authorized the sale of so much of the real estate belonging to the estate situated in the town of P. as was necessary for certain purposes, the order constituted no authority for the sale of a parcel of land lying outside of but adjoining the town of P. *Wilkin v. Geo. W. Owens & Bros.* (Civ. App.), 110 S. W. 552, reversed in 114 S. W. 104.

Where Order Includes Homestead.

—An order for the sale of land including homestead, to pay the debts of an estate, may be erroneous, so far as homestead is concerned, but administrator can not treat it as nullity. *Wright v. McNatt*, 49 Tex. 425, 429.

Termination of Authority Conferred by Order.—An order granting authority to a temporary administrator to sell land, made on the day of his appointment, did not authorize a sale by him after he had been appointed permanent administrator. *Cruse v. O'Gwin*, 48 Tex. Civ. App. 48, 106 S. W. 757.

A conveyance of community land by a surviving wife,—to whom the certificates under which the land was afterwards surveyed were turned over to be disposed of for the support and maintenance of herself and family, by order of the probate court,—who was appointed administratrix, made after the probate court has declared the administration closed, and after her powers have ceased by a second marriage, can not be considered as a sale by an

administratrix under an order of court. *Groesbeck v. Bodman*, 73 Tex. 287, 11 S. W. 322.

(5) Revocation of Order of Sale.

Where the county court makes an order to sell property, and at a subsequent term, while the proceeding is still in fieri, it is shown that the property does not belong to the estate, the order of sale should be revoked. *Wall v. Clark*, 19 Tex. 321, citing and approving *Hartwell v. Jackson*, 7 Tex. 576, 583; *Munson v. Newson*, 9 Tex. 109; *Finch v. Edmonson*, 9 Tex. 504; *Neil v. Hodge*, 5 Tex. 487; *Davis v. Stewart*, 4 Tex. 223.

Where the court ordered an administrator's sale of the whole of a lot, and later ordered sale of undivided half thereof, first order was thereby revoked, and administrator's deed to whole lot passed title to half interest only. *Pace v. Fishback*, 10 Tex. Civ. App. 450, 452, 31 S. W. 424.

k. Inventory and Appraisal.

Land of an estate can not be sold pending administration before it has been inventoried and appraised. *Chifflet v. P. J. Willis & Bro.*, 74 Tex. 245, 11 S. W. 1105.

Where a statute requires that there should be an appraisement of land before its sale by an order of a probate court, it is not necessary to the validity of a sale made under such an order that it should appear on the records of the court that there was such appraisement, or that the party claiming under the sale should prove a compliance with the statute. *Jemison v. Gaston*, 21 Tex. 266.

l. Manner, Conduct, and Terms of Sale.

(1) Sale Judicial in Character.

Sales by administrators are judicial sales. The administrator is the agent, or instrument, through which the court acts; his powers are statutory, derived from the law, through the exercise of jurisdiction conferred upon the court.

The duties and powers of an administrator in selling land belonging to the estate of his intestate, are analogous to the duties and powers of a master in chancery, who receives authority from the court to sell, and reports the sale to the court for confirmation. *Lynch v. Baxter*, 4 Tex. 431, 437; *Ball v. Collins* (Sup.), 5 S. W. 622, 623; *Corley v. Anderson*, 5 Tex. Civ. App. 213, 218, 23 S. W. 839.

(2) Duty to Pursue Terms of Statute and Order of Sale.

An administrator who has no other interest in the property than as administrator, can only sell in the mode authorized by law. *Chubb v. Johnson*, 11 Tex. 469, 475; *Tippett v. Mize*, 30 Tex. 362, 365.

It is a general rule that authority given to executors and administrators to sell is a personal trust, and must be strictly pursued; and if they transcend their authority in any essential particular, their act is void. *Peters v. Caton*, 6 Tex. 554, 559; *Brown v. Christie*, 27 Tex. 73, 77; *Graham v. Hawkins*, 38 Tex. 628, 633.

Requisites.—There must be vendor, vendee and consideration to constitute valid administrator's sale. *Hamblin v. Warnecke*, 31 Tex. 91, 94.

Duty to Pursue Terms of Order.

An order of a sale by the county court constitutes an administrator's warrant of power to sell the property belonging to the estate, and he must, in making such sale, act in obedience to and conformity with such order and truly report his action thereunder to court. *Wipff v. Heder*, 6 Tex. Civ. App. 685, 691, 26 S. W. 118.

(3) Statute Liberally Construed.

Statutes authorizing executors and administrators to sell land should be liberally construed. *Hudson v. Jurnigan*, 39 Tex. 579.

(4) By Whom Sale May Be Made.

Where a sale of decedent's land is ordered by the district court in a suit

to enforce a vendor's lien, the order should direct the administrator and not the sheriff, to make the sale. *Heath v. Garrett*, 46 Tex. 23.

To be legal and valid, a sale and conveyance of the property of a deceased person's estate must be made by an administrator or executor. A sale thereof by a commissioner of the probate court does not divest the estate of the title. *Rose v. Newman*, 20 Tex. 131.

The sale by a properly appointed and authorized administrator *de bonis non*, under order of court, is effectual to pass title to land belonging to estate. *Baker v. De Zavalla*, 1 Posey 621, 638; *Mitchell v. Dewitt*, 20 Tex. 294.

(5) Sale by Less than All.

As to sale by less than all where more than executor, see, also, ante, "Execution of Power by Less than All, Where More than One Executor," II, F, 5.

Though there be two executors when proceedings for sale of a decedent's land are had, an order for one of them to sell, and a sale reported by him, and confirmed by the court, is sufficient to pass title as against a collateral attack. *Corley v. Anderson*, 5 Tex. Civ. App. 213, 23 S. W. 839; *Wells v. Mills*, 22 Tex. 302, in which both administrators joined in the deeds.

(6) Time and Place of Sale.

The probate judge has authority to order a sale of slaves or lands to be made at a place other than the courthouse door of the county, but if the order of sale does not designate another place the sale must be made at the courthouse door. *Peters v. Caton*, 6 Tex. 554; *Neill v. Keesee*, 5 Tex. 23; *Jemison v. Gaston*, 21 Tex. 266, 271.

Act January 21, 1849, entitled "An act to regulate public sales," provided that all sales by sheriffs, administrators, etc., shall be held at the court-

house of the respective counties, unless the court order the sale at some other place. Act February 4, 1841, entitled "An act to regulate sale by judgment or decree of the probate court," enacted that such sales should be regulated by the laws governing sales under execution. Held, that the acts are not repugnant to each other, and authorize an order of sale of real estate and slaves elsewhere than at the county seat. *Neill v. Keese*, 5 Tex. 23.

Where, upon a petition for leave to sell land "at the late residence of the deceased," the order of court granted leave to sell "according to law," it was held that a sale at said residence was valid, although a statute provided that the sale should take place at the courthouse, unless the court ordered otherwise. *Jemison v. Gaston*, 21 Tex. 266, construing the order with reference to the payer of the petition.

Validity of Sale at Wrong Time or Place.—A sale not made at the time or place provided by statute or decree is void. Such a departure from the state is not a mere irregularity. *Peters v. Caton*, 6 Tex. 554, 559; *Tipsett v. Mize*, 30 Tex. 362, 365; *Brown v. Christie*, 27 Tex. 73; *Howard v. North*, 5 Tex. 290.

Where there is no confirmation of the sale by the probate court, the sale by the administrator, like that of the sheriff, is a nullity if not made at the time and place specified by law. *Graham v. Hawkins*, 38 Tex. 628, 633; *Brown v. Christie*, 27 Tex. 73; *Harris v. Shafer* (Civ. App.), 21 S. W. 110, 113, reversed in 86 Tex. 314.

There are exceptions to this rule, as where the sale is confirmed, all minors being represented, and there is no appeal; or where those who are interested in annulling the sale are estopped, as by the reception of the proceeds, etc. *Peters v. Caton*, 6 Tex. 554.

Such a sale should have been set aside by the probate court, but if improperly confirmed by the probate

court, its judgment might be corrected by a direct proceeding instituted for that purpose by any one having an interest in the matter. But it is not open to collateral inquiry. *Brown v. Christie*, 27 Tex. 73; *Harris v. Shafer* (Civ. App.), 21 S. W. 110, 113, reversed in 86 Tex. 314.

Where a sale of land by an administrator, so illegally made, has been confirmed by the probate court, it can not be collaterally questioned in a suit for the land, brought by a party who in good faith derives his title under the purchaser at such sale. *Brown v. Christie*, 27 Tex. 73. See, also, *Alexander v. Maverick*, 18 Tex. 179.

(7) Private or Public.

The probate court may authorize a sale of the land belonging to an estate, by an administrator, either at private or public sale, as it may deem best. *Hirschfield v. Davis*, 43 Tex. 155, 159.

(8) In Parcels or in Gross.

A decree of the probate court, confirming a sale of land, is not void, though the statute and decree of sale direct it to be made in parcels, and the report of sale shows it to have been made in gross. *McC Campbell v. Durst*, 73 Tex. 410, 11 S. W. 380.

(9) Necessity for Possession of Land Certificate at Time of Sale.

As a certificate to some extent located would naturally be in the surveyor's office, an executor's sale thereof under order of the court is not invalid because it was not in his possession at the time of the sale. *Corley v. Anderson*, 5 Tex. Civ. App. 213, 23 S. W. 839.

(10) Terms and Conditions of Sale.

(a) In General; Power of Administrator to Prescribe.

An administrator can not prescribe terms and conditions on which lands shall be sold at an executor's sale which are not authorized by the orders or decree under which the sale is

had or by the laws of the state. *Hamilton v. Pleasants*, 31 Tex. 638.

(b) Cash or Credit.

By a supplementary act passed February 5, 1841 (1 Sayles' Early Laws, art. 954), the law as it appeared in act of February 5, 1840, § 29 (1 Sayles' Early Laws, art. 736), was changed, and all sales by administrators were required to be made on a twelve months' credit, hence, an administrator's sale made on twelve months' credit under an order made in October, 1841, which simply ordered the administrator to sell on such terms as the law provides, was a valid sale. *Berryman v. Biddle*, 48 Tex. Civ. App. 624, 107 S. W. 922.

Where an administrator is directed to sell property which exceeds the widow's homestead exemption in value, the terms of such sale should be cash to the amount of the exemption, and the balance on a credit of twelve months. *Wood v. Wheeler*, 11 Tex. 122.

An administrator, authorized to sell land for cash, took, instead, a release from the purchaser of a personal debt. Held, that the sale was not void, but voidable. *Heath v. Layne*, 62 Tex. 686.

Finding that a sale made by an administrator was for cash, as reported by him, can not be sustained on mere statement of purchaser that he paid cash, it appearing, unexplained, that he, on receiving the administrator's deed, executed to the wife of the latter an instrument reciting that whereas, such deed acknowledged receipt of the entire purchase money, while he had paid only part of it; and whereas, said wife, one of the distributees, had agreed to postponement of payment of such share of the purchase money as amounted to her distributive share of the estate and her approved claim against the estate: Therefore, to secure the administrator and his wife, he thereby gave a lien on the premises,

and further agreed to deed the wife a half interest in the land, if she should elect to pay half the purchase money, deducting from said half the money coming to her; and it further appearing that he afterwards deeded a half interest to her. *Wipff v. Heder* (Civ. App.), 41 S. W. 164.

(c) Duty with Respect to Securing Deferred Payments.

When the sale is confirmed, it then becomes the duty of the purchaser to give note for the purchase money and mortgage, if land be sold on time; but the administrator can waive that duty, and become personally responsible for the amount of the purchase money on his bond. *Sypert v. McCowen*, 28 Tex. 635, 639; *Autrey v. Whitmore*, 31 Tex. 623; *Wornell v. Williams*, 19 Tex. 180; *Wright v. Heffner*, 57 Tex. 518, 524; *Reynolds v. Dechaums*, 24 Tex. 174.

Hart. Dig., arts. 1016, 1023, 1039, directing the mode of selling property of decedents under order of court, do not authorize the taking of mortgage security for the purchase price. *Hall v. Hall*, 11 Tex. 526.

Personal Liability of Administrator Failing to Take Proper Security.—An administrator becomes himself liable for the proceeds of property of the estate sold by him on a credit, if he make a conveyance of the property without taking note and security as required by law, and when a conveyance of property so sold has been made by an administrator, it is to be presumed, in the absence of proof, that the terms of the sale were complied with. *Giddings v. Steele*, 28 Tex. 732; *Lockhart v. White*, 18 Tex. 102, 111; *Sypert v. McCowen*, 28 Tex. 635, 639; *Wornell v. Williams*, 19 Tex. 180; *Reynolds v. Dechaums*, 24 Tex. 174.

Estate and Heirs Bound by Administrator's Waiver.—The action of an administrator in waiving the taking of a mortgage to secure deferred payments on sale and electing to enforce

the contract of sale by judgment and foreclosure is binding on the estate and heirs. *Miller v. Anders*, 51 S. W. 897, 21 Tex. Civ. App. 72.

Effect of Failure to Take Proper Security.—The failure of the administrator to secure the debt, by a mortgage upon the property, does not release the sureties; and, upon the same principle, the failure to give two, will not discharge the one who has contracted as surety, unless he had been induced to sign, by an understanding, to which the administrator was privy, that a cosurety should be obtained. *Reynolds v. Dechaums*, 24 Tex. 174, 175.

Waiver of Vendor's Lien.—The failure to take a mortgage from the purchaser at a sale by an executor or administrator or to recite such lien in the deed when it is acknowledged in the promissory money note does not waive the vendor's lien for the purchase money. *Wright v. Heffner*, 57 Tex. 518; *Overruling Autrey v. Whitmore*, 31 Tex. 623, 627; *Cundiff v. Corley* (Civ. App.), 27 S. W. 167.

Failure of an administrator to take a mortgage to secure deferred payments on sale of land will not operate to retain superior title in the estate where the statutes in effect at the time of the transaction do not so provide. *Miller v. Anders*, 51 S. W. 897, 21 Tex. Civ. App. 72.

Sufficiency of Security Taken.—The effect of an agreement for judgment for the price of land sold at administrator's sale, and for foreclosure of lien, is the same as though a mortgage to secure the purchase price of land had been given in the first instance. *Miller v. Anders*, 51 S. W. 897, 21 Tex. Civ. App. 72.

The act of February 5th, 1840, prescribed no form of mortgage. The general law upon the subject controlled. Whatever could have been good as a mortgage between others, would have been good as a mortgage

from a purchaser of property of an estate to the executor or administrator who represented the estate. *Hall v. Hall*, 11 Tex. 526, 540.

(d) Vendor's Lien.

The doctrine of a vendor's lien applies to the probate sales of realty. *Wright v. Heffner*, 57 Tex. 518, overruling *Autrey v. Whitmore*, 31 Tex. 623, 627. See, also, *Warhmund v. Merritt*, 60 Tex. 24, 27.

An order by a probate judge for the sale of property and reservation of lien, by process verbal, is void, although purchaser assents. *Hall v. Hall*, 11 Tex. 526, 549.

Not Waived by Failure to Take Security Required by Law.—See ante, "Duty with Respect to Securing Deferred Payments," II, G, 5, 1, (10), (c).

Subrogation of Creditors to Benefit of Lien.—A subrogation occurs to the lien of an administrator for purchase money on land sold at administrator's sale, in behalf of the holders of preferred claims against the estate, who released the estate and surrendered them, and by agreement among all parties took the notes of the purchaser of the land, to be secured by vendor's lien and deed of trust. *Warhmund v. Merritt*, 60 Tex. 24.

The transaction may be considered either as a transfer to the creditors by the administrator of the claim he had against the land growing out of the sale, in consideration of their releasing the estate from all liability to them; or it may be regarded as if the creditors had furnished the purchaser with the means of paying the purchase money of the land upon an agreement that they were to have the same remedies to recover the money thus provided that the original vendor possessed to enforce his demand. *Warhmund v. Merritt*, 60 Tex. 24, 26.

(e) Bond for Title.

An administrator can not give bonds to convey land of his intestate which bind the estate of the deceased, but

he is personally bound thereby. He is made personally responsible because there is no principal to whom resort can be had. The obligation would be entirely void, unless construed to be the administrator's personal obligation. *Eckhart v. Reidel*, 16 Tex. 62, 69.

(f) Statute of Frauds.

The statute of frauds applies to administrators' sales and the auctioneer is regarded as the agent of both vendor and vendee, with authority to sign for them, equally in sales of real and personal property. *Dawson v. Miller*, 20 Tex. 171. See, also, *Brock v. Jones*, 8 Tex. 78; *Lovering v. McKinney*, 7 Tex. 521.

m. Who May Purchase at Sale.

(1) Nonresident Aliens.

A sale made by the probate court in the petition of the administrator is not void on the ground that the purchaser, was a citizen of Louisiana at the time of the sale, namely on February 3d, 1846. *Lee v. King*, 21 Tex. 577, 581.

(2) Attorney Holding Claims for Which Property Was Sold.

That an attorney at law held claims against an estate for collection, and used all legal efforts to obtain an order of sale of property of the estate to provide for their payment, and at the sale became himself the purchaser of the property sold, are not facts which tend to prove fraud in the sale or in the order therefor. It was his duty as an attorney to obtain payment of the claims in that or any other lawful manner, and he had as much right as other persons to bid for the property at the sale. *Giddings v. Steele*, 28 Tex. 732.

(3) Right of Personal Representative to Purchase.

Common-Law State.—An administrator may purchase at his own sale in common-law state. *McCulloch v. Renn*, 28 Tex. 793, 796.

In the state of Alabama, a purchase of slaves by an administratrix, at a sale

by herself and coadministrator, and a confirmation of the sale by the orphans' court of that state, vested title in her to the slaves purchased. *McCulloch v. Renn*, 28 Tex. 793.

Texas.—Formerly it was held that an administrator was excepted from the rule that a trustee to sell can not purchase at his own sale and that an executor might purchase, without fraud, any property of the testator at open public sale. *Erskine v. De La Baum*, 3 Tex. 406, 421.

Under the present law, however, an administrator can not become a purchaser, either directly or indirectly, of any of the property of the estate of which he is the representative. *Crescent Ins. Co. v. Camp*, 71 Tex. 503, 506, 92 S. W. 473; *Hamblin v. Warnecke*, 31 Tex. 91, 94; *Wipff v. Heder*, 6 Tex. Civ. App. 685, 692, 26 S. W. 118.

Prima facie a purchase made by an administrator at his own sale is deemed fraudulent in law and is void. *Hardy v. DeLeon*, 5 Tex. 211, 246.

If an administrator, directly or indirectly, purchases land at a sale made by himself as administrator, the sale will be set aside on application of the parties interested. *Hamblin v. Warnecke*, 31 Tex. 91, 92; *Fisher v. Wood*, 65 Tex. 199.

A purchase by an administrator at his own sale, either by himself or through the intervention of another, is void, though no fraud is shown. *Wipff v. Heder*, 6 Tex. Civ. App. 685, 26 S. W. 118.

An administrator can not take any part of the estate at its appraised value. *Crescent Ins. Co. v. Camp*, 71 Tex. 503, 506, 92 S. W. 473. See the title EXECUTORS AND ADMINISTRATORS, ante, p. 364.

Purchase by Executor Who Has Failed to Apply Funds to Discharge of Debts.—Where an executor has realized funds from the estate sufficient to pay all claims against it, he is not in a position to purchase and hold in

his own right any property of the estate sold by him for the payment of such claims. *Fortune v. Killebrew*, 70 Tex. 437, 7 S. W. 759.

Where Property Sold to Pay Debt on Which Representative Is Surety.—

"Cases may arise in which an executor, who is surety for his testator, might be permitted to buy property of the estate when sold to pay the debt for which he was surety." *Fortune v. Killebrew*, 70 Tex. 437, 441, 7 S. W. 759.

It is the duty of an independent executor, when necessary to pay debts which can only be paid by sale of personal property, to sell and liquidate them; failing in this, he can not, even when surety on a claim against the testator on which judgment was rendered during his administration, and land of the estate sold under execution, of which he became the purchaser, assert title to it against the heirs, whether his failure to pay the debts and thus prevent the sale, resulted from a corrupt motive or willful neglect; and this, independent of the fact that he paid an inadequate price. *Fortune v. Killebrew*, 70 Tex. 437, 7 S. W. 759.

Property Indirectly Acquired.—The pretense of the administrator making a sale to himself through an agency is in reality no sale, and those interested in the estate may, by timely and proper procedure, have such sale set aside. *Hamblin v. Warnecke*, 31 Tex. 91, 95; *Dodd v. Templeman*, 76 Tex. 57, 62, 13 S. W. 187.

An administrator's sale made for credit instead of cash as order required, and under which purchaser conveyed half interest to administrator's wife, is fraudulent and void. *Wipff v. Heder*, 6 Tex. Civ. App. 685, 692, 26 S. W. 118.

Where an executor fraudulently procured an order to be made by the probate court for the sale of the lands of the estate, and, under the orders of

sale and confirmation, executed a deed to another, reciting payment of one-half the consideration, which was not in fact, but one-half the property reconveyed to him individually in lieu thereof, such property in their hands will be charged with a trust for those entitled to the estate. *Fisher v. Wood*, 65 Tex. 199.

Judgment Decreeing Land Certificate to Administrator.—A judgment of probate court decreeing to an administrator in part payment of his claim against insolvent estate of his intestate, land certificate issued to intestate, is a nullity in so far as it attempts to invest him with title, when such judgment was rendered while act of February 5, 1840, was in force (*Hartley's Digest*, p. 329). *Halsey v. Jones* (Civ. App.), 25 S. W. 697, 698, affirmed in 86 Tex. 488.

n. Bids.

Under the law governing sales at public auction, where the sale is advertised to be on specific and restricted terms, any bid made at that sale, not in strict conformity with the terms advertised, is no bid at all, and the crier is not bound to notice the same. *Moore v. Owsley*, 37 Tex. 603, 605.

Where at an administrator's sale for cash, a creditor offered a bid, explaining that he would pay in cash the overplus above the amount of his demand against the estate, the administrator was not bound to notice the bid; and an instruction that if the creditor bid at all his bid was absolute and could be enforced, and that the administrator was bound to cry the bid, was erroneous. *Moore v. Owsley*, 37 Tex. 603.

o. Report of Sale.

What Report Must Show.—An administrator's report of a sale of property belonging to an estate must show the purchaser and terms of sale. *Wipff v. Heder*, 6 Tex. Civ. App. 685, 692, 26 S. W. 118. See, also, *Bartley*

v. Harris, 70 Tex. 181, 183, 7 S. W. 797.

Description of Property Sold.—In an administrator's report of a sale of land, a description thereof as one-half league of land, being the south half of the league belonging to the estate, is sufficient. *Pendleton v. Shaw*, 44 S. W. 1002, 18 Tex. Civ. App. 439.

An administrator was ordered to sell all the intestate's estate for the payment of debts. He reported a sale of "154 acres of the Luke Moore & Jacob Thomas tracts," which was disapproved by the court, and the administrator was then ordered to sell 250 acres, "part of the Perkins farm on Bray's bayou, in Harris county, in the lower half of the Luke Moore league." The administrator reported a sale of "400 acres, part of the Luke Moore and Jacob Thomas leagues," which was duly approved. Held that, such description in connection with evidence that intestate only owned 400 acres on Bray's bayou, part of it lying north and part south of the bayou, was sufficient to identify the land. *Evans v. Ashe*, 50 Tex. Civ. App. 54, 108 S. W. 398; *Hermann v. Likens*, 90 Tex. 448, 39 S. W. 282.

Verification.—The provision of the statute (Paschal's Dig., art. 1327), that the administrator shall swear to a report of sale, is a directory, and not a jurisdictional, requirement, and no presumption, that he did not swear to his report, will arise from the fact that his affidavit was not indorsed on his report. *Hurley v. Barnard*, 48 Tex. 83.

Entry on Minutes.—Failure to enter the return of the account of an administrator's sale on the minutes of the county court is but an irregularity, which at most, would only render the proceedings confirming the sale voidable. *Heath v. Layne*, 62 Tex. 686.

Conclusiveness of Report.—A report of sale by an administrator, showing that land belonging to his decedent's estate had been sold to a desig-

nated person, is not conclusive as to who the purchaser was, but the real purchaser may be shown by parol, though the decree of confirmation directed that conveyance be made to "the purchaser." *Dodd v. Templeman*, 76 Tex. 57, 13 S. W. 187.

p. Confirmation of Sale.

(1) Object and Purpose.

The purpose of a decree of confirmation of a probate sale is not so much to determine what particular person purchased as to determine that the sale was made in such manner and for such price as justifies the court's sanction to its completion. An order of confirmation only approves the sale, without reference to the purchaser. *Dodd v. Templeman*, 76 Tex. 57, 61, 13 S. W. 187.

(2) Necessity for Confirmation.

(a) To Complete Title in Purchaser.

See, also, post, "Necessity for Deed," II, G, 5, q, (1).

Sales of land under a decree of court are judicial sales, and are not complete until confirmed by the court. *Littlefield v. Tinsley*, 26 Tex. 353; *Edwards v. Gill*, 5 Tex. Civ. App. 203, 206, 23 S. W. 742.

A regularly legal title to property sold at an administrator's sale can only be passed from the estate by confirmation of the sale upon a report of it by the administrator in conformity to the statute. But an equitable right may be acquired by a sale without a formal confirmation. *Littlefield v. Tinsley*, 26 Tex. 353, 357; *Davis v. Stewart*, 4 Tex. 223; *Bradbury v. Reed*, 23 Tex. 258, 260; *Neill v. Cody*, 26 Tex. 286, 290; *Yerby v. Hill*, 16 Tex. 377, 381; *Wells v. Mills*, 22 Tex. 302, 305; *Goldstein v. Susholtz*, 46 Tex. Civ. App. 582, 105 S. W. 219, affirmed in 102 Tex. 583, no op.

"A confirmation of the sale, or something from which a confirmation might be inferred, or at least something done by the purchaser giving him the right

to have the sale confirmed, must have been shown, to enable him to claim title." *Neill v. Cody*, 26 Tex. 286; *Simmons v. Blanchard*, 46 Tex. 266, 271. See, also, *Littlefield v. Tinsley*, 26 Tex. 353, 357; *Davis v. Stewart*, 4 Tex. 223; *Bradbury v. Reed*, 23 Tex. 258; *Bartley v. Harris*, 70 Tex. 181, 182, 7 S. W. 797.

The record of the probate court, consisting of a petition by an administrator for a sale of decedent's land, an order of sale in accordance therewith, and a report of sale by the administrator, but no approval or confirmation of the sale by the court, or further proceedings thereon evidencing the completion of the sale, is no evidence of title in the purchaser. *Neill v. Cody*, 26 Tex. 286.

"A sale of lands, under an order of a court of equity, requires the confirmation of the court, in order to make the deed binding." *Graham v. Hawkins*, 38 Tex. 628, 632.

When one purchases at an administrator's or executor's sale, he knows that he has no title unless the sale is confirmed, and, if there is a conflict between his interest and that of the estate, preference must ordinarily be given in favor of the latter. *Hirshfield v. Davis*, 43 Tex. 155; *James v. Nease* (Civ. App.), 69 S. W. 110, 111 (see 97 Tex. 637, no op.).

The law in force in 1841 did not require a confirmation of the sale by the probate court. *Berryman v. Biddle*, 48 Tex. Civ. App. 624, 107 S. W. 922, 924, affirmed in 101 Tex. 666, no op.; *Williams v. Cessna*, 43 Tex. Civ. App. 315, 95 S. W. 1106.

Though the statutes in force in 1841 regulating sales of realty by administrators did not require confirmation, the law of 1840 did require a return of the sale by executors and administrators within a month after sale. Held that, in the absence of confirmation, title would not pass from the estate, in the absence of proof that the

requirements of the statute had been complied with; the administrator's deed being unsustainable by presumption. *Cruse v. O'Gwin*, 48 Tex. Civ. App. 48, 106 S. W. 757.

Under the act of 1840 (Hart. Dig., art. 1018), which required a return to the probate court of a sale of a decedent's land by executors or administrators within one month after sale, the court had power to approve or disapprove a sale, though the act was silent as to the necessity of confirmation; and, in the absence of a decree confirming a sale, the title did not pass to the purchaser, unless it is shown that he was entitled to confirmation by virtue of his compliance with the statute in all essential particulars. *Harris v. Brower*, 3 Tex. Civ. App. 649, 22 S. W. 758, affirmed in 93 Tex. 685, no op.

Under Rev. St. 1895, arts. 2141, 2144, 2146, requiring that sales of real or personal property of a decedent to be reported to and confirmed by the court, a sale by a temporary administrator passes no title until approved by the probate court, though the sale was authorized. *Goldstein v. Susholtz*, 46 Tex. Civ. App. 582, 105 S. W. 219.

(b) Purchaser Not Required to Complete Sale until After Confirmation.

A purchaser is not required to comply with the terms of an administrator's sale by payment until it is confirmed by the probate court. *Neill v. Cody*, 26 Tex. 286.

A purchaser of land at an administrator's sale will not be in default for failing to comply with the terms of the sale, or liable to an action under Hart. Dig., art. 1775, until the sale has been confirmed by decree entered on the minutes of the probate court and a conveyance has been ordered to be made. *Bradbury v. Reed*, 23 Tex. 258.

An administrator can not collect by action the price of land sold at public sale, when he refuses or neglects to return the sale for confirmation. *Dowl-*

ing *v. Duke*, 20 Tex. 181; *Tippett v. Mize*, 30 Tex. 362, 366.

(3) Hearing and Determination.

(a) Duty of Judge with Respect to Hearing.

"It is made the duty of the county judge, at a regular term of his court, to inquire into the manner in which a sale of this character is made and to hear evidence in support of or against the report of it, and if satisfied that such sale was fairly made, and in conformity to law, to enter upon the necessities of the court a decree confirming such sale. Art. 2144, Rev. Stat." *James v. Nease* (Civ. App.), 69 S. W. 110, 111 (see 97 Tex. 637, no op.).

(b) Notice.

A purchaser at a probate sale is not entitled to notice before the rejection of the sale. *Davis v. Stewart*, 4 Tex. 223.

(c) Evidence.

Upon an administrator's application asking that confirmation of sale be denied, on ground that price was inadequate, evidence of value is admissible, and exclusion of such evidence raises issue of value on appeal. *Hardin v. Smith*, 49 Tex. 420, 424.

The refusal to hear evidence as to value upon the application for denial of confirmation is equivalent to dismissal and erroneous. *Hardin v. Smith*, 49 Tex. 420, 424.

(d) Considerations Affecting the Decision.

Whether Fairly Made—Adequacy of Price.—The duty of the county judge to inquire into the manner in which a sale of this character is made is held to include the fairness and adequacy of the price at which the land is sold, as well as its conformity to law, and the absence of fraud or any unfairness in manner of making the sale. *James v. Nease* (Civ. App.), 69 S. W. 110, 111, affirmed in 97 Tex. 637, no op.; *Hirshfield v. Davis*, 43 Tex. 155; *Hardin v. Smith*, 49 Tex. 420, 424.

A probate sale has not been fairly made when made for an inadequate price. *Hirshfield v. Davis*, 43 Tex. 155; *James v. Nease* (Civ. App.), 69 S. W. 110, 111 (see 97 Tex. 637, no op.).

Under Pasch. Dig., art. 5713, providing for the confirmation of a public sale, if it appears to have been "fairly" made, an executor's sale will not be confirmed where the price was inadequate. *Hirshfield v. Davis*, 43 Tex. 155.

An administrator, after selling lands lying in another county at 28 cents per acre, learned that they were worth from \$2 to \$5 per acre, and therefore objected to a confirmation of the sale. Held, that it was error to refuse to hear testimony as to the value of the land. *Hardin v. Smith*, 49 Tex. 420.

"The word 'fair,' as defined by Webster, in synonymous with honest, equitable, impartial, reasonable. If, therefore, it appears that the price at which the land was sold was inequitable or unreasonable, the sale, within the meaning of the law, has not been fairly made and should not be confirmed. That it was made according to law, without fraudulent contrivance, or anything whatever being done to stifle competition or to depress its price, may ordinarily be regarded as prima facie evidence that the property offered was sold for a fair and adequate price." *Hirshfield v. Davis*, 43 Tex. 155, 161.

Sale at Wrong Time or Place.—An executor's sale of real estate made on a day different from that in the published advertisement of the sale will not be confirmed. *Trousdale v. Trousdale's Ex'rs*, 35 Tex. 756. See, also, *Brown v. Christie*, 27 Tex. 73; *Harris v. Shafer* (Civ. App.), 21 S. W. 110, 113, reversed in 86 Tex. 314. And see ante, "Time and Place of Sale," II, G, 5, 1, (6).

(e) Discretion of Judge with Respect to Confirmation or Rejection.

Much discretion is left to a judge of

probate, when required to confirm or set aside a sale of land. If he should believe that the sale was not fair, or that it was not made in conformity with law, it would be his duty to set it aside and order it to be sold again; and he is not required to place his reasons on record. *Davis v. Stewart*, 4 Tex. 223.

The judgment of the chief justice of the county court as to the confirmation of sales of land by executors is not appealable. *Wells v. Mills*, 22 Tex. 302. See, also, *Davis v. Stewart*, 4 Tex. 223.

The discretion vested in the district court with regard to approval of probate sale, is legal and not arbitrary discretion. *Hirshfield v. Davis*, 43 Tex. 155, 159.

(4) What Constitutes and Sufficiency of Confirmation.

Though an entry in the minutes of the court in relation to an executor's sale of a land certificate was not in terms a confirmation, yet where no further sale was ordered, and no objection was raised, and the money was paid, and possession of the certificate taken, by the purchaser, this is equivalent to a confirmation, and is sufficient to pass title. *Corley v. Anderson*, 5 Tex. Civ. App. 213, 23 S. W. 839; *Neill v. Cody*, 26 Tex. 286, 290; *Moody v. Butler*, 63 Tex. 210.

Approving Report of Sale.—The court's approval of the report of an administrator's sale is a sufficient confirmation thereof. *Pendleton v. Shaw*, 44 S. W. 1002, 18 Tex. Civ. App. 439.

Ordering Conveyance Made.—A colony certificate was sold, under order of the county court, by the administrator, of the estate of the deceased colonist in 1851, and the money paid by the purchaser; there was no formal confirmation of sale, but the same was reported by the administrator to the court, in an exhibit showing the condition of the estate, two years after which the court ordered the adminis-

trator to make title to the purchaser to a part of the land afterwards covered by the certificate, which had been patented to the heirs of the colonist. Appellees claimed the land under the original purchaser at administrator's sale. Held, that these facts, in connection with other undisputed mesne conveyances to appellees, constituted a right in them to the land as against the heirs of the colonist's wife. *Simmons v. Blanchard*, 46 Tex. 266.

Recognition of Sale.—"It is sufficient confirmation if the court recognizes sales. *Robertson v. Johnson*, 57 Tex. 62, 66; *Moody v. Butler*, 63 Tex. 210, 212; *Neill v. Cody*, 26 Tex. 286, 289." *Pendleton v. Shaw*, 18 Tex. Civ. App. 439, 456, 44 S. W. 1002, affirmed in 93 Tex. 693, no op.

"Even though there was no entry in the record books of the probate court tending to show that an order of sale was issued to the permanent administrator, or tending to show an approval of the sale made by him, still if there was anything written on any paper filed in the case in the probate court that directly or indirectly indicated approval of the sale by the probate court, we would sustain its validity under the authority of decisions of the supreme court. *Neill v. Cody*, 26 Tex. 286; *Moody v. Butler*, 63 Tex. 210." *Cruse v. O'Gwin*, 48 Tex. Civ. App. 48, 106 S. W. 757, 759, affirmed, no op.

Approving Administrator's Account, etc.—The approval of the final account of an administrator, and his discharge, is a substantial compliance with the law requiring an order of confirmation of a sale by the administrator. *Ferguson v. Templeton* (Civ. App.), 32 S. W. 148.

An order reciting that an account of an administrator is regular and authenticated in accordance with law is equivalent to a confirmation of sale. *Erhart v. Bass*, 54 Tex. 97, 98.

If any confirmation of sale of land by an administrator over fifty years

ago were required, evidence showing compliance in approving administrator's account is sufficient to show confirmation. *Pendleton v. Shaw*, 18 Tex. Civ. App. 439, 456, 44 S. W. 1002, affirmed in 93 Tex. 693, no op.; *Ferguson v. Templeton* (Civ. App.), 32 S. W. 148; *Bartlett v. Cocke*, 15 Tex. 471, 480.

The laws in force in 1841 did not require a confirmation by the probate court of a sale of land by an administrator under order of the court, but where a sale was reported to the court, and under its order the proceeds were distributed to the creditors, and the account of the administrator embracing these matters was approved, if any confirmation was necessary the facts stated would show a sufficient approval by the court as against a collateral attack postponed for over 60 years. *Berryman v. Biddle*, 48 Tex. Civ. App. 624, 107 S. W. 922.

(5) What Order of Confirmation Must Show.

An administrator's sale of land will not be held void on the ground that the order of confirmation does not show that proof was heard upon the question of the sufficiency of the price for which the land sold when the order was made, as the statute does not require that the minutes of the court shall show affirmatively that this was done, and it is to be presumed that the court did its duty in that respect. *Capt v. Stubbs*, 68 Tex. 222, 4 S. W. 467.

(6) Description of Property Sold.

Where an order approving an administrator's sale of land contained no description of the land, the sale was invalid. Judgment (Civ. App.), 110 S. W. 552, reversed. *Wilkin v. Geo. W. Owens & Bros.*, 102 Tex. 197, 114 S. W. 104, judgment modified in (Sup.), 115 S. W. 1174, and (Civ. App.), 117 S. W. 425.

Where under an application and order for the sale of town lots belonging

to an estate, the land sold was outside of though adjoining the town, an order confirming the sale, containing no description of the land, though the report of sale referred to it as 7 2-5 acres out of the northeast quarter of L., pre-emption, could not supply the omission of an order of sale, since neither the order nor the report of sale which it confirmed described the land so that it could be identified. *Wilkin v. Geo. W. Owens & Bros.* (Civ. App.), 110 S. W. 552, reversed in 114 S. W. 104.

An order confirming an administrator's sale of 1,800 acres of a certain league and labor of land, and directing a deed to be made to the purchaser for the 1,800 acres, "it being the upper part of the survey," and a deed made in pursuance thereof, in which the land is described as "being the upper part of the league and labor of land granted to the heirs of Mary Bird, situated on the waters of Pecan bayou, in Travis," are void for uncertainty of description of the land. *Harris v. Shafer*, 86 Tex. 314, 23 S. W. 979, 24 S. W. 263, reversing 21 S. W. 110.

Description Aided by Reference to Other Papers in Case.—A judgment of a probate court confirming an executor's sale for payment of a debt secured by mortgage is not void for failure to properly describe the land, where the land was properly described in the mortgage and in other portions of the probate records, including an inventory filed by the executor prior to such confirmation. *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325.

An order for an administrator's sale does not help out order of confirmation, where former refers to land on "upper line" of survey, and latter as land out of "upper part" of same. *Harris v. Shafer*, 86 Tex. 314, 320, 23 S. W. 979, 24 S. W. 263.

An administrator's inventory included "one-third of a league of unlocated lands, amounting to one thou-

sand one hundred and seven acres," and "three hundred and twenty acres of unlocated soldier scrip." In an annual exhibit of the estate, the property was described as "a certificate for one-third league of land, and also a certificate for 320 acres (a bounty land claim)." The administrator petitioned for an order to sell "the land certificates included in the inventory," and the court ordered a sale of "one-third of a league of land, the headright certificate of the deceased, and a bounty land certificate for 320 acres also granted to the deceased." The administrator reported a sale of "a certificate for one-third of a league of land granted to the heirs of R., deceased, by the board of land commissioners of H. county, No. 396, dated February 3, 1838," and "a certificate for 320 acres of the bounty granted to R. by the Secretary of War, and dated December 29, 1837, No. 1,434." The court directed a conveyance to the purchaser of "the certificate of headright of R., deceased, granted by the board of land commissioners of H. county, No. 396, dated February 3, 1838, for one-third of a league of land; also a bounty and certificate granted to R. for 320 acres No. 1,434, dated December 29, 1837." Held, that the description of the property was sufficient to pass title. *Boslet v. Thomas*, 80 S. W. 115, 35 Tex. Civ. App. 144.

(7) Erroneous Recitals; Clerical Mistakes, etc.

The fact that the order of confirmation of an administrator's sale of real estate belonging to a decedent referred to "the sale made in pursuance to an order of this court," and referred also to a date subsequent to its own date as the date when the sale was ordered, does not make void the order of confirmation. *Barton v. Davidson* (Civ. App.), 45 S. W. 400.

(8) To Whom Conveyance Directed to Be Made.

After confirming an administrator's

sale of land to one purchaser, the court may, on such purchaser's consent, change the order and confirm the sale in the name of a different purchaser. *Davis v. Touchstone*, 45 Tex. 490. See, to the same effect, *Dodd v. Templeman*, 76 Tex. 57, 61, 13 S. W. 187.

An heir who expected a particular tract of land to be allotted him, sold it and received the purchase money, executing his bond to make title when partition should be made. The land being afterwards sold by the administrator, the heir bid it off, and prayed the probate court to order the deed to be made direct to his vendee as the equitable owner. It seems that the order should have been made, there having been no liens on the heir's interest when he sold the land. *Ackerman v. Smiley*, 37 Tex. 211.

(9) Entry of Order on Minutes.

Where the record does not show that the confirmation of the sale of the land made by the executor was entered upon the minutes of the county court, but shows that an indorsement of confirmation was made upon the return of sales by the judge of the court, the failure of the clerk to enter the order was a clerical oversight which can not prejudice the purchaser in a collateral attack upon his title. *Moody v. Butler*, 63 Tex. 210, 212; *Neill v. Cody*, 26 Tex. 286, 289; *Cruse v. O'Gwin*, 48 Tex. Civ. App. 48, 106 S. W. 757, 795, affirmed, no op.

(10) Objections; Rights and Remedies of Purchaser.

When a purchaser bids for land sold by decree of the judge of probate, his bid is subject to the confirmation or rejection of the sale by the probate judge; and he can not object to the refusal to confirm the sale, where the report of sale is made by the administrator d. b. n. after the death of the executor. *Davis v. Stewart*, 4 Tex. 223; *Yerby v. Hill*, 16 Tex. 377, 381. See ante, "To Complete Title in Purchaser," II, G, 5, p, (2), (a).

The merely having made an ineffectual bid at the sale is not such an injury as will give a right of action against the estate. *Wells v. Mills*, 22 Tex. 302, 305; *Yerby v. Hill*, 16 Tex. 377.

A purchaser at an administrator's sale under Prob. Act. 1870 may appeal from an order of the district court disapproving such sale. *Hirshfield v. Davis*, 43 Tex. 155, distinguishing *Davis v. Stewart*, 4 Tex. 223, 225; *Yerby v. Hill*, 16 Tex. 377, 381; *Wells v. Mills*, 22 Tex. 302, 304.

(11) Appellate Proceedings.

An appeal from orders of the probate court approving a sale by a temporary administratrix, and appointing a permanent administratrix, is a direct attack on the orders, and on the hearing the district court, under Rev. Stat. 1895, art. 2262, must act on the application to confirm the sale and for permanent administration de novo with the power originally possessed by the probate court. *Goldstein v. Susholtz*, 46 Tex. Civ. App. 582, 105 S. W. 219, affirmed in 102 Tex. 583, no op.

The appellate court, on reversing the confirmation of an executor's sale for inadequacy of price, will set aside the sale, and not remand the cause for a new trial; there being nothing to indicate that stronger evidence of adequacy could be produced. *James v. Nease* (Civ. App.), 69 S. W. 110; *St. Louis, etc., R. Co. v. Adams*, 24 Tex. Civ. App. 231, 237, 58 S. W. 1035, affirmed 94 Tex. 710, no op.

An executor's sale, into which Rev. St., art. 2144, requires the county judge to inquire, and, if satisfied that it was fairly made, to confirm, can not be sustained, though confirmed by said judge; being made for \$33,800; four witnesses for the executor fixing the value at from \$45,000 to \$50,000, one at \$40,000, and one at \$38,000, and five witnesses for the purchaser fixing it at from \$35,000 to \$40,000, one at \$35,000, and one at from \$30,000 to

\$35,000. *James v. Nease* (Civ. App.), 69 S. W. 110.

Questions Not Raised Below—Amendments.

Where objections were filed in the county court, to the confirmation of an administrator's sale, on the ground that the order of sale was invalid and that the sale was not returned within thirty days, on appeal from the order of the county court, which overruled the exceptions and confirmed the sale, the court said the contestant might have amended in the district court and set up other objections to the sale, but as he had not done so, he could not be permitted to prove that the sale was not fairly made. The court should not have required the appellee to meet an objection founded on extraneous facts which had not been before presented, and of which he had no notice, and which had previously been no part of the case made by the appellant. *Brown v. Hobbs*, 19 Tex. 167, 170; *Moore v. Hardison*, 10 Tex. 467; *Danzey v. Swinney*, 7 Tex. 617; *Pierpont v. Threlkeld*, 13 Tex. 244.

(12) Revocation of Order of Confirmation.

A probate judge has no power to revoke a title, which has been made in pursuance of a sale which has been confirmed at a former term. *Davis v. Stewart*, 4 Tex. 223.

(13) Costs.

Where an executor's sale confirmed by the county judge is set aside on appeal for inadequacy of price, costs should be taxed against the estate. *James v. Nease* (Civ. App.), 69 S. W. 110.

(14) Proof of Confirmation; Presumption.

See, also, ante, "What Constitutes and Sufficiency of Confirmation," II, G, 5, p. (4).

The law in force in 1846 did not, it seems, require that a sale of land by an administrator under order of court

should be confirmed, but if it did, such confirmation would be presumed after the lapse of fifty years and the destruction of the probate records by fire. *Miles v. Dana*, 13 Tex. Civ. App. 240, 36 S. W. 848.

When plaintiff claims title under an administrator's deed reciting a sale and order of confirmation on certain dates, but fails to produce the order, or excuse its nonproduction, it will not be presumed that an order of later date, confirming a resale of lands not identified except by a different deed, is a confirmation of the sale under which he claims. *Blakey v. Perry*, 38 S. W. 374, 15 Tex. Civ. App. 26, citing *Tucker v. Murphy*, 66 Tex. 355, 1 S. W. 76; *House v. Brent*, 69 Tex. 27, 30, 7 S. W. 65; *Hill v. Templeton* (Civ. App.), 29 S. W. 535, 536; *White v. Jones*, 67 Tex. 638, 639, 4 S. W. 161; *Baker v. Coe*, 20 Tex. 429, 430.

(15) Operation and Effect of Order of Confirmation.

(a) As Curing Defects and Irregularities.

All irregularities are cured by the decree of confirmation, which is an adjudication that the sale was made under the authority of the court. *Altgelt v. Meriwitz*, 37 Tex. Civ. App. 397, 83 S. W. 891.

If there was a defect in the order of sale, and the sale was ratified and approved by the court—and to this no objection was made—the title of the purchaser can not be brought in question on this account in a collateral proceeding. *Farris v. Gilbert*, 50 Tex. 350, 356.

It seems that a confirmation of a sale made without previous authority will pass title to the land such as can not be attacked collaterally. While the proposition is against the reasoning in the case of *Ball v. Collins* (Sup.), 5 S. W. 622, a contrary view can not well be reconciled with the decision in the case of *Pelham v. Murray*, 64 Tex. 477. *Fishback v. Page*, 17 Tex. Civ.

App. 183, 186, 43 S. W. 317, affirmed in 93 Tex. 639, no op.

The transcript in probate proceedings in a county court showed: 1. A valid administration. 2. An order to sell land at public or private sale. 3. A return of sale, which did not disclose whether the sale was a public or a private one, and an order which amounted to a confirmation of the sale. Evidence in connection therewith established the payment of the purchase money and that no deed was made. Held: 1. The facts were sufficient to enable the purchaser to maintain trespass to try title. 2. The title prima facie vested in the purchaser. *Erhart v. Bass*, 54 Tex. 97.

Conveyance in Payment of Attorney's Fees.—An administrator's conveyance of intestate's land in payment of attorney's fees is not validated by approval of probate court. *Teal v. Terrell*, 48 Tex. 491, 509.

(b) Vests Title.

Confirmation of administrator's sale vests title in purchaser, subject to the payment of the purchase money, independent of the execution of the deed by administrator. *Rock v. Heald, etc., Co.*, 27 Tex. 523, 525.

Subject to Payment of Money or Execution of Bond.—A probate order granting an application to purchase land conveys no title unless the applicant pays price or executes required bond. So held where in partition of an estate land was ordered to be sold and allowed to be taken by a distributee on his executing bond with securities to the other distributees for the appraised value. *Williams v. Davis*, 56 Tex. 250, 254.

(c) Same; Relates Back.

A confirmation by the court of an administrator's sale relates back to the date of the sale, if such date is made to appear, and carries title from that date. *Edwards v. Gill*, 5 Tex. Civ. App. 203, 23 S. W. 742. See *Cox v. Bray*, 28 Tex. 247, 261.

An administrator, under an order of court, sold a land certificate of his intestate in March, but the sale was not confirmed until the following May. In April a patent was issued by virtue of the certificate. Held, that title to the land passed on the sale of the certificate, the presumption being that the certificate had not been located at the time of the sale, and was personal property, and the sale relates back to the date, and carries title from that time. *Edwards v. Gill*, 5 Tex. Civ. App. 203, 23 S. W. 742.

(d) As a Lis Pendens; Necessity for Recordation.

An order of confirmation by the probate court, directing an administrator to retain a lien for the purchase money on property sold, unless it is registered according to the statute for the record of deeds and mortgages, is not, in the absence of proof of notice to third parties, such constructive notice as will affect them by the lien. *Allen v. Atchison*, 26 Tex. 616.

(e) As Evidence.

See, also, ante, "Erroneous Recitals; Clerical Mistakes, etc.," II, G, 5, p. (7).

Of Regularity of Sale in General.

It should be conclusively presumed from order of confirmation of an administrator's sale, that the sale was made in accordance with law. *Arnold v. Hodge*, 20 Tex. Civ. App. 211, 215, 49 S. W. 714, affirmed in 93 Tex. 635, no op.; *Crawford v. McDonald*, 88 Tex. 626, 630, 33 S. W. 325, affirming 33 S. W. 325; *Templeton v. Ferguson*, 89 Tex. 47, 57, 33 S. W. 329, affirming 32 S. W. 148; *Martin v. Robinson*, 67 Tex. 368, 375, 3 S. W. 550; *Bartley v. Harris*, 70 Tex. 181, 183, 7 S. W. 797.

Of Order of Sale.—Confirmation of a sale by an administratrix is presumptive of an order of sale. *Bartley v. Harris*, 70 Tex. 181, 183, 7 S. W. 797.

As to Notice and Time of Sale.—It will be presumed from the confirmation of an administrator's sale by the probate court, in the absence of any-

thing in the records, that he complied with the order of the court as to notice and time of sale. *Ferguson v. Templeton* (Civ. App.), 32 S. W. 148.

Of Return of Sale.—In an action to quiet title, a deed by an administrator was introduced, purporting to convey the headright certificate issued to decedent, the patentee in plaintiff's chain of title. The order of sale was made in January, and the order of confirmation, made in February, recited the return of the sale, and declared that, on inspection of the same, it appeared that the sale was made according to law. Held, that an objection to the deed on the ground that there was no report of the sale was untenable. *Day Land & Cattle Co. v. New York & T. Land Co.* (Civ. App.), 25 S. W. 1089.

As Evidence of What Was Intended to Be Sold.—"An administrator's sale is completed by the order of confirmation and a compliance on part of the purchaser with the terms of the offer. After an order of sale, and the acceptance of the bid, the approval of the court is still necessary to the consummation of the agreement, and hence the confirmation should be looked to as cogent evidence of what was intended to be sold. When it shows, that the undivided one-half interest was sold as the property of the estate, and it appears that the administrator asserted title to that interest and asked an order to sell it, we do not think, in view of statute which we have quoted, that the expression 'all the right title and interest of the estate' in the land, or other like expressions in the order and report of sale and in the deed, should limit the conveyance to a mere transfer of the chance of the title." *White v. Frank*, 91 Tex. 66, 72, 40 S. W. 962, reversing 39 Tex. 988.

(f) Conclusiveness of Order of Confirmation.

The decree of the probate court, confirming an administrator's sale, is con-

clusive, except on appeal or certiorari, or on allegation of fraud in the purchase, or want of jurisdiction of the court over the estate, against minors as well as adults. *Dancy v. Stricklinge*, 15 Tex. 557.

(16) Effect of Order Rejecting Sale.

See, also, ante, "Objections; Rights and Remedies of Purchaser," II, G, 5, p, (10).

Terminates Rights of Purchaser.—A surviving partner who claims the entire firm property and appropriates it to his own use as sole owner by virtue of an unauthorized sale by the temporary administratrix of the deceased partner, which sale the court refuses to confirm, is guilty of a conversion thereof. *Goldstein v. Susholtz*, 46 Tex. Civ. App. 582, 105 S. W. 219, affirmed in 102 Tex. 583, no op.

q. The Deed.

(1) Necessity for Deed.

See, also, ante, "Necessity for Confirmation," II, G, 5, p, (2), et seq.; "Vests Title," II, G, 5, p, (15), (b).

An administrator's sale of land is effective without any deed, where the administrator receives the purchase money. *Whitaker v. Thayer*, 86 S. W. 364, 38 Tex. Civ. App. 537; *Erhart v. Bass*, 54 Tex. 97; *McBee v. Johnson*, 45 Tex. 634.

The order of sale, sale, confirmation, and payment of purchase money constitute an equitable title without deed. *McBee v. Johnson*, 45 Tex. 634.

"The execution of a deed by the administrator is at most but the formal evidence of the title vested in the purchasers by the decree of the court." *Rock v. Heald, etc., Co.*, 27 Tex. 523, 525.

To pass a perfect legal title to land of an estate, sold by an administrator under order of the county court, a conveyance by the administrator, executed according to the statute, is necessary; but without a conveyance from the administrator a purchaser,

upon complying with the terms of the sale as confirmed by the county court, has in the land an equitable interest sufficient to maintain a suit against a stranger to the estate. Pas. Dig., art. 1328; *Sypert v. McCowen*, 28 Tex. 635, 636; *Runnels v. Kownslar*, 27 Tex. 528, 533; *Wornell v. Williams*, 19 Tex. 180.

Where decedent's lands were sold under an order of the court, and the purchase money paid during administration, such facts formed a sufficient defense in a suit by the heirs for recovery against the purchaser, though no deed had been executed to him. *Bartlett v. Cocke*, 15 Tex. 471; *Miller v. Alexander*, 8 Tex. 36.

(2) Right of Purchaser to a Conveyance.

Compliance with the terms of the sale, by the purchaser is a condition precedent to his right to a deed, and the administrator can not execute a valid deed until such compliance. *Akin v. Horn*, 2 App. Civ. Cases, §§ 8, 10.

Where an administrator's sale of land was confirmed, but the administrator refused to deliver the deed because of the purchaser's refusal to execute a mortgage on the land to secure the note for the purchase price, recovery by the administrator of a judgment on the note with foreclosure of the vendor's lien and sale thereunder perfected the sale and divested the estate of title to the land and entitled the purchaser to a deed. *Miller v. Anders*, 21 Tex. Civ. App. 72, 76, 51 S. W. 897, affirmed in 93 Tex. 734, no op.

(3) By Whom Executed.

(a) Generally.

After the act of February 5th, 1840 (and perhaps before), regulating the duties of probate courts, and the settlement of successions (Hart. Dig., p. 324), it was not competent for the judge of probate to execute an order for the sale of property of a succession, and reserve a lien for payment of

the purchase money by process verbal and act of sale, in the mode which had been in use (perhaps in some counties only), under the adoption of the laws of Louisiana; and such a proceeding was held to be utterly void, in a suit by the administrator to enforce the lien, although it was alleged and proposed to be proved, that the judge acted by authority from the administrator, that the purchaser accepted the process verbal as his title to the property, thereby assenting to the lien reserved therein, and that the claimants under him had actual notice. *Hall v. Hall*, 11 Tex. 526.

On the 3d of March, 1840, the act regulating the duties of probate courts (Hartley's Dig., art. 995, et seq.) had not yet gone into effect as it had in the case of *Hall v. Hall*, 11 Tex. 526, 550 in which a similar case was held invalid, and a conveyance then made by a judge of probate to a purchaser at an administrator's sale, ordered by him, in which was recited the order of sale, the sale, and the payment of the purchase money, and which was executed with witnesses, was the appropriate evidence of an administrator's sale under the laws then in force. *Pleasants v. Dunkin*, 47 Tex. 343.

(b) Deed by Administrator after Office Has Expired.

Where lands are sold under an order, and the purchase money paid during administration, it would seem that it is no ground for rejection of the deed that it was not executed by the administrator till after his office had expired. *Bartlett v. Cocke*, 15 Tex. 471; *Poor v. Boyce*, 12 Tex. 440.

(c) Deed by Less than All.

See, also, ante, "Sale by Less than All," II, G, 5, 1, (5); "Execution of Power by Less than All, Where More than One Executor," II, F, 5.

Where a deed is 50 years old and is executed by only one administrator, though there were in fact two administrators, and the county records have

been destroyed by fire, it will be presumed to uphold the deed that the land was duly sold by order of court, authorizing the execution of the deed by one administrator. *Miles v. Dana*, 13 Tex. Civ. App. 240, 36 S. W. 848.

(4) Authority to Make Conveyance; Necessity for Order of Sale, Confirmation, etc.

The deed of the administrator to the purchaser can not be regarded as a complete and perfect legal title unless it was made by the administrator in obedience to an order of court, properly entered upon its records, confirming the sale, and ordering its execution. *Calloway v. Nichols*, 47 Tex. 327, 330.

The validity of an administrator's act in executing a deed depends upon power granted him by the probate court, and the failure to produce an order granting power, or account for its absence and prove its having existed, renders the deed useless for any purpose. *Riley v. Pool*, 5 Tex. Civ. App. 346, 347, 24 S. W. 85; *Terrell v. Martin*, 64 Tex. 121; *McNally v. Haynes*, 59 Tex. 583. See, also, *Whitaker v. Thayer*, 38 Tex. Civ. App. 537, 542, 86 S. W. 364.

The deed, however full its recitals may be, can not supply the absence of competent testimony of the orders of the court giving it effect to pass title. *Terrell v. Martin*, 64 Tex. 121, 125. Where there is no testimony excusing the production of this testimony by showing the loss or destruction of the records of the court. *White v. Jones*, 67 Tex. 638, 4 S. W. 161; *Bartley v. Harris*, 70 Tex. 181, 183, 7 S. W. 797.

While an administrator has no power to convey until the court has confirmed the sale made by him, a deed previously executed will take effect on confirmation. *Judgment (Civ. App.)*, 71 S. W. 799, reversed. *El Paso v. Ft. Dearborn Nat. Bank*, 74 S. W. 21, 96 Tex. 496. See, also, *Whitaker v. Thayer*, 38 Tex. Civ. App. 537, 86 S. W. 364.

Facts held insufficient to support a finding that evidence offered was insufficient to prove that the person who made a deed was empowered to make it. *Tucker v. Murphy*, 66 Tex. 355, 1 S. W. 76.

(5) Form and Requisites of Deed.

(a) Deed of Female Representative; Assent of Husband, Privy Examination, etc.

A married woman in 1842 joined her husband in conveying land certificates then located and surveyed which were in part the separate property of her former husband and partly their community property. This she did after an order of the probate court had been entered closing her administration on the estate of her former husband, though an order had been entered during her administration turning the property over to her to be used and disposed of by her for the support of herself and children. The wife was not examined privily and apart from her husband by the officer in taking her acknowledgment to the deed. In a suit brought by the heirs of the woman and of her first husband to recover the land against those claiming under the deed, who had not been in possession but who had paid taxes on the land for over forty years, held, the deed of the wife can not be regarded as one made by her as administratrix in pursuance of an order of court. *Groesbeck v. Bodman*, 73 Tex. 287, 11 S. W. 322. See the title **HUSBAND AND WIFE**.

"In *Poor v. Boyce*, 12 Tex. 440, 441, the widow of *McRae* (the first husband, to whom the certificates were issued, and who died in 1835) married her second husband, *Poor*, in 1837, and she conveyed the land subsequently under order of the probate court. But she became administratrix of *McRae's* estate after her second marriage with *Poor*. One of the objections in that case made to the conveyance was the want of the assent of the second hus-

band to the conveyance, which was held to be unnecessary." *Groesbeck v. Bodman*, 73 Tex. 287, 291, 11 S. W. 322.

(b) Recitals in Deed.

aa. Previous Proceedings.

It seems that it is not essential for an administrator's deed to recite the previous proceedings. *Bartlett's Heirs v. Cocke*, 15 Tex. 471.

Though an administrator's deed must contain a recital of a decree of confirmation, to make it prima facie evidence that the necessary proceedings have been had, yet a deed without such a recital is not a nullity, and will have every other effect of a conveyance, when it is shown that the necessary proceedings were in fact had. Judgment (Civ. App.), 71 S. W. 799, reversed. *El Paso v. Ft. Dearborn Nat. Bank*, 74 S. W. 21, 96 Tex. 496.

"Since the sale was ordered and approved by the probate court, the deed of the administrator, acknowledged thereafter, was sufficient to pass the title, without reciting the source of the power, * * *. The existence of the power was the essential thing. *Bennett v. Virginia, etc., Cattle Co.*, 1 Tex. Civ. App. 321, 21 S. W. 126, and cases there cited." *Odell v. Kennedy*, 26 Tex. Civ. App. 439, 441, 64 S. W. 802, affirmed in 95 Tex. 683, no op.

hb. Recital of Representative Capacity.

An administrator's deed conveying property sold by order of court is sufficient to pass title without stating that it was made by the administrator in his representative capacity. *Odell v. Kennedy*, 64 S. W. 802, 26 Tex. Civ. App. 439; *Bennett v. Virginia, etc., Cattle Co.*, 1 Tex. Civ. App. 321, 21 S. W. 126.

(c) Description of Property Sold.

aa. Certainty and Sufficiency in General.

An administrator conveying land

should describe the land in a deed as fully as possible, and on failure to do so purchaser's rights to enforce such description will be guarded. *Akin v. Horn*, 2 App. Civ. Cases, §§ 8, 9.

The description in an administrator's deed should be sufficiently definite to enable the bidders to ascertain without unreasonable trouble, land sold. *Hermann v. Likens*, 90 Tex. 448, 454, 39 S. W. 282, reversing 37 S. W. 981.

The description in an administrator's sale is not aided by extrinsic evidence of what the officer intended to sell, and ought to be sufficiently definite to enable bidders to ascertain the precise tract to be sold, though it need not enable them to do so from mere inspection of such description. *Hermann v. Likens*, 90 Tex. 448, 39 S. W. 282, reversing 37 S. W. 981.

"For example, a deed to 'all the grantor's lands in a certain county,' naming it, will convey all his lands situate in that county. Such a description in an administrator's or sheriff's deed ought at least to be a good ground for setting aside the sale." *Hermann v. Likens*, 90 Tex. 448, 454, 39 S. W. 282, reversing 37 S. W. 981. See, also, *Wilson v. Smith*, 50 Tex. 365.

The case of *Munnink v. Jung*, 3 Tex. Civ. App. 395, 22 S. W. 293, is the only case which directly sustains the contention that the rule of evidence as to uncertainty of description applies alike to administrator's deeds and deeds of sheriffs and tax collectors. In that case, there was no evidence offered to show that the intestate of the plaintiff's vendor, at the time of his death, owned a tract of land corresponding, as to the number of acres and the name and number of the survey, exactly with the land described in the administrator's deed and in the order of sale and the inventory, and that he owned no other land in that survey. *Hermann v. Likens* (Civ. App.), 37 S. W. 981, 982, reversed in 90 Tex. 448.

bb. Construction and Interpretation.

An administrator reported that he had sold block 6, on which a cemetery was located, and the report was confirmed in general terms by the judge in chambers. Afterwards another report was filed, describing the property as before, and the court confirmed the sale of the property; describing it as in the report, but adding that it was particularly described in a deed executed by the administrator. This deed described the land by metes and bounds, which embraced blocks 7 and 8, but made no reference to block 6; and attached to the deed was a certificate of confirmation by the clerk, and a copy of the judge's order of confirmation. The cemetery was in fact located on parts of blocks 7 and 8. Held to clearly show that the land which had been sold was blocks 7 and 8, and not block 6. Judgment (Civ. App.), 71 S. W. 799, reversed. *El Paso v. Ft. Dearborn Nat. Bank*, 74 S. W. 21, 96 Tex. 496.

cc. Extrinsic Evidence in Aid of Description.

By Reference to Other Parts of Record, Papers in Case, etc.—The execution of an imperfect deed does not affect the rights of the purchaser, a sufficient description and a proper order of sale appearing in the record. *McBee v. Johnson*, 45 Tex. 634.

The description in an administrator's deed may be aided by inventory and other records in proceeding. *Hermann v. Likens*, 90 Tex. 448, 452, 39 S. W. 282, reversing 37 S. W. 981.

Maps, Certificates, Surveys, Patents, etc.—The identity of land conveyed by an administratrix under a description so imperfect as to leave in doubt the district to which the land belongs may be determined by reference to maps, to land certificates giving the location and description of surveys, district numbers, patents, etc., and by reference, also, to proceedings had in

the administration and partition of the estate. *Kerlicks v. Keystone Land & Cattle Co.* (Civ. App.), 21 S. W. 623, citing *Davis v. Touchstone*, 45 Tex. 490, 496; *McBee v. Johnson*, 45 Tex. 634, 641; *Hurley v. Barnard*, 48 Tex. 83, 88.

Evidence of Intention.—The description in an administrator's sale is not aided by extrinsic evidence of what the officer intended to sell. *Hermann v. Likens*, 90 Tex. 448, 39 S. W. 282, reversing 37 S. W. 981.

dd. Surplusage, Clerical Mistakes and Other Inaccuracies.

If from the whole instrument the thing sold can be clearly and certainly identified, a misdescription in some parts of an administrator's deed will not invalidate a deed as a conveyance. *Farris v. Gilbert*, 50 Tex. 350.

Probate records and deeds based thereon which, in describing lands of an estate, give the correct numbers of the surveys, and the correct quantities, and are sufficient in other respects to identify the lands with reasonable certainty, will pass title, though containing abbreviations in the description, and inaccuracies in the spelling of the name of the patentee. *Dupree v. Frank* (Civ. App.), 39 S. W. 988, reversed. *White v. Dupree*, 40 S. W. 962, 91 Tex. 66.

In proceedings to sell land of a decedent, the description of the land in the petition and administrator's deed gave the field notes, but the order of sale did not. The petition described the land as being covered by patent No. 249, which was the proper number, but the order of sale and administrator's deed described it as No. 248. The field notes showed that the property was the same as that covered by patent No. 249. Held error, in trespass to try title, to exclude the deed and order because of the variance, it being for the court to determine whether the land in controversy was that intended to be sold. *Minor v.*

Lumpkin (Civ. App.), 29 S. W. 799, 800. See, also, *Smith v. Hill*, 6 Tex. Civ. App. 312, 25 S. W. 1079; *Mason v. McLaughlin*, 16 Tex. 24; *Pleasants v. Dunkin*, 47 Tex. 343, 357.

ee. Imperfect Description; Application of Doctrine of Caveat Emptor.

When an administrator's deed to land, gives such imperfect description thereof that it can not be brought in maxim "Id certum est quod certum reddi," whether doctrine of caveat emptor applies, quære. *Akin v. Horn*, 2 App. Civ. Cases, § 8.

ff. Descriptions Held to Be Sufficient.

In a sale of certain land by an administrator, the land was described as the N. E. league of the four leagues granted to K. The land in question was the N. E. league of the original grant to K. of four leagues. Held, that the description in the conveyance was sufficient. *Berryman v. Biddle*, 48 Tex. Civ. App. 624, 107 S. W. 922.

An administrator's deed fifty years old described the land as part of a headright league situated in Liberty county, but did not specify the state or republic of Texas. Held, that the omission was not material, as the court would take judicial notice that Liberty county was, in 1846, a part of the republic of Texas. *Miles v. Dana*, 13 Tex. Civ. App. 240, 36 S. W. 848.

Where an administrator's deed and the proceedings in the probate court describe the land sold as the interest of decedent "in and to 830 acres" of a certain survey, and the evidence shows a deed to the decedent of a half interest in such a tract, described by metes and bounds and duly recorded, the description is not too indefinite to pass title. 37 S. W. 981 (Civ. App.), reversed. *Hermann v. Likens*, 39 S. W. 282, 90 Tex. 448.

"The description in the present case is in substance a half interest in the property of the estate of the intestate

in 893 acres of land, a part of the P. W. Rose survey in Harris county, Texas. This does not indicate, as in *Wofford v. McKinna*, 23 Tex. 36, that the intention was to sell a half interest in an undefined part of the Rose survey, but an undivided half of a certain tract, in which the intestate owned that interest." *Hermann v. Likens*, 90 Tex. 448, 454, 39 S. W. 282, reversing 37 S. W. 981. See, also, *Harris v. Shafer*, 86 Tex. 314, 316, 23 S. W. 979, 24 S. W. 263, reversing 21 S. W. 110; *Wooters v. Arledge*, 54 Tex. 395, 398.

The court held the following description to be insufficient, viz.: "One tract of land, originally granted to Hugh Miller, being the southwestern part of the tract on the waters of Duffau's creek, bounded on the southwesterly side by lands now or late of J. Belden, containing 640 acres, situated in Bosque county, Texas." For the reasons set forth in the case of *Minor v. Lumpkin* (Civ. App.), 29 S. W. 799, it was held that the court erred in this ruling. *Minor v. Lumpkin* (Civ. App.), 29 S. W. 799, 801. For descriptions of property in deeds, held to be sufficient, see *Terrell v. Martin*, 64 Tex. 121, 128.

gg. Descriptions Held to Be Insufficient.

A deed of an executrix describing land as 1,612 acres of land, being a part of the headright league of the decedent, situated in a certain bayou, was too indefinite to show title in the grantee. *Gorham v. Settegast*, 44 Tex. Civ. App. 254, 98 S. W. 665 (see 102 Tex. 583, no op.).

Where an administrator's application for leave to sell and the order, report, and order of confirmation of sale describe the land as "all the right, title, and interest of * * *, deceased, to about six or seven leagues of land, more or less, situated" in various named counties, "being part of an eleven-league tract of land originally

granted to G., the said land consisting of detached and separate parcels of various sizes, and located in different places within the said tract, whose several contents are unknown," the deed of the administrator, containing the same description, with the added words, "it is intended and understood that the whole and entire interest of said * * *, deceased, in said eleven-league tract, is hereby conveyed," is void for uncertainty of description. *Macmanus v. Orkney* (Civ. App.), 39 S. W. 614, reversed 40 S. W. 715, 91 Tex. 27.

Hewitt & Newton owned the west one-fourth of survey number 198, in § 1, on Palo Alto Creek, of one-third league. After the death of Hewitt, Newton sold 150 acres off the north end of the Hewitt & Newton tract. An attempt to sell the remainder was made by one Williams, administrator of the Hewitt estate, and acting under a power from Newton. Williams' deed as administrator and attorney in fact purports to convey "all the right, title, and interest of said estate and of said Newton in and to 320 acres, survey 198, section number 1, on Palo Alto Creek, Gillespie County." The order of sale described the land as "320 acres of land, survey number 198, section number 1, Palo Alto Creek." The order confirming sale describes it as "320 acres in survey number 198, § 1, on Palo Alto Creek." In suit for 291 acres of land out of the southwest corner of the survey 198, held: 1. That said deed failed to convey the interest of the Hewitt estate in the land sued for. *Morris v. Hunt*, 51 Tex. 609. 2. Nor did it convey the interest of Newton. It does not appear with reasonable certainty what particular 320 acres of the survey was intended as that out of which his interest was to be conveyed. *Munnink v. Jung*, 3 Tex. Civ. App. 395, 22 S. W. 293.

(6) Warranties and Representations.

See post, "Warranties and Repre-

sentations; Rule of Caveat Emptor," IV, G, 6, b.

(7) Operation and Effect of Deed.

(a) As Color of Title; Defective Deeds.

An administrator's deed sufficiently describing the land conveyed to support the limitation by five years' possession is not affected by the fact that the judge ordering and confirming the sale was disqualified where, the fact is not apparent upon the face of the deed. *El Paso v. Ft. Dearborn Nat. Bank*, 96 Tex. 496, 74 S. W. 21.

A deed from an administrator for land sold at his administration sale, under order of the probate court, and duly confirmed by that court, passes the legal title of the land to the purchaser, notwithstanding such deed may be voidable at the suit of a subsequent administrator, or of the heirs or devisees of the estate, on account of fraudulent collusion in the sale between the purchaser and the former administrator. Consequently, in a suit for the recovery of the land by the subsequent administrator or by the heirs or devisees, such a deed, being voidable only and not void, is sufficient as a link in the title adduced to support the plea of the statute of limitations of three years. *Pearson v. Burditt*, 26 Tex. 157.

Although an executor's deed of a land certificate by an order of the court conveyed only the certificate, it was a deed to land within meaning of five years' statute of limitation when the certificate had been located and patented and the deed adopted as a part of the recitals in the decree attached to it and recorded with it which covered both the certificate and the land patented under it. *Wood v. Mistretta*, 20 Tex. Civ. App. 236, 242, 49 S. W. 236, 50 S. W. 135, affirmed in 93 Tex. 678, no op.

And although the deed may be absolutely void because there was no valid order of sale, the statute of limitations begins to run at once as against the

heirs seeking to recover the land. *Millican v. McNeill*, 102 Tex. 189, 114 S. W. 106.

(b) Equitable Title Not Affected by Defective Deed.

A sale of a decedent's land pursuant to an order therefor, a confirmation thereof, and the payment of the price, constitute an equitable title sufficient to protect the purchaser, notwithstanding any defects in the administrator's deed. *McBee v. Johnson*, 45 Tex. 634. See, also, *Erhart v. Bass*, 54 Tex. 97; *Whitaker v. Thayer*, 38 Tex. Civ. App. 537, 86 S. W. 364, 366; *Sypert v. McCowen*, 28 Tex. 635, 638; *Bartlett v. Cocke*, 15 Tex. 471, 477.

(c) Right, Title, and Interest Conveyed by Deed.

See post, "Title, Interest and Estate Passing to Purchaser," II, G, 6, c.

(d) Operation and Effect of Deed as Evidence.

aa. Admissibility.

(aa) Laying the Foundation.

aaa. Necessity for Proof of Authority to Sell and Convey.

In the absence of proof of an administrator's power to sell, his deed is not admissible. *Terrell v. Martin*, 64 Tex. 121, 126.

The deed of an administrator pro tem, executed without authority, is not admissible for any purpose, in a suit afterwards instituted by the same person as administrator, to recover the property mentioned in the deed. *Robinson v. Martel*, 11 Tex. 149.

In trespass to try title, it appeared that B., who held a conditional head-right certificate, executed to W. a title bond for the land in dispute, and at the same time W. executed to B. a title bond for other land; and that both B. and W. died before executing deeds pursuant to the bonds. Held, that it was error to admit in evidence a deed of the W. land, executed by

W.'s surviving wife and administratrix, who had married again, and B.'s executor, to a third person, in the absence of any showing of authority for the execution of the deed by her. In such case it was proper to admit in evidence the transcript of the probate court showing that, on the petition of one S., the land described in the title bond to W., was conveyed to S., in compliance with such bond, for the purpose of showing that B. received the benefit of such land. *Buchanan v. Park* (Civ. App.), 36 S. W. 807.

bbb. Facts Required to Be Proved to Show Authority.

Order of Sale, Confirmation, etc.—A deed of a headright land certificate made by an administrator is not available as a defense in an action of trespass to try title for the land where no order of court authorizing the deed to be made, and no order of confirmation, is shown. *Lynn v. Burnett*, 34 Tex. Civ. App. 335, 79 S. W. 64.

An administrator's deed for land is not admissible as evidence without proof that the maker was administrator; nor without proof of the confirmation of the sale, where the deed does not recite such confirmation. *Ury v. Houston*, 36 Tex. 260.

Necessity for Proving Existence of Debts Authorizing Sale.—In trespass to try title, defendants claiming under an executor's deed, pleaded the statute of five and ten years' limitation, and improvements in good faith. Held, that the deed was admissible under these pleas, without proof of the existence of debts of the estate authorizing the sale. *McCown v. Terrell*, 9 Tex. Civ. App. 66, 29 S. W. 484 (see 87 Tex. 470).

ccc. Same; How Shown.

(aaa) Generally.

The power of person executing deed as administrator to so execute it should be shown by production of

properly certified transcripts of orders of court under which he acted. *Tucker v. Murphy*, 66 Tex. 355, 360, 1 S. W. 76.

A deed purporting to have been executed by an administrator at a sale under order of court is not admissible in trespass to try title, to show title in plaintiff, unless the order under which the sale was made is produced, or its absence accounted for and its existence proved. *Riley v. Pool*, 5 Tex. Civ. App. 346, 24 S. W. 85.

(bbb) Variance; Idem Sonans.

An administrator's deed to F. Joseph Calvit was not inadmissible because the order of confirmation showed that the sale was to Joseph Calvert, the names being idem sonans. *Day Land, etc., Co. v. New York, etc., Land Co.* (Civ. App.), 25 S. W. 1089 (see 93 Tex. 638, no op.).

(ccc) Recitals in Deed as Evidence of Authority to Sell and Convey.

An administrator's deed, however full its recitals may be, can not supply the absence of competent testimony of the orders of court giving it effect to pass title. *Bartley v. Harris*, 70 Tex. 181, 183, 7 S. W. 797; *Terrell v. Martin*, 64 Tex. 121, 125; *White v. Jones*, 67 Tex. 638, 4 S. W. 161.

Recitals in an executor's deed are not competent to establish the testator's will, the probate thereof, and the proceedings ending in the execution of the deed as against persons not in privity with the grantor. These facts must be proved by competent evidence without the aid of any recitals in the deed. *McCoy v. Pease*, 17 Tex. Civ. App. 303, 42 S. W. 659.

A deed which, merely from its recitals, purports to have been executed by an administrator upon a sale of lands previously directed and subsequently confirmed by the probate court, is inadmissible in evidence, and proves no conveyance of title, unless coupled with competent proof of the

jurisdictional steps thus recited. *Tucker v. Murphy*, 66 Tex. 355, 1 S. W. 76.

In Case of Ancient Deeds, Destroyed Records, etc.—See the titles ANCIENT DOCUMENTS, vol. 1, pp. 256, 258, 265; BEST AND SECONDARY EVIDENCE, vol. 2, p. 796.

Though the recitals in an administrator's deed are not ordinarily sufficient to show an order for the sale of the land of the estate, yet in a case where the records of the probate court and the papers in the proceedings were destroyed, the administrator was dead, and 25 years had elapsed since the sale, it will be presumed that the orders were made as the administrator's deed set forth, from the failure of the heirs to set up their claim against the deed for so long a time. *White v. Jones*, 67 Tex. 638, 4 S. W. 161.

"It was held by this court in the case of *Terrell v. Martin*, 64 Tex. 121, 124, that the recitals in an administrator's deed are not sufficient to show an order for the sale of land of the estate. Of the correctness of that ruling as applied to the facts of that case there can be no doubt. The record of the proceedings of a court, if they be in existence, are necessarily the best and the only competent evidence of its orders. No reason was shown in that case why a copy of the minutes of the court could not be had, and hence the court in that case was right in holding that the recitals in the deed were not sufficient." *White v. Jones*, 67 Tex. 638, 640, 4 S. W. 161.

"In *Baker v. Coe*, 20 Tex. 429, 430, this court held that although the records of the court failed to show that everything had been done which was required by law in making sales of the property of deceased persons, yet the sale having been proved and nothing shown to impeach its fairness, it would be presumed that the court and its officers did their duty and the validity of the sale would be sustained. The lapse of time in that case was

about twenty-five years." *White v. Jones*, 67 Tex. 638, 640, 4 S. W. 161.

In a suit to try title between the grantees of decedent's heirs and the grantees of her administrator, defendants introduced a deed by the administrator more than 60 years old, which recited an order to the administrator to sell land of the estate for certain purposes, etc. It did not appear that the sale as made had been reported to the court, but it was shown that the county courthouse with all the deeds and probate records of the county had been burned more than 30 years before the suit. Defendants and their vendors who claimed under the deed had paid taxes on the land for more than 50 years, and plaintiffs until the suit had never made any effort to enforce their claim to the land. The administrator was a son-in-law of the decedent, and had died many years before the date of the trial. Held, that the deed was properly admitted in evidence, and sufficient to pass the title to the land described therein, since under the circumstances it must be presumed that every requirement of the law necessary to the validity of the sale was complied with. *Fields v. Burnett*, 49 Tex. Civ. App. 446, 108 S. W. 1048, affirmed, no op.

Under such circumstances another deed by the administrator to another portion of the land, and more than 50 years old, and reciting an order directing the sale, the administrator's report of the sale, and the court's order directing the sale, the administrator's report of the sale, and the court's order directing the administrator to make a deed conveying the land to the purchaser, was admissible in evidence, and sufficient to pass title as against the collateral attack made on it by the grantees of decedent's heirs. *Fields v. Burnett*, 49 Tex. Civ. App. 446, 108 S. W. 1048, affirmed, no op.

(bb) Deeds Admissible under Statute; Evidence of What Facts.

Under the express provisions of

Sayles' Ann. Civ. St. 1897, arts. 2152, 2153, an administrator's deed, executed under order of the county court, conveying land of a decedent to a trustee, as provided by a bond for title executed by intestate in his lifetime, was prima facie evidence of title in the trustee. *Dutton v. Wright*, 38 Tex. Civ. App. 372, 85 S. W. 1025, affirmed in 101 Tex. 634, no op.

Under Sayles' Rev. Civ. St., art. 2153, providing that a conveyance under the provisions of this chapter shall be prima facie evidence that all the requirements of law have been complied with in obtaining it, an administrator's deed made under the statute authorizing specific performance by an administrator of a contract for the conveyance of land made by his intestate, is admissible in evidence without further proof. (Civ. App.) *Hughes v. Wright & Vaughan*, 97 S. W. 525, judgment reversed on another point in 100 Tex. 511, 101 S. W. 789.

Though an administrator's deed under Rev. St., arts. 2091, 2092, providing for the conveyance of property sold, after confirmation of the sale passes to the purchaser all the title that testate or intestate had in the property described, yet the recitals of the deed which refer to the proceedings in administration authorizing its execution are not prima facie evidence that those proceedings occurred. *Terrell v. Martin*, 64 Tex. 121.

An administrator's deed which, under the statute, is made prima facie evidence, is prima facie evidence of the act of sale only; that is, of the time, place, mode of selling, notice, etc. *Terrell v. Martin*, 64 Tex. 121.

An administrator's deed is prima facie evidence of the act of making the sale but not of his authority. *Terrell v. Martin*, 64 Tex. 121, 125.

(cc) Deeds Executed by Attorney or Agent.

Although the discretionary power of an executor can not be delegated, yet

his deed executed through an attorney may be admissible under the pleas of five and ten years' limitation, and improvements in good faith. *McCown v. Terrell*, 9 Tex. Civ. App. 66, 29 S. W. 484 (see 87 Tex. 470).

(dd) Deed as Evidence of Contract for Location of Land.

The mere recitals in a deed by an executor of a party's locative interest in a land certificate is not evidence of any contract between the party and the decedent for the location of land, or that the party located the land. *League v. Williamson*, 33 Tex. Civ. App. 647, 77 S. W. 436.

(ee) Estoppel to Object to Admission of Deed.

Where plaintiffs seek to exclude an executor's deed through which defendants claim, proof that plaintiffs had previously brought suit to foreclose the vendor's lien retained in the deed, and to collect purchase money thereby due on the land, is admissible against them by way of estoppel. *McCown v. Terrell*, 9 Tex. Civ. App. 66, 29 S. W. 484 (see 87 Tex. 470).

So it may be shown that the plaintiffs had accepted the purchase price and ratified the deed in writing. *McCown v. Terrell*, 9 Tex. Civ. App. 66, 29 S. W. 484 (see 87 Tex. 470).

bb. Weight and Sufficiency of Deed as Evidence.

(aa) As Proof of Authority to Sell.

A recital in an administrator's deed that at the ——— term of court an order and decree to sell land had been made, followed by a recital that the grantor was appointed administrator of the estate of L. on December 19, 1840, which was the date of the issuance of letters of temporary administration, was insufficient to raise a presumption that an order had been granted to the grantor as permanent administrator authorizing him to sell land. *Cruse v. O'Gwin*, 48 Tex. Civ. App. 48, 106 S. W. 757.

A certified copy of an administrator's deed executed in 1848 recited that the probate court had ordered the administrators to sell land sufficient to liquidate the debts of the estate; that certain named appraisers had been appointed and had appraised the property to be of the value of \$— per acre, amounting to \$—, that the administrator, after due notice, offered the lands at public sale; and that the grantee bid for the said land in a certain sum, etc. The deed and probate records were destroyed by fire. In trespass to try title to the property, the son of the decedent testified that his father died about 1845; that the estate was administered by the administrators named, and was closed prior to 1849; that the league from which the land was sold for the purpose of paying community debts was community property; and that the grantee was the purchaser of some of it. Held to conclusively show the authority of the administrator to sell the land. *Williams v. Cessna*, 43 Tex. Civ. App. 315, 95 S. W. 1106.

(bb) As to Identification of Land.

An administrator's deed and a reference to the description therein in an order of confirmation held to show that the property sold was that described in the deed, and not that described in the administrator's report and the court's order of confirmation. *El Paso v. Ft. Dearborn Nat. Bank*, 96 Tex. 496, 74 S. W. 21.

r. When Title Vests.

See ante, "Vests Title," II, G, 5, p, (15), (b); "Same; Relates Back," II, G, 5, p, (15), (c).

s. Payment.

(1) Mode and Medium.

Where the terms of the administrator's sale provide that the bidder shall give note with good personal security for price, auctioneer can not refuse to accept note unless there be reasonable

ground to believe security insufficient. *Hope v. Alley*, 9 Tex. 394, 396.

Payment in Confederate Money.—

An executor, authorized to sell testator's property and to divide the proceeds between two legatees, was not guilty of a breach of trust merely because he took Confederate money in 1864 in payment of the property sold. *Kennedy v. Briere*, 45 Tex. 305.

An executor obtained an order of sale during the Civil War, and sold for Confederate money, which he paid to such creditors of the estate as would accept. After the war, he was permitted to resign and settle his accounts on Confederate money returns and vouchers. Held, in an action for accounting, that he must be charged with the value of the assets at the time he sold them for Confederate money. *Trammel v. Philleo*, 33 Tex. 395.

(2) Proof of Payment; Presumptions.

Where an administrators' sale of land is illegal, no presumption will arise from the receipt of the consideration in the deed that the purchase price has been paid. *Fishbeck v. Page*, 17 Tex. Civ. App. 183, 43 S. W. 317.

(3) Proceedings to Enforce Payment, to Recover Land, to Resell in Case of Default, etc.

(a) Rights and Remedies.

aa. To Enforce Payment.

Where, on an administrator's sale of an intestate's land under order of court, the purchase price is not paid, and no deed made to the purchaser, who claims the benefit of his purchase, but the sale is confirmed, and the administrator charges himself with the price in his accounts, and after settlement is discharged, he is subrogated to the rights of the estate against the purchaser, and has an equitable lien on the land for the amount of the price, as against a purchaser under execution sale against the former purchaser. *Parker v. Smith* (Sup.), 11 S. W. 909.

bb. To Recover Land, Foreclose Lien, etc.

The fact that a deed was made by an administrator under an order of the court, reserving a lien for the unpaid purchase money, does not defeat the claim that the contract was executory and that the representatives of the estate have same remedy for enforcement of its rights that an individual would have in a similar transaction. *Shotwell v. McCardell*, 19 Tex. Civ. App. 174, 176, 47 S. W. 39, distinguishing *Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590; *Burgess v. Millican*, 50 Tex. 397; *Wright v. Wooters*, 46 Tex. 380.

Where Recovery of Purchase Money Barred by Statute of Limitations.—A deed by an administrator of land sold under order of the court, which contains a reservation of a lien to secure unpaid purchase money, is an executory contract, entitling the vendor, upon default of payment, to recover the land, unless the vendee has secured title through adverse possession, although the recovery of the purchase money be barred by limitation. *Shotwell v. McCardell*, 47 S. W. 39, 19 Tex. Civ. App. 174.

cc. Resale in Case of Default.

If a purchaser of land at an administrator's sale fail to comply with the terms of the sale, the administrator can and should readvertise and resell the property, and for this purpose a new order of sale is not necessary; but in order to make the defaulting purchaser liable for the statutory damages and for any deficiency in the price obtained at the second sale, the administrator must readvertise and sell within a reasonable time. *Sypert v. McCowen*, 28 Tex. 635; *Short v. Ramsey*, 18 Tex. 397, 399.

Where a purchaser at an administrator's sale fails to comply with the terms of the sale, the administrator has only to readvertise and proceed again to sell the property, and no new

order of sale is requisite. In all cases the administrator should proceed to readvertise and sell as soon as he conveniently can after the default of the bidder is ascertained. Unless this is done within a reasonable time, such bidder can not be held answerable for any deficiency of price at the second sale. *Short v. Ramsey*, 18 Tex. 397.

Reasonable Time.—What is a reasonable time for a resale where a bidder at an administrator's sale fails to comply with the terms of the sale must depend upon the circumstances of each case. *Short's Adm'r v. Ramsey*, 18 Tex. 397.

Damages Recoverable.—At a sale of lands belonging to an estate, defendant purchased two tracts and the administrator tendered to him a deed to the same, which he refused upon the ground that the land was not sufficiently described, whereupon the administrator resold the land, but did not receive as much as defendant had bid for it. Held, that the administrator could recover the amount of the difference, with 10 per cent damages. *Akin v. Horn*, 2 Willson, Civ. Cas. Ct. App. § 11.

A delay from January to the following October by an administrator in readvertising and selling land, where the bidder at a final sale has defaulted, if unexplained, is such a delay as will discharge the first bidder from all liability to make good any difference in price. *Short's Adm'r v. Ramsey*, 18 Tex. 397; *Sypert v. McCowen*, 28 Tex. 635, 639.

Remedy Not Exclusive.—Notwithstanding Hart. Dig., art. 1175, providing that, when a bidder at a probate sale shall fail to comply with his bid, the property shall be readvertised and sold, and the first bidder charged with any deficiency plus 5 per cent on his own bid, the administrator making the sale can maintain an action against the purchaser for the amount of his bid, since the remedy provided by

statute is merely cumulative. *Dawson v. Miller*, 20 Tex. 171.

(b) Jurisdiction.

The probate court is without jurisdiction to issue an execution on default in the payment of a bond given for the purchase money of land sold by an administrator, exclusive original jurisdiction to render judgment and issue execution being in the district court. *Kent v. Kelso*, *Dallam*, Dig. 523.

(c) Administrator's Declaration or Other Pleading.

F brought suit by injunction to restrain an administrator from selling land under trust deed to satisfy a note held by the administrator against F for the purchase money; the note was described in F's petition, and the facts of its execution stated. The administrator, in his answer, prayed for judgment on the note. At the trial, the injunction was dissolved, and, the cause being submitted to the court, a judgment was rendered for the administrator on the note, though the same was not offered in evidence. Held, that it was unnecessary for the administrator to set out the note, or formally declare on it in his answer, or to offer it in evidence, and there was no error. *Walker v. Burks*, 48 Tex. 206.

(d) Defendant's Answer or Other Pleading.

A general allegation, that an administrator, represented in a general way at a public sale of land claimed as belonging to the estate, that the estate had good title to the same, with nothing more alleged to show any deception intended or accomplished by the administrator, is not sufficient, in a petition by the purchaser, to authorize an injunction to enjoin a sale of the land, under a trust deed, to satisfy the purchase-money notes. *Walker v. Burks*, 48 Tex. 206.

An answer setting up fraud and false representations should aver that the

representations, however false and fraudulent, were relied on by the defendant, and that they did actually deceive him. *Moreland v. Atchinson*, 19 Tex. 303; *Luckie v. McGlasson*, 22 Tex. 282; *Woolridge v. Womack*, 1 App. Civ. Cases, § 338.

In an action on a note given as a part of the purchase price of land sold by an executrix where the answer positively alleged that the executrix lacked the power to convey, that the title was defective and that the deed was not sufficient but did not state whether the sale was public or private or what constituted the want of power on the part of the executrix or the defect of title or why the deed was not sufficient but the plaintiff failing to point out the defects in the mode of statement by special exceptions that were applicable, the allegations, though vague and general, show sufficiently the want of title having been made. *Hurt v. McReynolds*, 20 Tex. 595.

(e) Evidence.

In a suit by an administrator on a note given by defendant and his sureties for land bought at administrator's sale, defendant pleaded that he held an approved claim against the estate which he was induced to purchase by the administrator agreeing that such claim might be applied in making a pro rata payment on the land to the extent of \$2,500. This was denied by the administrator. The estate as to general creditors was insolvent. On the day of sale, defendant on approaching the administrator, took from his pocket the claim referred to and which the administrator had not before seen and asked him how much land it would buy, to which question after a hasty calculation, he answered \$2,500. Held, that where the good faith of defendant in the purchase of the claim was denied, nothing short of the clearest proof and the most perfect good faith could sustain the defense. *Floyd v. Rust*, 58 Tex. 503.

Held, further, that the answer of the administrator was rather an expression on an opinion than a proposition to receive the claim in payment for that amount of money in case of a purchase of land. *Floyd v. Rust*, 58 Tex. 503.

An administrator can not agree that the sums due by an estate to the purchaser on the petition sale shall be credited on payment of the purchase price. Therefore testimony as to such an agreement is irrelevant. *Rindge v. Oliphint*, 62 Tex. 682, 685.

(f) Matters Pleadable in Defense.

aa. That Sale Has Not Been Reported or Confirmed.

See ante, "Purchaser Not Required to Complete Sale until After Confirmation," II, G, 5, p, (2), (b).

bb. Failure of Administrator to Execute Deed.

See, also, ante, "Right of Purchaser to a Conveyance," II, G, 5, q, (2).

The confirmation of an administrator's sale by the probate court vests the title to the land sold in the purchaser, subject to the payment of the purchase money; and, after such confirmation, it is no defense to a note given for the purchase money in the hands of an indorsee after maturity that the administrator has not made a deed, such deed being at most but formal evidence of title. *Rock v. Heald*, *Massie & Co.*, 27 Tex. 523.

cc. That Sale Was Invalid, Defective or Irregular.

See ante, "As Curing Defects and Irregularities," II, G, 5, p, (15), (a).

A purchaser from an administrator can not retain the property and refuse to pay the price, on the ground that the sale was invalid. *Claiborne v. Yoeman*, 15 Tex. 44.

dd. That Title Is Defective; Failure of Title.

The doctrine of caveat emptor applies to purchases at administrators' sales, and it is no defense to an action upon a promissory note executed in

consideration of a purchase at an administrator's sale that the title to the property for which the note was given has failed. *Doxey's Adm'r v. Burns*, 37 Tex. 719.

The purchaser from an administrator must pay although the title is defective. *Williams v. McDonald*, 13 Tex. 322, 323.

"In administrators' sales the administrator is not, in general, bound, in selling the property of an estate, to make known defects of title within his knowledge; and where there is neither fraud nor misrepresentations by the administrator in selling, and the sale is regular, the purchaser is bound to pay the amount of his bid, although there be a defect in the title. *Woer. Admin.*, § 484." *Altgelt v. Mernitz*, 37 Tex. Civ. App. 397, 83 S. W. 891.

At law, the rule governing a purchase at administrator's sale is caveat emptor. In equity, if there has been such fraud or mistake in the sale as would entitle a purchaser to relief, the burden rests on him to establish such facts. It has not been decided by this court that a mere want of title in an estate to land, at the time of administrator's sale, would constitute an equitable defense. *Ward v. Williams*, 45 Tex. 617.

The mere fact, that at the time of making an administrator's sale of land the records of the clerk's office in the county where the land is situate, showed that the intestate had conveyed the land in his lifetime, of which fact the purchaser had no actual knowledge, will afford no defense in a suit brought on a note given for the purchase money. *Crayton v. Munger*, 9 Tex. 285; *Lynch v. Baxter*, 4 Tex. 431, 437; *Ward v. Williams*, 45 Tex. 617, 620, citing *Edmondson v. Hart*, 9 Tex. 554; *Williams v. McDonald*, 13 Tex. 322; *Coombs v. Lane*, 17 Tex. 280; *Walton v. Reager*, 20 Tex. 103.

The suggestion made in *Walton v.*

Reager, 20 Tex. 103, that a sale by the intestate, though unknown to the administrator and to the purchaser at administrator's sale, would constitute a fraud upon the purchaser. Held, to be obiter dicta. *Ward v. Williams*, 45 Tex. 617.

"The cases most analogous to this, perhaps, are that of *Hawpe v. Smith*, 25 Tex. Supp. 448, 450, when there appeared to be a defect of title in writing, and no positive proof of representations about the title at the sale by the administrator, and that of *Thompson v. Munger*, 15 Tex. 523, where it was alleged that the intestate had no title, having sold it by deeds recorded, and that the administrator knew of the deeds before the sale by him, but made no representations as to the title at the time of the sale. In both of these cases, being suits for the purchase money, the court held, that the purchasers were not entitled to equitable relief. The representations as to good title alleged to have been made by the administrator in this case were of a general character, and did not relate to any specific matter relating thereto calculated to mislead any one, and the proof in this case about representations, like that in *Hawpe v. Smith*, were not near so strong as the allegation." *Ward v. Williams*, 45 Tex. 617, 620.

ee. Failure of Administrator to Extinguish Outstanding Liens as Per Agreement.

A purchaser at an administrator's sale may set up an outstanding mortgage lien upon the land in suit on his purchase-money notes, where it was agreed at sale that it was to be extinguished by administrator. *May v. Taylor*, 27 Tex. 125, 128.

M. executed a note to T., administrator of the estate of W., deceased, for the amount of the purchase money of a tract of land purchased by M. at a public sale made by the administrator; M. mortgaging the land to T. to

secure the note. After the maturity of the note, T. made a deed to M., and subsequently sued M. on the note and to foreclose the mortgage. In his answer M. alleged that there was an outstanding mortgage upon the land, executed by the intestate of the administrator; that said mortgage was to have been discharged by T.; that it was upon these terms, by an express agreement with T., that the land was purchased; that the mortgage was still unsatisfied; and that, the estate of W. being insolvent, M. would not be able to make the amount of said mortgage and interest from said estate in case he should be compelled to pay said mortgage. Held that, this being a case of an executed contract, the plea presented facts which entitled the defendant to be let in to his defense, and that the court erred in sustaining the exception of the plaintiff to the answer. *May v. Taylor*, 27 Tex. 125, following *Cooper v. Singleton*, 19 Tex. 260.

ff. Mistake and Fraudulent Representations.

See, also, post, "Warranties and Representations; Rule of Caveat Emptor," II, G, 6, b.

At law, the rule governing a purchase at an administrator's sale is caveat emptor. In equity, if there has been such fraud or mistake as would entitle a purchaser to relief, the burden rests upon him to establish such facts. *Ward v. Williams*, 45 Tex. 617.

In an action upon a note the answer alleged that it was given for a tract of land of 170 acres purchased at administrator's sale, and that the estate never had title to more than 25 acres. Fraud and fraudulent representations by the administrator with regard to the title and number of acres were alleged in general terms. Held, that the answer was not sufficient to defeat the rule of caveat emptor, as it obtains in administration sales. *Wooldridge v. Womack*, 1 White & W. Civ. Cas. Ct.

App. § 338; *Walton v. Reager*, 20 Tex. 103; *Ward v. Williams*, 45 Tex. 617.

Fraudulent representations as to title by an administrator in an executory contract for the sale of land, under which the other party agreed to pay rent for a year if the title proved unsatisfactory, may be pleaded in defense of an action for the rent, and the rule estopping a tenant from denying the landlord's title does not apply in such case. *Cross v. Freeman*, 19 Tex. Civ. App. 428, 47 S. W. 473.

gg. Breach of Covenant or Warranty.

See post, "Warranties and Representations; Rule of Caveat Emptor," II, G, 6, b.

hh. That Sale Was Illegal or Contrary to Public Policy.

An administrator's sale, contrary to public policy and illegal, can not be enforced. *Roehl v. Pleasants*, 31 Tex. 45, 48.

Where an administrator sold land to which there was no other title than the location of a rejected and fraudulent certificate, the plea of failure of consideration ought to have been sustained. *Roehl v. Pleasants*, 31 Tex. 45.

The principle of caveat emptor in judicial sales has no application to such a case. It was simply a question of justice, where the estate parted with nothing and the purchaser got nothing. *Pas. Dig.*, art. 1333, note 499. *Roehl v. Pleasants*, 31 Tex. 45.

ii. Tender.

Where a note payable on a certain day is given for the price of land sold by an administrator under order of court, the administrator is entitled to maintain an action thereon after maturity of the note; but if the purchaser alleged and proved tender, and demand of the deed made in pursuance of the order of the probate court confirming the sale, the administrator will be liable for costs. *Calhoun v. Thomas*, 13 Tex. 89.

In such a case execution should be suspended until title made; but it seems the court should require the money to be deposited. *Calhoun v. Thomas*, 13 Tex. 89, 90.

jj. Failure of Administrator to Renew His Bond.

The omission of an administrator to renew his bonds from year to year is no ground of defense to an action brought by him to recover the purchase money for land sold by him, where he has renewed them before making such sale, although such renewal was subsequent to the order of the county court directing the sale. *Edwards v. Raguet*, 19 Tex. 164.

kk. Statute of Limitations.

Right of heirs to subject land sold at administrator's sale to payment of balance of purchase money is barred by limitations where heirs for more than statutory period of limitations, do nothing to keep judgment obtained by administrator on note given for purchase price, in force. *Miller v. Anders*, 21 Tex. Civ. App. 72, 77, 51 S. W. 897, affirmed in 93 Tex. 734, no op.

ll. Defenses Available to Sureties.

In a suit against a surety upon a note executed for land sold at administration sale, the principal in the note being dead, and neither his administrator nor heirs being parties, the surety can not set up the invalidity of the sale as a defense. *Lathrop v. Masterson*, 44 Tex. 527.

Where a purchaser at an administrator's sale is satisfied with his title and retains possession, his surety on bond executed for the land can not set up as defense that sale was invalid. *Lathrop v. Masterson*, 44 Tex. 527, 528.

In an action against several on a promissory note, the defendants pleaded that they gave the note as sureties for the purchase of property at an administrator's sale, in the expectation that the administrator would

perform his duty to the estate he represented by also taking from the purchaser the mortgage security required by law and by the order of sale from the probate court. There was no allegation of any fraud practiced by the plaintiff on the defendants. Held, that the plea was insufficient. *Wornell v. Williams*, 19 Tex. 180.

mm. Counterclaim, Set-Off, etc.

As a general rule, in an action brought by an administrator against a purchaser at an administrator's sale, the defendant can not plead in set-off a debt that has been allowed by the administrator and approved by the probate judge. But this rule admits of exceptions, as where a man is the sole creditor of an estate. *Hall v. Hall*, 11 Tex. 526.

A judgment against defendant's intestate can not be established as an offset to a note given at an administrator's sale. *Walker v. Burks*, 48 Tex. 206.

In a suit by an administrator against a purchaser at a probate sale possession of claim by vendee does not give him right to set it off when estate is insolvent. *Floyd v. Rust*, 58 Tex. 503, 510.

Facts that purchaser of land belonging to estate and sold on partition credited amount of purchase money on claim against estate gives no equity protectable in suit to enforce vendor's lien. The credit thus entered would be the proper subject of cancellation and he could proceed to collect his claim. *Rindge v. Oliphint*, 62 Tex. 682, 685; *Townsend v. Smith*, 20 Tex. 465; *Burns v. Ledbetter*, 56 Tex. 282, 285.

The cases of *Atchison v. Smith*, 25 Tex. 228, and *Guthrie v. Guthrie*, 17 Tex. 541, decide that a party who has purchased property of an estate and given his note, can not, when sued by the administrator, offset against the note a claim which he may hold against the estate. To allow this, the court

held, would virtually vest the probate jurisdiction and transfer the settlement of estates to the district court. *Floyd v. Rust*, 58 Tex. 503, 507.

Offset by Agreement.—The rule, however, is for the benefit of the executor or administrator. It exempts them from compulsion, but does not interfere with their voluntary action. They act upon their own judgment, and at the peril of being held accountable upon a deficiency of assets. *Teas v. McDonald*, 13 Tex. 349, 352. In the two cases last cited, there was no dispute about the facts. *Dickinson* and *Swenson* had acted in perfect good faith. They had relied upon the acts and representations of the administrators, and it would have been a fraud upon them if those acts and representations were repudiated. *Floyd v. Rust*, 58 Tex. 503, 508, explaining *Swenson v. Walker*, 3 Tex. 99, and *Dickenson v. McDermott*, 13 Tex. 248. See the title EXECUTORS AND ADMINISTRATORS, ante, p. 364.

An administratrix can not make a binding agreement with a creditor of the estate to allow a credit on his claim as a payment of purchase money bid by him for lands of the estate. *Rindge v. Oliphint*, 62 Tex. 682.

In an action by an administrator to recover land for his estate or in the alternative to recover on a promissory note given in payment for the land, sixteen years after sale in which no mortgage had been given to secure payment though order of sale so directed, defendant as a defense might show that plaintiff did not intend insisting on prompt payment of note but that delay resulted from agreement that defendant should be allowed amount of note for claims due him from estate, though defendant could not plead such claims as set-off. *Cundiff v. Corley* (Civ. App.), 27 S. W. 167, 168.

At an administrator's sale of land, defendant bought, and gave a note

with sureties for the purchase money, and, when sued, sought to apply, pro tanto, a claim held by him against the estate represented by the administrator, claiming that the administrator, at the time of the sale, consented to such application. This the administrator denied. The fact was not clearly proved, the estate was insolvent, and there was some doubt as to defendant's good faith in becoming the owner of the claim. Held, that his defense could not avail him, nor could it avail the sureties; the administrator having promised them nothing, any understanding by the sureties when they contracted the obligation that it was to be paid with the approved claim of their principal was no defense for them unless such understanding resulted from the acts of the administrator. *Floyd v. Rust*, 58 Tex. 503.

Where Land Sold to Satisfy Creditor's Lien.—A creditor of the estate, who asks that land on which he has a lien be sold, and who purchases at such sale, may apply to the county court to fix the amount of money to be paid by him to the administrator for the expenses of such sale, in order to have the balance of his bid credited on his claim against the estate. *Huddleston v. Kempner* (Civ. App.), 28 S. W. 236.

A creditor of an insolvent decedent who buys the land sold by the administrator to pay debts must pay the latter his commissions, but may retain the balance of his bid to apply to the payment of his claim. *Claridge v. Lavenburg*, 7 Tex. Civ. App. 155, 26 S. W. 324.

(g) Judgment or Decree.

In a suit by an administrator to enforce a vendor's lien, brought in a district court, a decree, rendered by consent, annulling the sale, is not void by reason of not being approved by the probate court having jurisdiction of the estate. *Titus v. Johnson*, 50 Tex. 224.

(h) Costs.

See ante, "Costs," II, G, 5, p, (13); post, "Disposition of Proceeds," II, G, 5, t.

t. Disposition of Proceeds.

The proceeds of an administrator's sale must be held as general fund to pay pro rata all debts of some class, not a particular debt. *Moore v. Owsley*, 37 Tex. 603, 606.

Where property of an estate, covered by a lien, is sold for less than sufficient to pay the lien and costs, it is error to apply the entire proceeds to the lien, and include the costs in the costs of administration, to the prejudice of other lien creditors. The costs of sale should first be paid from the proceeds. *Greer v. Riley's Estate*, 53 S. W. 578, 92 Tex. 699.

Where real estate of a deceased person, subject to a vendor's lien for purchase money, is sold by his administrator, the fund obtained from such sale can not be applied in payment of the expenses of administration before distribution, but is liable only for legitimate costs of the sale; the cost of administration being payable out of the entire estate. *Stell v. Lewis*, 2 Posey Unrep. Cas. 533.

Where an administrator, by order of the probate court, sells a located but unpatented land certificate for the payment of debts, as between the heir of the intestate and the creditor for whose benefit the certificate was sold the equity of the creditor has precedence. *Peevy v. Hurt*, 32 Tex. 146.

u. Review of Proceedings.

(1) In the Same Court.

See, also, ante, "Revocation of Order of Confirmation," II, G, 5, p, (12).

The county court has jurisdiction to review and set aside its orders relating to the sale of land belonging to a deceased minor's estate to satisfy the debts of the estate. *Edwards v. Halbert*, 64 Tex. 667; *Fortson v. Alford*, 62 Tex. 576.

(3) In Higher Court.

As to appeals from order of confirmation, see ante, "Appellate Proceedings," II, G, 5, p. (11). See, also, the title COURTS, vol. 5, pp. 255, 300.

(a) Who May Seek Review.

See the title CERTIORARI, vol. 4, pp. 39, 43.

(b) Mode of Review.

The legality of an order for the sale of land by an administrator can not be tested by resisting an order for the removal of the administrator because of his disobedience thereof, but the remedy is by appeal or certiorari. *Wright v. McNatt*, 49 Tex. 425.

(c) Parties.

See the title CERTIORARI, vol. 4, p. 43.

(d) Petition or Other Pleading.

See the title CERTIORARI, vol. 4, p. 49.

(e)* Amendments.

Where in certiorari by an heir to review proceedings in a county court settling the ancestor's estate in which proceedings land was sold, a judgment was entered by agreement after the writ issued setting aside the sale and among other things settling the administrator's right to certain commissions claimed by him, allegations in the original petition attacking the administrator's right to such commissions were immaterial, though carried into an amendment to the petition made after the agreement was executed. *Kalteyer v. Wipff*, 92 Tex. 673, 52 S. W. 63.

The original proceeding having been brought in due time such amendment was not subject to the defense of limitation. *Kalteyer v. Wipff*, 92 Tex. 673, 52 S. W. 63, reforming and affirming 49 S. W. 1055.

The proceedings for obtaining certiorari still constituted a part of the record, though plaintiff after obtaining the writ had amended without continuing his prayer for certiorari; such

amendment did not change the action and the proceedings continued to be a direct and not a collateral attack upon the sale. *Kalteyer v. Wipff*, 92 Tex. 673, 52 S. W. 63, reforming and affirming 49 S. W. 1055.

(f) Matters Reviewed and Determined.

See the title CERTIORARI, vol. 4, p. 71.

Persons named as executors, and to whom was bequeathed all of the estate remaining after the payment of debts, filed their application for probate of the will and for letters testamentary, which application testator's widow contested, and filed application for letters of administration. Pending this contest a temporary administrator was appointed, and obtained an order to sell certain property as perishable. The executors and widow excepted to the report of sale, and from an order confirming the sale, the widow, but not the executors, appealed to the district court. Pending this appeal the application of the executors for probate of the will was granted, and on appeal by the widow to the district court a like order was made. Executors then settled with the widow for her interest in the estate, and thereafter filed in the district court in the appeal of the widow from the order confirming the sale by the temporary administrator a pleading setting up the facts and objecting to the confirmation of the sale. The widow moved to dismiss her appeal, which was granted, and the application of the executors to have their objections to the confirmation passed on was refused. Held, that under Rev. St. 1895, art. 2262, providing that an appeal to the district court from the county court in the administration of estates shall be tried anew, it was error to refuse to consider the objections filed by the executors to the confirmation of the sale, though they had failed to perfect an appeal from the order of the county court confirm-

ing the same, since the district court was governed by the same rule as to parties and amendments as would obtain on the original hearing in the county court. *Harrell v. Traweck*, 49 Tex. Civ. App. 417, 108 S. W. 1021.

Questions Not Raised below.—The objection that an amended application for an order of sale did not state that it was filed in lieu of an original application of a certain date must be taken by special exception, and can not be first raised on appeal. *Henry v. Drought*, 10 Tex. Civ. App. 379, 30 S. W. 584.

Failure of lien creditors of an estate to object in the lower court to an order authorizing the sale of real estate to pay debts does not prevent them from objecting on appeal that the record fails to show that notice of the application for the order of sale was given as required by law, and that there was no evidence showing any necessity for the sale. *Texas Land & Loan Co. v. Dunovant's Estate*, 87 S. W. 208, 38 Tex. Civ. App. 560.

On application by administrators for the sale of land to pay debts the fact that creditors having liens on part of the land did not object to the sale of the property in bulk did not prevent them from urging on appeal that there was no evidence authorizing such a sale. *Texas Land & Loan Co. v. Dunovant's Estate*, 87 S. W. 208, 38 Tex. Civ. App. 560.

(g) Presumptions on Appeal.

The supreme court must suppose that the probate court in the settlement of an estate, and ordering a sale of real estate, acted properly, though the record does not show the facts essential to regularity. *Dancy v. Stricklinge*, 15 Tex. 557.

6. Right, Title, Duties and Liabilities of Purchaser.

a. Bona Fide Purchasers.

(1) In General; Who May Be Bona Fide Purchaser.

One may be an innocent purchaser

at an administrator's sale. *White v. Frank*, 91 Tex. 66, 40 S. W. 962; *Taylor v. Harrison*, 47 Tex. 454.

A bona fide purchase may be made from an heir or from an administrator. *Taylor v. Harrison*, 47 Tex. 454.

Heirs' relinquishment of their interest in estate lands is sufficient consideration to support their claim of subsequent bona fide purchasers thereof. *Halbert v. De Bode*, 15 Tex. Civ. App. 615, 629, 40 S. W. 1011.

That a purchaser at an administrator's sale paid for the land by crediting the price on her claim against the estate may preclude her from claiming as a bona fide purchaser, but will not preclude her vendee for value. *White v. Frank*, 91 Tex. 66, 40 S. W. 962.

Quære, can an attorney of an administrator purchasing at his sale be an innocent purchaser, when such sale is attacked for irregularities. *Klein-ecke v. Woodward*, 42 Tex. 311. See ante, "Who May Purchase at Sale," II, G, 5, m.

(2) Purchaser from Original Purchaser.

See, also, post, "Rights of Purchaser from Original Purchaser," II, G, 6, c, (5), (b).

A purchase of real estate, in good faith, from the vendee at an administrator's sale, held by order of the probate court, before proceedings are begun to set aside the administration, will be protected. *Halbert v. Young's Heirs* (Sup.), 6 S. W. 747, distinguishing *Fortson v. Alford*, 62 Tex. 576, 577; *White v. Frank*, 91 Tex. 66, 74, 40 S. W. 962.

Though, at an administrator's sale, land was bid off for the administrator by a nominal purchaser, who after confirmation of the sale received conveyance from the administrator, and subsequently conveyed to the latter, in whom the title was thus placed by fraud yet subsequent purchasers for value are not chargeable with notice of the fraud by reason of the record

of the conveyances between the administrator and the nominal purchaser. *Wells v. Polk*, 36 Tex. 120.

Claims against a decedent's estate having been allowed by the fraudulent collusion of the claimant and the administrator, and lands ordered sold by the court to pay the claims, the claimant purchased the lands, and afterwards sold to others. Held, in an action by the heirs of the intestate against these subsequent purchasers, the lands could not be recovered; it appearing they had been purchased bona fide, and for value, from the original purchaser, who was guilty of the fraud. *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550.

That a purchaser at an administrator's sale paid for the land by crediting the price on her claim against the estate, will not preclude her vendee for value from claiming as a bona fide purchaser. *White v. Frank*, 91 Tex. 66, 40 S. W. 962.

Although the jurisdiction of the court was subject to question because of the pendency of a decree in another county fully adjusting and settling the estate, and although the purchaser had notice thereof, still his vendee would be protected in case he paid a valuable consideration and bought without notice. *Edwards v. Halbert*, 64 Tex. 667.

(3) Purchaser at Void Sale.

A purchaser of land at a void probate sale is not an innocent purchaser. *Henderson v. Lindley*, 75 Tex. 185, 12 S. W. 979.

Even though such a purchaser act in good faith he gets no title. *Paul v. Willis*, 69 Tex. 261, 266, 7 S. W. 357, citing *Withers v. Patterson*, 27 Tex. 491, 492; *Hurt v. Horton*, 12 Tex. 285, 287; *Wardrup v. Jones*, 23 Tex. 489; *Marks v. Hill*, 46 Tex. 345, 347, and *Hanrick v. Alexander*, 51 Tex. 494, 501.

A sale of property under an order of the county court will not pass a

title unless the order itself is valid and court's jurisdiction has attached. *Withers v. Patterson*, 27 Tex. 491, 497.

(4) Same; Jurisdictional Defects Rendering Sale Void.

See, also, post, "Collateral Attack," II, G, 7.

An administrator's sale of lands of an estate is void where the court had no power to grant letters of administration, and may be shown to be so in any collateral proceeding in which it is relied on to support a claim of right. *Withers v. Patterson*, 27 Tex. 491, 501.

Sale Made at Wrong Time or Place.—See ante, "Time and Place of Sale," II, G, 5, 1, (6).

Sale of Land Granted under Soldier's Certificate without Consent of Heirs or Next of Kin.—A purchaser at an administrator's sale, where the records show that the land was granted to decedent's estate for services in the army of the republic, acquires no title, when the administrator was not next of kin, nor had authority to apply for administration from the next of kin, as required by Pasch. Dig. art. 1398. *Templeton v. Falls Land & Cattle Co.*, 77 Tex. 55; 13 S. W. 964. See *Chinn v. Taylor*, 64 Tex. 385, a similar case.

(5) Same; Where Court, Having Jurisdiction, Transcends Same.

It does not follow, because the statute authorizes the court to order the sale of land of an estate under certain circumstances, that all sales of such land by order of the court are authorized; and it is certainly true that if the court orders a sale when the circumstances do not exist, which under the law, authorize it to do so, it acts, in doing so, without jurisdiction, or, in other words, without authority. *Withers v. Patterson*, 27 Tex. 491, 496.

If the court, though having jurisdiction to order sale of land of an estate, has not the power to order a particular sale, because for a purpose not au-

thorized by statute, no title passes to the purchaser. Since the court has no power, in such a case, to order the sale of land, no title can pass to the purchaser at a sale made in pursuance of such an order, and this, whether the purchaser has knowledge of the facts or not. *Withers v. Patterson*, 27 Tex. 491, 500.

Purchasers at a sale made to satisfy an allowance to a widow by the probate court, which was void for want of power in the court, acquired no title by their purchase. *Newcomb v. Newcomb*, 38 Tex. 561.

In the case of an administration upon the estate of a living man, the court necessarily determines that the man is dead, and yet the man may be shown to have been alive at the time of the judgment; and in such case, although every step in the proceedings by which the man's estate is sold may have been taken with the most perfect regularity, and although the purchaser buys in good faith, no title passes or can pass. *Withers v. Patterson*, 27 Tex. 491, 497.

(6) Effect of Defects Not Going to the Jurisdiction.

If the sale was fairly made, and the defendant was a bona fide purchaser for value, his title will not be affected by mere irregularities in the proceedings of the administrator and the probate courts, if the court had jurisdiction over the subject matter, that is he takes a title which can not be impeached collaterally. *Pearson v. Burditt*, 26 Tex. 157, 171; *Burdett v. Silsbee*, 15 Tex. 604, 620; *Withers v. Patterson*, 27 Tex. 491, 501; *Giddings v. Steele*, 28 Tex. 732, 750; *Soye v. McCallister*, 18 Tex. 80, 100; *Baker v. Coe*, 20 Tex. 429, 430; *Lynch v. Baxter*, 4 Tex. 431; *Poor v. Boyce*, 12 Tex. 440; *Dancy v. Strickling*, 15 Tex. 557.

(7) Same; Effect of Purchaser's Knowledge of Fraud, Defects, Irregularities, etc.

The grounds of protection to the

purchaser's rights against the irregularities of the officer fail when his knowledge of the violations of the law or the omissions of duty must necessarily be presumed. *Peters v. Caton*, 6 Tex. 554, 558.

A sale under a grant of administration, obtained fraudulently and contrary to law, can confer no rights on a purchaser with notice of the fraud, as against the heirs, or others interested in the estate, who are thereby defrauded. *McMahan v. Rice*, 16 Tex. 335; *Same v. Smith*, 1d.

"If the administration was properly opened, and the sale was made, as charged, by and through the fraud of the administrator and the purchasers, then, if the suit was brought within the time prescribed, the sales would be annulled and set aside as to those who participated in the fraud or had notice thereof before they purchased." *Gains v. Barr*, 60 Tex. 676, 678.

If an administrator has authority to sell, the fact that he does not comply with the directions of law regulating the manner of sale may render the sale voidable, as to persons who are not purchasers for value and without notice; but persons who are such purchasers are protected. *Pleasants v. Dunkin*, 47 Tex. 343.

If an administrator's report of sale and the order confirming it were procured through fraud, they can not form the basis of a right claimed by the purchaser or his vendee in a suit to cancel the deeds, they having notice of the fraud complained of. *McC Campbell v. Durst*, 73 Tex. 410, 11 S. W. 380.

If the plaintiff can prove that there was fraud in the sale, to which the defendant was privy, or of which he is chargeable with notice, then his title will not protect him either in his possession or his improvements. *Pearson v. Burditt*, 26 Tex. 157, 171; *Burdett v. Silsbee*, 15 Tex. 604, 620.

Where an executor sells land belonging to an estate under circum-

stances which show that he intends to use the money for purposes other than that prescribed by the will, and the purchaser has notice of such facts, the conditions authorize the setting aside of the sale for fraud. *Baldrige v. Scott*, 48 Tex. 178.

(8) Same; Defects and Irregularities Not Going to the Jurisdiction.

Administrator Not Regularly Appointed.—Mere irregularities in grant of letters or orders of sale, or omissions that do not appear to be supplied, will not vitiate acts of administrator, if court has jurisdiction. *Soye v. McCallister*, 18 Tex. 80, 99.

Where the fiduciary character of one acting as administrator is recognized by the probate court, as between the heirs and creditors, and those dealing with the acting administrator, his authority can not be called in question collaterally for the purpose of invalidating his lawful acts, done in the due course of administration. And therefore, if he alienates property of the estate by order of the probate court and in the manner prescribed by law, though his appointment be not regular and legal, the title of the bona fide purchaser will nevertheless be good and indefeasible. *Poor v. Boyce*, 12 Tex. 440.

Failure of Record to Show Appointment.—The failure of a record to show the appointment of an administrator held not sufficient, under the evidence, to defeat a title under a sale by the administrator. *Moseley v. Stucken*, 26 Tex. Civ. App. 290, 62 S. W. 1103, affirmed in 95 Tex. 683, no op.

Where A. died in 1847, and the county records were burned in 1850, and subsequently D. took an oath and filed a bond as A.'s administrator, and the probate court issued an order for D. to sell A.'s real estate at an administrator's sale, the fact that the record did not show D.'s appointment as administrator was not sufficient to defeat a title under the sale, since the action

of the probate court was equivalent to a formal appointment. *Moseley v. Vander Stucken*, 62 S. W. 1103, 26 Tex. Civ. App. 290.

Want of Bond; Failure to Appoint Guardian Ad Litem.—The validity of an order of sale of a land certificate, made by the probate court in 1840, did not depend on the regularity of the bond, or a compliance with all of the regulations prescribed in the civil code of Louisiana. A bona fide purchaser was protected by the decree of the court, if it had jurisdiction; and a decree of sale would not have been an absolute nullity, even if the court had omitted to appoint an attorney to represent absent heirs. *Pleasants v. Dunkin*, 47 Tex. 343.

Want of Written Petition.—See, also, ante, "Necessity for Written Petition," II, G, 5, h, (1).

Even though it should appear by the record that the application by an administrator for an order of sale was not made by a petition in writing, it could not, on principle, be held to defeat the probate court of its jurisdiction to order the sale on the application of the administrator; it would not subject the sale to collateral attack nor could the purchaser be affected by the irregularity, if such it was, in making the order. He was not required to look beyond the judgment of a court of competent jurisdiction. *Brown v. Christie*, 27 Tex. 73; *Alexander v. Maverick*, 18 Tex. 179; *Guilford v. Love*, 49 Tex. 715, 736.

Under the probate act of 1848 (*Paschal's Dig.*, art. 1319), a petition was not essential to give the court jurisdiction to order the sale of land for the payment of debts; and when no petition asking a sale is found among the papers pertaining to the estate on file, it will be presumed that it had been lost, rather than that it had never been filed. *Hurley v. Barnard*, 48 Tex. 83.

Sale upon Defective Petition.—Where a sale of land belonging to an

estate was made under the act of Aug. 15, 1870, on an application merely stating that the land should be sold on account of its condition without stating statutory grounds, and it appeared that at the time debts against the estate existed which the purchase money realized did not satisfy and that the estate was honestly administered, the sale was not void and its confirmation by the court under facts existing which authorized it passed the title to the purchaser with the administrator's deed. *Gillenwaters v. Scott*, 62 Tex. 670.

Sale Procured by Fraud.—Under sales of land made by an administrator, where the order of sale was fraudulently procured from the court, the title of the purchaser will be protected, unless there be satisfactory evidence of complicity, or that the purchaser had notice of the fraud. *McCown v. Foster*, 33 Tex. 241.

Where an administration is granted after lapse of many years, and the land sold to satisfy fraudulent claims, against an estate, has passed into hands of innocent purchasers, for a valuable consideration and without notice, a defrauded party's only remedy is personal against those who committed such fraud. *Martin v. Robinson*, 67 Tex. 368, 382, 3 S. W. 550.

Failure to Obtain Extension of Term of Administration.—Where an administrator, after the expiration of his term, continues to act under the sanction of the probate court, it is well settled that the mere absence, in the record, of evidence of extension of the term by the court, does not invalidate a sale so made by him after his term has expired. *Soye v. McCallister*, 18 Tex. 80; *Poor v. Boyce*, 12 Tex. 440; *Howard v. Bennett*, 13 Tex. 309; *Dancy v. Strickling*, 15 Tex. 557; *Burdett v. Silsbee*, 15 Tex. 604. See *Giddings v. Steele*, 28 Tex. 732.

The omission of an administrator to obtain an extension of time, or of the

court to make the entry of such order on its minutes can not have the effect of invalidating acts done by the administrator in the due course of administration to the extent of defeating the title of a bona fide purchaser. *Poor v. Boyce*, 12 Tex. 440; *Townsend v. Munger*, 9 Tex. 300.

Another Suit Pending; Sale before Notice.—A sale of land belonging to a deceased minor's estate was made to satisfy the debts of the estate, the proceedings being regular and under the order of the probate court of D. county. Later, one of the heirs brought a bill of review in the probate court of D. county to correct the orders made in that court, on the ground that when letters of administration were granted in D. county, there was pending a decree of the district court of A. county fully adjusting all rights and interests in the estate. Held, that since the sale was made prior to the filing of suit to set aside the proceedings in the county court of D. county, it gave a good title to the purchaser, unless he had notice of the facts which questioned the jurisdiction of the court, and that if he did have notice of such facts, still his vendee would be protected in case he paid a valuable consideration and bought without notice. *Edwards v. Halbert*, 64 Tex. 667; *Fortson v. Alford*, 62 Tex. 576; *Harle v. Langdon*, 60 Tex. 555, 562.

(9) The Record as Notice.

(a) Right to Rely upon Order of Sale and Confirmation.

Courts should liberally construe all statutes authorizing executors and administrators to sell land, and much indulgence has been given to apparent irregularities in judgments and decrees, in the entries of clerks, etc. *Lynch v. Baxter*, 4 Tex. 431, 439; *Hudson v. Jurnigan*, 39 Tex. 579, 589; *Burdett v. Silsbee*, 15 Tex. 604, 608. See, also, *Alexander v. Maverick*, 18 Tex. 179, 195.

A purchaser at an administrator's sale need only see that the court had jurisdiction and that the decree authorized the sale. He is not required to go behind the order of sale to see if prior proceedings were regular. *Rindge v. Oliphint*, 62 Tex. 682, 686; *Dancy v. Stricklinge*, 15 Tex. 557, 560; *Bartlett v. Cocke*, 15 Tex. 471, 478; *Poor v. Boyce*, 12 Tex. 440. See *Peterson v. Lowry*, 48 Tex. 408; *Alexander v. Maverick*, 18 Tex. 179; *Brown v. Christie*, 27 Tex. 73; *Pleasants v. Dunkin*, 47 Tex. 343, 356; *McNally v. Haynes*, 59 Tex. 583, 585; *Hudson v. Jurnigan*, 39 Tex. 579, 589; *Burdett v. Silsbee*, 15 Tex. 604, 608; *Anderson v. Lockhart*, 2 Posey 63, 68; *Flanagan v. Pierce*, 27 Tex. 78, 79.

A purchaser at an administration sale who has purchased in good faith and paid the purchase money, will be protected if he shows an order of the court directing the sale and another confirming it, or acts of the court amounting to the confirmation, where the court has jurisdiction over the estate and the grounds that confer jurisdiction upon the court to administer the estate exist. *Saul v. Frame*, 3 Tex. Civ. App. 596, 22 S. W. 984; *Flanagan v. Pierce*, 27 Tex. 78, 79; *Anderson v. Lockhart*, 2 Posey 63, 68.

The purchaser at an administrator's sale is not bound, in matters that do not go to the jurisdiction, to look beyond the decree of the court. *George v. Watson*, 19 Tex. 354; *Lynch v. Baxter*, 4 Tex. 431; *Burdett v. Silsbee*, 15 Tex. 604; *Dancy v. Stricklinge*, 15 Tex. 557; *Alexander v. Maverick*, 18 Tex. 179; *Brown v. Christie*, 27 Tex. 73.

Bona fide purchasers under decrees of the probate court which are not void, are entitled to rely upon such decrees and to esteem them as of absolute verity. *Martin v. Robinson*, 67 Tex. 368, 382, 3 S. W. 550.

The case of *McNally v. Haynes*, 59

Tex. 583, holds, in effect, that the purchaser at an administration sale is chargeable with the vices disclosed by the application for the sale, accompanying exhibits, if any, and the order of sale; and that he may rely upon these, and is not bound to go behind them. *Gains v. Barr*, 60 Tex. 676, 679. See, also, *Murchison v. White*, 54 Tex. 78, 86.

Where the application of an administrator for the sale of land purported to be for the payment of the expenses of administration, the purchaser need not look beyond the application and orders of the court to ascertain whether or not the court had jurisdiction to make the order of sale. *Storer v. Lane*, 1 Tex. Civ. App. 250, 20 S. W. 852.

(b) Same; Purchaser Must Look to the Jurisdiction.

A purchaser at an administrator's or executor's sale must inquire, at his peril to see that the court had jurisdiction to make the order, and if it had, a stranger buying at a judicial sale under it will be protected. It is always understood that the jurisdiction of the court has been rightfully called into exercise and that the order of sale is valid. *Edwards v. Halbert*, 64 Tex. 667, 670; *Withers v. Patterson*, 27 Tex. 491, 496. See, also, ante, "Right to Rely upon Order of Sale and Confirmation," II, G, 6, a. (9), (a).

(c) Where Record Shows That Court Was without Power, or Has Transcended Its Jurisdiction.

Where the facts upon which an administration of an estate of a deceased person was granted and upon which order of the sale was made appear on the face of the record itself and show that the court had no jurisdiction to grant such orders, they are null and void, and will furnish no protection to the purchaser under them. *Summerlin v. Rabb*, 11 Tex. Civ. App. 53, 55, 31 S. W. 711, distinguishing *Martin v. Robinson*, 67 Tex. 368, 3 S.

W. 550, and following Stone Land, etc., *Co. v. Boon*, 73 Tex. 548, 554, 11 S. W. 544; *Allen v. Peters*, 77 Tex. 59, 13 S. W. 767; *Paul v. Willis*, 69 Tex. 261, 7 S. W. 357; *Harwood v. Wylie*, 70 Tex. 538, 541, 7 S. W. 789; *Duncan v. Veal*, 49 Tex. 603; *Wardrup v. Jones*, 23 Tex. 489; *Withers v. Patterson*, 27 Tex. 491, 492, and *Chinn v. Taylor*, 64 Tex. 385; *McNally v. Haynes*, 59 Tex. 583, 585; *Guilford v. Love*, 49 Tex. 715.

The regularity of the order will not be presumed against the record; that is, if the record discloses the fact that the court, in the exercise of its jurisdiction over the subject matter, has transcended the limits prescribed, that then the presumption is repelled, and the order is no protection to the purchaser. As, for instance, if the application which calls into exercise the power of the court to order the sale of lands, should disclose the fact that the purposes and objects for which the sale is asked are wholly foreign to that for which the court is authorized to make the order, then the purchaser would be chargeable with notice of the vice in the sale, and would not be protected by the presumption of the regularity of the order. *Withers v. Patterson*, 27 Tex. 491; *Guilford v. Love*, 49 Tex. 715; *McNally v. Haynes*, 59 Tex. 583, 585.

Where the record shows that the probate court, in ordering a sale of the land of a decedent's estate, transcended its powers under the statute, the purchaser is chargeable with notice. He is not, however, chargeable with notice of all proceedings in administering the estate. *McNally v. Haynes*, 59 Tex. 583; *Withers v. Patterson*, 27 Tex. 491, 500; *Merriweather v. Kennard*, 41 Tex. 273, 278.

Where the record of an administration proceeding discloses that the court transcended the prescribed limits of its jurisdiction, the presumption of regularity is repelled, and no order therein can protect a purchaser of the

administration property. *Templeton v. Falls Land & Cattle Co.*, 77 Tex. 55, 13 S. W. 964.

If the grant of letters was valid, but it was apparent by the record that the special circumstances authorizing the court to order the sale did not in fact exist, a purchaser at a sale under such order, though in good faith and without notice, would acquire no title. *Withers v. Patterson*, 27 Tex. 491.

A purchaser from an executor is charged with absolute notice, by reason of the records of the proceedings, of any want of power in the executor to make the sale. *Coy v. Gaye* (Civ. App.), 84 S. W. 441.

(d) Purchaser Not Bound to Notice Entire Record; Record Notice of What Matters.

Although a purchaser is chargeable with notice where the record shows that the court has transcended its powers, he is not chargeable with notice of all proceedings in administering the estate. *McNally v. Haynes*, 59 Tex. 583. See, also, ante, "Right to Rely upon Order of Sale and Confirmation," II, G, 6, a, (9), (a).

A purchaser of land at an administrator's sale is charged with notice of prior administration sale of the certificate after its location, but before issuance of the patent. *Brockenborough v. Melton*, 55 Tex. 493, 506.

Neither devisees nor purchaser from them nor from an executor are chargeable with knowledge of debts of estate or means in hands of executor for their payment. *McDonough v. Cross*, 40 Tex. 251, 283.

Although by a previous report of the administrator there appeared to be a balance due the estate of \$438.36, after the payment of all debts and expenses of administration, yet the application made for the sale of the land purported to be for the payment of expenses of administration, and a purchaser need not look beyond the application and decrees of court to

ascertain whether or not the court has jurisdiction to order the sale, and such sale can not be collaterally attacked in a suit of trespass to try title. *Storer v. Lane*, 1 Tex. Civ. App. 250, 20 S. W. 852.

(10) Rights as against Recorded Conveyances.

In suit on bond for purchase price of the land sold at an administrator's sale, purchaser can not defend on ground that intestate had conveyed land during lifetime, where the deed was on record. *Ward v. Williams*, 45 Tex. 617, 620.

Where the alleged paramount outstanding titles, exhibited by the answer, appear to have been duly recorded, the defendant, in addition to the application of the maxim caveat emptor, is chargeable with constructive notice of the superior title. *Thompson v. Munger*, 15 Tex. 523, 527.

Defective Recordation; Recordation in Wrong County.—The assignment of a land certificate, accompanied by a declaration of trust in the assignee, of the same date, and recorded at the same time, but in a county different from the one in which the land is located, does not affect a purchaser at an administrator's sale with notice of the trust. *Love v. Berry*, 22 Tex. 371, 372.

(11) Will Filed and Proved, as Notice to Purchaser.

Where land in Texas owned by a nonresident was sold to pay debts in spite of the testator's will, a copy of which was filed and proved in Texas, such will was not within the chain of title of a subsequent purchaser, so as to charge him with notice of outstanding equities. *Nelson v. Bridge*, 87 S. W. 885, 39 Tex. Civ. App. 283.

b. Warranties and Representations; Rule of Caveat Emptor.

(1) Caveat Emptor the General Rule; No Implied Warranty.

In an executor's administrator's sale under order of court which is a ju-

dicial sale and operates in rem, there is no warranty express or implied. The administrator sells only such title as the estate had. The maxim caveat emptor applies; and mere defects of title can not avail the purchaser, either as a defense to an action for the purchase money or as a ground for rescinding the contract. The purchaser has no grounds of complaint for defects in the quantity, quality, or title of the property purchased. *Thompson v. Munger*, 15 Tex. 523, 527; *Lynch v. Baxter*, 4 Tex. 431; *Williams v. McDonald*, 13 Tex. 322, 323; *Medlin v. Wilkins*, 60 Tex. 409, 417; *Ward v. Williams*, 45 Tex. 617; *Hamilton v. Pleasants*, 31 Tex. 638; *Hurt v. Blackburn*, 20 Tex. 601; *Walton v. Reager*, 20 Tex. 103; *Doxey v. Burns*, 37 Tex. 719; *Hawpe v. Smith*, 25 Tex. Supp. 448; *Club Land, etc., Co. v. Dallas County*, 26 Tex. Civ. App. 449, 64 S. W. 872; *Edmondson v. Hart*, 9 Tex. 554; *Altgelt v. Mernitz*, 37 Tex. Civ. App. 397, 83 S. W. 891.

"The court orders the sale in such cases only of such interest and estate and rights in the premises as the executor or administrator had or could have asserted for the estate in his official capacity; no more, no less. The purchaser succeeds to his rights and attitude in respect to the property sold, stands in his place, and acquires his interest as the same existed in his hands, subject to all the infirmities of title then attaching to the estate. The purchaser buys at his peril, and takes upon himself the risk of any outstanding rights that could have been successfully asserted against the decedent; and if, by reason of the existence of such rights, whether known or not, he takes nothing by his purchase, he will not be heard to complain." This is because they are judicial sales and operate in rem. *Altgelt v. Mernitz*, 37 Tex. Civ. App. 397, 83 S. W. 891; *Lynch v. Baxter*, 4 Tex. 431; *Williams v. McDonald*, 13 Tex. 322; *Walton v. Reager*, 20 Tex. 103.

"If the executor, having authority to sell, puts up and exposes for sale a certain tract of land, the purchaser is, in the absence of fraud or misrepresentation, bound to pay his bid, although the testator had no title; for at such a sale he sells the interest of his testator's estate, whatever it may be, without any warranty or guaranty." *Altgelt v. Mernitz*, 37 Tex. Civ. App. 397, 83 S. W. 891; *Herrington v. Williams*, 31 Tex. 448, 462; *Stephenson v. Marsalis*, 11 Tex. Civ. App. 162, 169, 33 S. W. 383; *O'Connor v. Vineyard*, 91 Tex. 488, 497, 44 S. W. 485.

"An attack upon such sales when they are ordered and approved by a court of competent jurisdiction, is in the nature of an attack upon a sale made by virtue of an execution regularly issued upon a valid judgment, at which every bidder at the sale is forewarned that he must beware that if he buys it is at the peril of getting no better title to the property than is in the execution debtor." *Altgelt v. Mernitz*, 37 Tex. Civ. App. 397, 83 S. W. 891.

A probate sale can only convey the interest of the estate; it can not give the purchaser an interest inconsistent with that of the estate recognized by same court in previous proceedings. *Guilford v. Love*, 49 Tex. 715, 729.

A purchaser at an administrator's sale, of inchoate title, must himself, perfect it. *Williams v. McDonald*, 13 Tex. 322, 323.

But Purchaser Takes All the Title That the Estate Has.—But while it is true, that a purchaser at administrator's sale, purchases at his own risk, and only takes such title as the estate has, he takes all the title the estate has. *Love v. Berry*, 22 Tex. 371, 378.

(2) Duty of Purchaser to Ascertain Authority of Administrator.

A purchaser at an executor's or administrator's sale of land purchases at his own peril, and is required to ascer-

tain the grounds and authority of such executor or administrator, not from his declarations at the time of the sale, but from the orders of the court and the statutes of the state in regard to his duties in the premises. *Hamilton v. Pleasants*, 31 Tex. 638.

(3) Duty of Administrator to Make Defects Known.

The mere silence of the administrator in respect to the title or quality, though he may know it to be defective, will not amount to a fraud vitiating the sale. *Thompson v. Munger*, 15 Tex. 523; *Altgelt v. Mernitz*, 37 Tex. Civ. App. 397, 83 S. W. 891. See *White v. Frank*, 91 Tex. 66, 71, 40 S. W. 962, reversing 39 S. W. 988.

The maxim *caveat emptor* is, in general, a sufficient answer to mere silence in regard to defects open to observation. *Thompson v. Munger*, 15 Tex. 523, 527.

(4) Authority to Bind the Estate by Warranty or Representation.

The powers of an administrator relating to the sale and conveyance of land are wholly statutory. He can make only such title as the estate has to convey, and can not bind the estate by a covenant of general warranty in a deed, nor by any oral agreement, express or implied, to indemnify the purchaser for any loss he may sustain by reason of any defect in the title to the land conveyed. His duty is to sell just such title as the estate has and his deed can have no other effect. *Club Land, etc., Co. v. Dallas County*, 26 Tex. Civ. App. 449, 64 S. W. 872, reversed in 95 Tex. 200; *Hamilton v. Pleasants*, 31 Tex. 638; *Nesbit v. Richardson*, 14 Tex. 656, 658; *Able v. Chandler*, 12 Tex. 88, 92; *Lynch v. Baxter*, 4 Tex. 431, 437; *Dallas County v. Club Land, etc., Co.*, 95 Tex. 200, 66 S. W. 294, affirming 64 S. W. 872; *Ward v. Williams*, 45 Tex. 617.

If the administrator, in executing the order of the court, gives the purchaser a bond for a warranty title, it is not

in his character as administrator, and he can not bind the estate of his intestate by such a covenant. *Lynch v. Baxter*, 4 Tex. 431.

Under 1 Sayles' Annotated Civil Statutes of 1879, arts. 2144, 2147, a judgment against an estate for a loss sustained by reason of a defect of title in land conveyed by the administrator under a covenant of warranty held error. *Club Land, etc., Co. v. Dallas County*, 26 Tex. Civ. App. 449, 64 S. W. 872.

(5) Duty to Give Personal Guaranty; Personal Liability of Administrator.

An administrator is not bound to give a personal guaranty of title. *Nesbit v. Richardson*, 14 Tex. 656, 659.

Personal Liability.—It seems that an administrator is not bound by a personal guaranty of title voluntarily made to a purchaser at a probate sale. *Nesbit v. Richardson*, 14 Tex. 656, 659.

Where an administrator recites in a deed that he does not bind himself personally, and makes covenant of warranty in his capacity of administrator, he can not be held liable personally on such covenant. Judgment, *Club Land & Cattle Co. v. Dallas County*, 64 S. W. 872, 26 Tex. Civ. App. 449, modified. *Dallas County v. Club Land & Cattle Co.*, 66 S. W. 294, 95 Tex. 200.

But an administrator, giving assurances to purchaser that he could and would make good title, is bound to do so, if practicable. *Nesbit v. Richardson*, 14 Tex. 656, 660.

An administrator can not be held answerable in damages for misrepresentations as to land sold, in suit for purchase money. *Thompson v. Munger*, 15 Tex. 523, 530.

(6) Limitations of Rule of Caveat Emptor.

(a) Does Not Necessarily Take as under a Quitclaim Deed.

A purchaser at an administrator's

sale does not necessarily take as under a quitclaim deed. *Lumpkin v. Adams*, 74 Tex. 96, 103, 11 S. W. 1070. See *Walton v. Reager*, 20 Tex. 103.

(b) Rule Extends Only to Matters Discoverable by Ordinary Diligence.

It is true that the doctrine of caveat emptor is said to apply to sales by administrators. But this doctrine applies only so far as to affect a purchaser at an administrator's sale with notice of everything that he could have ascertained by the use of ordinary diligence. *Love v. Berry*, 22 Tex. 371, 378; *Cheveral v. Bowman*, 2 App. Civ. Cases, § 114.

(c) Not Affected by Secret Conveyances, Trusts or Equities.

A purchaser at administrator's sale does not necessarily take as under a quitclaim deed, and he may, as a bona fide purchaser without notice, be entitled to protection against prior conveyances by the decedent and secret trusts between him and others. *Lumpkin v. Adams*, 74 Tex. 96, 11 S. W. 1070.

A purchaser from an administrator stands in the place of creditors, and is protected against unrecorded deeds. *Wallace v. Crow* (Sup.), 1 S. W. 372, 374; *Taylor v. Harrison*, 47 Tex. 454; *Ayres v. Duprey*, 27 Tex. 593; *Grace v. Wade*, 45 Tex. 522; *Lumpkin v. Adams*, 74 Tex. 96, 103, 11 S. W. 1070; *Love v. Berry*, 22 Tex. 371, 372. See *White v. Frank*, 91 Tex. 66, 74, 40 S. W. 962, reversing 39 S. W. 988.

A purchaser from the heirs or representatives of the vendor, if he purchases and pays for the land, without actual or constructive notice of the equities arising out of a previous sale, is as fully within the spirit and equity of the statute as a second purchaser from the vendor himself. *Love v. Berry*, 22 Tex. 371, 378; *Rodgers v. Burchard*, 34 Tex. 441, 453; *Taylor v. Harrison*, 47 Tex. 454, 459.

"It can hardly be said to be the duty of an administrator when he knows of

a defect in the title of his intestate to conceal the fact and to sell to an innocent purchaser to the injury of the grantee in a prior conveyance. But when the apparent title is in the estate, and no defect in that title is known," it is the duty of the court to order the sale and of the administrator to sell and convey the land in such manner as to protect the purchaser against an unknown and unrecorded title. "It being to the interest of the estate and of its creditors that the property should be sold according to the apparent title, when no defect is known, it is the duty of the court so to order it sold and of the administrator to sell it, and it should be presumed that such was the intention unless it affirmatively appear from the proceedings that it was merely a doubtful title or a chance of title which was sold." *White v. Frank*, 91 Tex. 66, 71, 40 S. W. 962, reversing 39 S. W. 988.

The purchaser at an administrator's sale who has no knowledge or notice of secret equities of third persons is not affected thereby, but takes the legal title which was in the estate free from such equities. *Love v. Berry*, 22 Tex. 371, 378; *Graham v. Hawkins*, 38 Tex. 628, 635; *Cheveral v. Bowman*, 2 App. Civ. Cases, § 114.

Recitals in Will as Notice of Community Character of Estate; Rights under Quitclaim Deed.—Testator, a nonresident, died, leaving land in Texas, and after his will had been probated in the state of his residence, administration was taken out on his estate in Texas, and after proof of a copy of his will the land in controversy, of which he had the apparent legal title when he died, was appraised in its entirety, and ordered sold, without recognition or mention of any outstanding interest, for the payment of debts. Held, that the administrator's deed to the purchaser, though a quitclaim, was sufficient to sustain a plea

that the purchaser was a purchaser in good faith and without notice that the land was community property and that a portion thereof belonged to the distributees of testator's deceased wife. *Nelson v. Bridge*, 39 Tex. Civ. App. 283, 87 S. W. 885, affirmed in 101 Tex. 651, no op.

The purchaser of the land was not charged with notice that the land was community property, and of the rights of testator's children by the recitals of his will, a copy of which was probated in Texas, in which the children were referred to as testator's children and made his devisees. *Nelson v. Bridge*, 39 Tex. Civ. App. 283, 87 S. W. 885, affirmed in 101 Tex. 651, no op.

"If, however, it be conceded that he must take notice of the recitals of the will, and therefore of the fact that the testator had children, still the facts fall short of avoiding his actual ignorance of defendants' claims, for it is well settled that that alone is not enough to charge him with notice. (*Lyster v. Leighton*, 36 Tex. Civ. App. 62, 81 S. W. 1033, affirmed in 98 Tex. 623, no op.; *Smith v. Olsen & Son*, 23 Tex. Civ. App. 458, 56 S. W. 568, affirmed in 94 Tex. 701, no op.; *Hall v. Gwynne*, 4 Tex. Civ. App. 109, 23 S. W. 289.) So it is immaterial whether the legal title to their maternal ancestor's interest was in the testator's estate or in the defendants', for if it be conceded that the burden of proof to show want of notice was on the plaintiff, it had been discharged according to the agreed facts, so far as actual knowledge is concerned." *Nelson v. Bridge*, 39 Tex. Civ. App. 283, 87 S. W. 885, 887, affirmed in 101 Tex. 651, no op.

Transfer Defectively Recorded.—An assignment of a land certificate accompanied by a declaration of trust, recorded in county other than that where the land lies, gives no notice to the purchaser at an administrator's sale. *Love v. Berry*, 22 Tex. 371, 378.

Immaterial That Administrator Had Notice.—It is immaterial that the administrator may have had notice. *Love v. Berry*, 22 Tex. 371, 372.

(d) Same; Where Purchaser Buys Mere Equity or Chance of Title.

Where the purchase is of a mere equity, which owes its existence to a court of chancery, and can not be enforced without its assistance, all reason for departing from the general maxim, no one can transfer to another a greater or more right than he has, is at an end; and the right acquired by a vendee under the sale is necessarily limited to that of the vendor. In other words, equity deals with the purchaser of an equitable title as the law deals with the purchaser of a legal title, and regards the purchase as incapable of either defeating rights or creating them. When, therefore, a purchaser buys an equitable estate with a knowledge of its real character, and without obtaining the legal title, he can found no claim on the mere fact of the purchase, and must stand or fall by the title of the vendor. In such a case the purchaser acquires only an equitable title, and takes it subject to all existing equities. *Herrington v. Williams*, 31 Tex. 448.

The intestate of the administrator had passed the equitable title out of himself for at least two hundred acres of land, and, whether it had descended by a regular transmission to the tenant in possession or not, it was sufficient for him as a shield of defense to his possession, to show upon the trial that the prior and better equity had passed out of the intestate in his lifetime, and was lodged elsewhere than in the keeping of the purchaser at the administrator's sale. *Herrington v. Williams*, 31 Tex. 448.

Does Not Depend upon Term of Deed.—Whether a purchaser at an administrator's sale without actual or implied notice of a prior unrecorded deed can claim protection against a

previous conveyance does not depend upon the form of the deed, but if it appears from the whole transaction that the land itself was sold and purchased and not a mere claim upon it or a chanced title, such purchaser may be an innocent purchaser. *White v. Frank*, 91 Tex. 66, 40 S. W. 962; *Nelson v. Bridge*, 39 Tex. Civ. App. 283, 87 S. W. 885, 887, affirmed in 101 Tex. 651, no op.; *Saunders v. Isbell*, 5 Tex. Civ. App. 513, 515, 24 S. W. 307; *Taylor v. Harrison*, 47 Tex. 454.

A conveyance of the right and title of an intestate by an administrator, under a statute which declares the effect of the conveyance to be to pass the right and title of the estate, is no less effective than a deed which in form conveys the property itself. *White v. Frank*, 91 Tex. 66, 72, 40 S. W. 962, reversing 39 S. W. 988.

Same; Purchase from Heir as Compared with Purchase from Administrator.—In the opinion in *Taylor v. Harrison*, 47 Tex. 454, it is intimated that with respect to unrecorded conveyances and unknown equities, a purchaser from an administrator stands upon a better footing than a purchaser from an heir. *White v. Frank*, 91 Tex. 66, 40 S. W. 962, reversing 39 S. W. 988.

Facts Held to Show Sale of Property.—One who derives title through a sale and conveyance by the administrator of an estate of "all the right, title, and interest" of the estate in the lands, without warranty, is a bona fide purchaser for value, as against the holder of an unrecorded title, under Laws 1876, p. 114, § 85, providing that on the compliance with the terms of the sale the executor shall deliver a conveyance of the property, which conveyance shall vest the title that the intestate had in the purchaser, the words "all the right, title, and interest of the estate" not being intended to limit the conveyance to a mere transfer of the chance of title. *Judgment, Dupree*

v. Frank (Civ. App.), 39 S. W. 988, reversed. *White v. Franks*, 40 S. W. 962, 91 Tex. 66. See, also, *Threadgill v. Bickerstaff*, 87 Tex. 520, 29 S. W. 757.

A sale by an administrator of an undivided one-half interest in the land described in the deed was a conveyance of such one-half interest and not a mere quitclaim and a purchaser from such grantee was an innocent purchaser. *White v. Frank*, 91 Tex. 66, 40 S. W. 962.

Facts Held to Show That Purchaser Took Chance of Title.—In the case of *Hitchler v. Scanlan*, 15 Tex. Civ. App. 40, 39 S. W. 633, affirmed in 93 Tex. 641, no op., in which a writ of error was refused, a lot of land belonging to the testator had been subdivided by him into small lots, and a number of them had been sold in his lifetime. His estate having been administered in the probate court and a partition ordered, the commissioners reported that they were unable to divide this property among the heirs because they could not ascertain what part of it belonged to the estate. Under these circumstances "the right title claim and interest of the heirs and devisees" in the lot were ordered to be sold and were sold. It was held that the purchaser was not an innocent purchaser, as against persons to whom the testator had conveyed subdivisions of the tract. The proceedings showed that it was not the purpose to sell the lands that the testator had conveyed, but merely so much of the original lot as remained unsold—whatever that might be. The purchaser took the chance of the title as to such parcels as had been previously conveyed and could not be a bona fide purchaser. It was upon this ground that the ruling of the court of civil appeals was sustained. See *White v. Frank*, 91 Tex. 66, 73, 40 S. W. 962, reversing 39 S. W. 988.

(e) Application of Rule in Case of Fraud, Misrepresentation, or Mistake.

The doctrine of caveat emptor, in

its application to judicial sales, does not extend to a discharge of those who make the sales from the obligation which obtains in all sales, to act fairly and not fraudulently. *Crayton v. Munger*, 9 Tex. 285; *Able v. Chandler*, 12 Tex. 88; *Coombs v. Lane*, 17 Tex. 280, 283; *Roehl v. Pleasants*, 31 Tex. 45, 49.

In the absence of fraud or mistake, the rule of caveat emptor applies to probate sales. *Edmondson v. Hart*, 9 Tex. 554.

The maxim that fraud vitiates everything it touches extends to sales by administrators; and, in such case, the rule caveat emptor will not apply. *Rice v. Burnet*, 39 Tex. 177.

Doctrine at Law and in Equity.—While, at law, the rule of caveat emptor governs a purchase at an administrator's sale, in equity there may be such fraud or mistake as would entitle the purchaser to relief. *Medlin v. Wilkins*, 60 Tex. 409, 417; *Ward v. Williams*, 45 Tex. 617, 619; *Club Land, etc., Co. v. Dallas County*, 26 Tex. Civ. App. 449, 452, 64 S. W. 872, reversed in 95 Tex. 200. See, also, *Hawpe v. Smith*, 25 Tex. Supp. 448, 451; *Walton v. Reager*, 20 Tex. 103, 109; *Lynch v. Baxter*, 4 Tex. 431, 437; *Williams v. McDonald*, 13 Tex. 322, 323.

Representation Not Such as Purchaser Entitled to Rely upon.—If the representation, whether true or false, was not such a one as the purchaser had any right to rely upon, in making the purchase, it will not take the case out of the rule caveat emptor. *Mitchell v. Zimmerman*, 4 Tex. 75, 80; *Walton v. Reager*, 20 Tex. 103, 109; *Crayton v. Munger*, 9 Tex. 285.

Relief Granted.—Fraudulent representations made by an administrator at the sale of property of the estate, respecting the character and soundness of the property, by which the purchaser is misled, entitle the latter to a rescission of the contract, or an abatement of the price contracted to be paid. *Able v. Chandler*, 12 Tex. 88.

An administrator sold at public sale a tract of land which he declared to be the property of his intestate, well knowing it was not so, for which the purchasers gave their note, on which judgment was rendered against them; they not having been informed of the fraud until after the judgment. Verdict being rendered for the plaintiffs (the purchasers) against the administrator for the amount they had paid and for the value of the improvements made, the court held that they were entitled to judgment and execution, and ordered that the execution against them, the whole not being paid, should be enjoined. *Coombs v. Lane*, 17 Tex. 280.

Same; As Conferring Right to Other Estate Land than Sold.—"If the representations of the administrator as to the lines and corners of land that he is about to sell under order of court could have in any case the effect to so bind the estate or heirs as to vest in the purchaser title to other lands of the estate than those advertised and sold, and which sale confirmed by the court, it would have to be when the administrator's declarations as to the lines and corners are positive and misleading in character, and the purchaser had relied upon such declarations in making the purchase." *Medlin v. Wilkins*, 60 Tex. 409, 417.

Burden of Proof.—The burden rests upon the purchaser to establish fraud or mistake. *Ward v. Williams*, 45 Tex. 617; *Medlin v. Wilkins*, 60 Tex. 409, 417.

If a purchaser at an administrator's sale would take himself out of the maxim of caveat emptor, he must satisfactorily prove that the administrator represented the property sold to belong to the estate of his intestate, and that it does not. *Walton v. Reager*, 20 Tex. 103; *Hawpe v. Smith*, 25 Tex. Sup. 448, 451.

Representations Not Amounting to Fraud.—An executor's declaration, at sale, that sale was for confederate

money could not operate as a fraud on the purchaser. *Hamilton v. Pleasants*, 31 Tex. 638, 641.

Where the representation of an administrator that his intestate had good title and that he can make good title to the land is but the honest expression of his opinion upon facts equally well known to the purchaser at the time, the purchaser is not relieved thereby from the rule of caveat emptor. *Walton v. Reager*, 20 Tex. 103.

"The case of *Mitchell v. Zimmerman*, 4 Tex. 75, was one where relief was granted, upon the ground of false representations to the quantity of land rented, where the party deceived had not fairly the means of detecting the gross mistake. In the case of *Able v. Chandler*, 12 Tex. 88, the false representations relieved against, were concerning the particular qualities of a slave, which no one but an owner would reasonably have the means of knowing. In the case of *Coombs v. Lane*, 17 Tex. 280, the administrator represented that the land sold belonged to the estate of Elizabeth Gray, located by virtue of her headright certificate; but the truth was, that a part of her headright had been located on it, which he had subsequently raised, and located on another tract of land. Here was a distinct fact represented which was false. And that which constituted the falsity—the raising the location and placing the certificate on another tract—was not a matter readily open to detection." *Walton v. Reager*, 20 Tex. 103, 110.

Where an administrator conveys land belonging to an estate, an oral agreement by the administrator to indemnify the purchaser for any loss sustained through a defect of title, of which both parties were aware, is not such a fraudulent representation as to entitle a purchaser to equitable relief against the estate. (Civ. App.), *Club Land & Cattle Co. v. Dallas County*, 64 S. W. 872, 26 Tex. Civ. App. 449,

judgment modified *Dallas County v. Club Land & Cattle Co.* (Sup.), 66 S. W. 294, 95 Tex. 200.

Sayles' Ann. Civ. St. 1897, arts. 2144, 2147, provide that after confirmation of a sale of a decedent's land the administrator shall execute a proper conveyance on the purchaser's complying with the terms of the sale, which shall be by deed, and shall vest the right or title that the intestate had in such real estate in the purchaser. An administrator conveyed land belonging to the estate, both the administrator and the purchaser knowing of a defect in the title. The administrator's deed contained a covenant of general warranty, and a clause providing that the administrator did not bind himself personally. Held, that on a failure of title the purchaser could not claim from the estate the amount of the purchase money, as the administrator had no power to bind the estate. (Civ. App.), *Club Land & Cattle Co. v. Dallas County*, 64 S. W. 872, 26 Tex. Civ. App. 449, judgment modified *Dallas County v. Club Land & Cattle Co.* (Sup.), 66 S. W. 294, 95 Tex. 200.

Want of Title, Previous Conveyance as a Fraud upon Purchaser.—It has not been decided by the supreme court that a mere want of title in an estate to land, at the time of an administrator's sale, would constitute an equitable defense. The suggestion made in *Walton v. Reager*, 20 Tex. 103, that a sale by the intestate, though unknown to the administrator and to the purchaser at administrator's sale, would constitute a fraud upon the purchaser. Held, to be obiter dicta. *Ward v. Williams*, 45 Tex. 617.

Personal Liability of Administrator.—See ante, "Duty to Give Personal Guaranty; Personal Liability of Administrator," II, G, 6, b, (5).

(f) **Application of Rule in Case of Insufficient or Uncertain Description.**

"Whether or not the doctrine of caveat emptor applies to an adminis-

trator's deed to land, which is so imperfect in its description of the land sold as that it may be said to convey nothing, or which is so uncertain in its description as that it can not be brought within the maxim, 'id certum est quod certum reddi potest,' is a question presented in this case, but not determined. As bearing upon the subject, the following cases are cited in the opinion. *Lynch v. Baxter*, 4 Tex. 431; *Edmondson v. Hart*, 9 Tex. 554; *Williams v. McDonald*, 13 Tex. 322; *Thompson v. Munger*, 15 Tex. 523; *Walton v. Reager*, 20 Tex. 103; *Hawpe v. Smith*, 25 Tex. Supp. 448; *Ward v. Williams*, 45 Tex. 617." *Akin v. Horn*, 2 App. Civ. Cases, § 8.

(g) **Illegal Sale of Rejected Land Certificate.**

The principle of caveat emptor, in judicial sales, has no application where an administrator sold land to which there was no other title than the location of a rejected and fraudulent certificate. *Roehl v. Pleasants*, 31 Tex. 45.

In such a case the plea of failure of consideration ought to have been sustained. Pas. Dig., art. 227, note 288; *Crayton v. Munger*, 9 Tex. 285; *Williams v. McDonald*, 13 Tex. 322; *Coombs v. Lane*, 17 Tex. 280; *Walton v. Reager*, 20 Tex. 103, 108; *Roehl v. Pleasants*, 31 Tex. 45.

"The principle of caveat emptor, in judicial sales, is wholly inapplicable here. Neither the case of *Edmondson v. Hart*, 9 Tex. 554; of *Williams v. McDonald*, 13 Tex. 322; or of *Walton v. Reager*, 20 Tex. 103, 108, pushes the doctrine of caveat emptor so far as to embrace a case like the present, though the latter case presses it to the utmost verge of legal or equitable toleration." *Roehl v. Pleasants*, 31 Tex. 45, 48.

c. **Title, Interest and Right Passing to Purchaser.**

(1) **Right of Bidder to Enforce Performance of Contract.**

See, also, ante, "Right of Purchaser to a Conveyance," II, G, 5, q, (2).

A bidder at an administrator's sale, to whom property is knocked down, has his action to compel a performance of the contract, upon the terms prescribed, so far as they are consistent with law. *Nesbit v. Richardson*, 14 Tex. 656.

Enjoining Second Sale Pending Appeal.—Pending an appeal from a judgment of the county court refusing to compel an administrator to execute a deed to a purchaser of land at administrator's sale, the administrator may be enjoined from making a second sale. *Claridge v. Lavenburg*, 7 Tex. Civ. App. 155, 26 S. W. 324, affirmed in 93 Tex. 702, no op.

Conclusiveness of Judgment Ordering Deed.—The grantee of a league of land executed to L. L. V. a bond for title to one-half of the league on the 7th day of June, 1831. The administrator of L. L. V., on the 6th day of January, 1833, sold the bond for title under an order of the alcalde of the jurisdiction of Washington, and D. A. became the purchaser at public sale. D. A. petitioned the judge of the first instance of the jurisdiction of Austin for the appointment of a curator of the grantee, and for a decree that the curator execute to him a deed for the half league. On the 11th of September, 1835, the judge decreed that the curator execute to him a deed, which was done accordingly. Held that the decree of the judge of the first instance was a valid judgment, divesting the original grantee of the title and vesting it in D. A., and that it concluded all inquiry into the legality of the original contract between the grantee and L. L. V., and into the legality of the administrator's sale. *Bohanan v. Hans*, 26 Tex. 445, following *Mills v. Alexander*, 21 Tex. 154; *Webb v. Mallard*, 27 Tex. 80.

(2) Outstanding and Subsequently Acquired Interests.

A purchaser at an administration sale is entitled to have conveyed to

him whatever title there is in the estate, and can enforce his right by action. *Nesbitt v. Richardson*, 14 Tex. 656.

Although the administrator can convey no greater or better title than the estate has, yet, where there is a title held by another for the benefit of the estate, he is bound to include that in the conveyance to the purchaser. *Nesbitt v. Richardson*, 14 Tex. 656.

Where there had been a failure to return the field notes within the time prescribed by law, and a new file by a different certificate had been made to protect the estate, it was held that if the new file was necessary to protect the title the purchaser was entitled to demand a conveyance of it, and was not bound to accept a deed for such right only as the intestate had in the land sold. *Nesbitt v. Richardson*, 14 Tex. 656.

(3) Rights and Equities in Case of Excess or Deficiency in Land.

As to fraudulent representations of administrator conferring right to additional land, see ante, "Application of Rule in Case of Fraud, Misrepresentation, or Mistake," II, G, 6, b, (6), (c).

The vendors of a tract of land made a bond for title, describing the land only by metes and bounds, without designating the number of acres. The vendee having died, leaving unpaid a balance of the purchase money, the vendors filed a petition alleging said indebtedness. The land was sold, the sale confirmed, and the proceeds paid to the vendors. The purchaser brought suit against the vendors to recover the land as described in the bond. Held that, irrespective of the number of acres the tract was supposed to and advertised to contain, the bond and sale passed title according to the boundaries as set forth in the bond, in the absence of fraud and the fact that the purchaser knew that the boundaries included more than was supposed. *Dalton v. Rust*, 22 Tex. 133.

The vendors of a tract of land made bond for title, stipulating that they would make the title when the vendee should, according to the terms of the agreement, pay two dollars per acre for the land. The land was described only by metes and bounds, without designating the number of acres sold or contained within the boundaries. Upon the death of the vendee, leaving the purchase money unpaid, the vendors filed a petition in the county court where the estate was administered, alleging that the account against the estate for the balance of the purchase money had been properly allowed and proved, and prayed for a sale thereof to satisfy their lien. A sale was therefore made by the administrator. Held that, irrespective of the number of acres for which the vendors were paid, the purchaser at such sale was not responsible for more than the amount of his bid on account of any excess in the quantity. *Dalton v. Rust*, 22 Tex. 133.

Where the purchaser of land at administrator's sale has received a deed for "two hundred acres of land, more or less," which was bid for at the sale by the acre, and both were ignorant that the deed conveyed a quantity of land largely in excess of that paid for and called for by number of acres, equity will not permit the purchaser to hold the excess until he has paid for it, either at the rate bid, or a fair value. *Ladd v. Pleasants*, 39 Tex. 415.

In a suit on a note given for the price of land purchased at administrator's sale, defendant alleging deficiency in acreage, and claiming abatement at greater rate per acre than price paid must clearly show value of land. *Edmondson v. Hart*, 9 Tex. 554, 555.

Probate sale of a tract of land, reserving a parcel contracted to be sold by the intestate, estimated to contain 185 acres; the proof was that the land sold by the intestate was sold at one dollar an acre, that the amount sold

was 357 instead of 185 acres, that it was worth \$2.50 per acre, but that the balance of the land around there was not so valuable; the probate sale brought only forty cents per acre. Held, the proof was too vague and insufficient to sustain a claim for a greater abatement of the purchase money than 40 cents per acre. *Tryon v. Butler*, 9 Tex. 553, 554.

Action to Recover Back Money in Case of Deficit.—Where there was no allegation of mistake or fraud in administrator's sale, held deficiency could not be recovered. *Giddings v. Heiskill*, 44 Tex. 386, 387.

The statutory mode of presenting a claim to an administrator for allowance or approval is not the proper remedy to recover back money for a deficit in land purchased at administrator's sale. *Giddings v. Heiskill*, 44 Tex. 386, 388.

(4) Administrator as Trustee for Purchaser and Vice Versa.

Neither an estate nor its administrator can be held a constructive trustee of the legal title for purchasers from an executor who had no authority to sell, but, if necessary, the purchasers may be held as trustees in invitum for the benefit of the estate. *Coy v. Gaye* (Civ. App.), 84 S. E. 441.

Where there has been fraud on the part of the administrator and the purchaser of land and the proceedings resulting in the sale thereof, such purchaser may be held as trustee of the legal title for the benefit of the person entitled thereto. *Storer v. Lane*, 1 Tex. Civ. App. 250, 20 S. W. 852.

(5) Right, Title, and Priority as against Third Persons.

See, also, ante, "Bona Fide Purchasers," II, G, 6, a, et seq.; "Rights as against Recorded Conveyances," II, G, 6, a, (10); "Will Filed and Proved, as Notice to Purchaser," II, G, 6, a, (11); "Warranties and Representations; Rule of Caveat Emptor," II, G, 6, b, et seq.; "Not Affected by Secret Con-

veyances, Trusts or Equities," II, G, 6, b, (6), (c); "Same; Where Purchaser Buys Mere Equity or Chance of Title," II, C, 6, b, (6), (d).

(a) Proceeding and Sale as a Lis Pendens.

See, also, the title LIS PENDENS.

Probate proceedings resulting in a probate sale of land had in a county other than that in which the land lies, are not constructive notice of the sale of the land. *Thompson v. Rust*, 32 Tex. Civ. App. 441, 74 S. W. 924, affirmed in 97 Tex. 649, no op., citing *Allen v. Atchison*, 26 Tex. 616; *Russell v. Farquhar*, 55 Tex. 355 and *Lewis v. Cole*, 60 Tex. 341.

Where decedent died in another state where he had resided, and the estate was administered in A. county in this state, the probate proceedings in that county were not notice, to a subsequent purchaser from heirs, of the administrator's sale of land belonging to the estate located in M. county. *Holland v. Nance*, 102 Tex. 177, 114 S. W. 346; *Weems v. Master-son*, 80 Tex. 45, 15 S. W. 590; *Rogers v. Pettus*, 80 Tex. 425, 428, 15 S. W. 1093; *Dean v. Gibson*, 34 Tex. Civ. App. 508, 79 S. W. 363, affirmed in 98 Tex. 614, no op.

(b) Rights of Purchaser from Original Purchaser.

See, also, ante, "Purchaser from Original Purchaser," II, G, 6, a, (2).

Where plaintiff was an innocent purchaser for value from the purchaser of land at an administrator's sale, and received a warranty deed from such purchaser, he was not charged with notice of outstanding equities, unless there was something in his chain of title or in the general situation to put him on inquiry, though the purchaser at the administrator's sale was not a purchaser for value by reason of having credited the amount of his bid on a debt against the estate. *Nelson v. Bridge*, 87 S. W. 885, 39 Tex. Civ. App. 283.

(c) Rights of Purchaser Where Judgment Creditor Had No Notice.

Where a purchaser at probate sale on husband's estate had notice of wife's undivided interest in land bought thereat, he acquires no title to her interest therein, even though judgment creditor had had no notice. *Bradley v. Love*, 60 Tex. 472, 478, citing *Grace v. Wade*, 45 Tex. 522.

(d) Rights and Priorities in Particular Instances.

In General.—The sale made under order of probate court in which administration is pending, duly reported to the probate court and confirmed with directions to the administrator to make title, vests in the purchaser under deed made in pursuance thereof, title to the land sold as against one who does not hold under a superior title. *Tom v. Sayers*, 64 Tex. 339.

Where Mortgagee Fails to Assert Claim in Probate Court.—Where one of two persons owning land jointly, subject to mortgage died, and his administrator conveyed decedent's interest to other joint owner, reserving vendor's lien, and vendee, failing to pay purchase money deeded entire tract to deceased's estate, held mortgagee was bound to assert its claim through probate court, and failing to do so, purchaser at subsequent administrator's sale, took such interest free from the lien, except as to undivided interest of deceased at date of his death. *American, etc., Mortg. Co. v. MacDonell* (Civ. App.), 54 S. W. 259.

As against Purchaser from Heir or Distributee.—A sale by an administrator de bonis non is valid as against a purchaser from a distributee, where such purchase had been made during a hiatus in the administration of the estate between the resignation of the administrator and qualification of his successor, although it was claimed by such purchaser that the administration was virtually closed when he pur-

chased. *Mitchell v. DeWitt*, 20 Tex. 294.

A deed from decedent's heirs conveyed title as against a purchaser at the sale by the administrator who failed to discharge the note and mortgage given by him for the purchase money. *Burgess v. Millican*, 50 Tex. 397.

As against Sheriff's Sale under Judgment against Distributee.—A purchaser at a sale under an order of court of certain lands of an estate takes title as against a purchaser of such property at a sheriff's sale under a personal judgment against a distributee in favor of a creditor, who might have enforced his lien upon such property, but did not do so. *Bradshaw v. House*, 43 Tex. 143.

Where Purchaser Has No Notice of Fraud by Which Certificate Was Obtained.—A purchaser at an administrator's sale ordered by court, having no notice of fraud by which land certificate was withdrawn from land office, or of contract with locator, takes good title. *Keen v. Casey*, 22 Tex. 412, 417.

One of several heirs who were entitled to a land certificate in right of their deceased father representing that he was the sole heir employed an agent to procure the certificate, and to locate and obtain a patent on the same, in consideration for which he agreed to give such agent one-third of the land located. The agent obtained the certificate, located the land, and made return thereof to the general land office. The heir obtained letters of administration of the father's estate, and fraudulently withdrew the certificate from the office, and sold it at public sale, by order of the county court, as the property of the estate. The agent brought suit against the heir for the certificate, and obtained an injunction to restrain its being patented upon other land than on the location procured by him.

Held, that upon the intervention of the purchaser at the administrator's sale, who had no notice of the agreement with the agent, the injunction should be dissolved, and the cause continued for damages against the heir. *Keen v. Casey*, 22 Tex. 412.

Where Notice of Adverse Claim Is Given at the Sale.—A purchaser at a probate sale with notice that it was forbidden by an attorney of an adverse claimant of the land to be sold, is not an innocent purchaser. *Henderson v. Lindley*, 75 Tex. 185, 189, 12 S. W. 979.

Under Sale of Judgment Lien in Unpatented Certificate as against Inheritable Right of Heir.—Where the equitable lien of a judgment creditor in an unpatented land certificate was sold by order of the probate court, the purchaser and those holding under him acquired under the certificate an equitable title to the land paramount to the legal title which subsequently vested in the heir by patent from the state. *Peevy v. Hurt*, 32 Tex. 146.

When an administrator under the order of the probate court sells a located but unpatented land certificate for the payment of debts, the sale of the certificate was the sale of the equitable lien of the creditor created by his judgment which has priority over the inheritable right of the heir and by the sale and confirmation of it the prior right passed to the purchaser with all its incidents. *Peevy v. Hurt*, 32 Tex. 146.

(6) **Right, Title and Interest in Particular Instances.**

(a) **Under Sale of Land Conveyed by Debtor of Estate to Heir in Consideration of a Release.**

Administrator can not convey greater title than testator had at time of death, and conveyance by him of land conveyed to sole legatee and devisee of estate by debtor of estate in consideration of remission of claim against him, the said debtor, passes

only claim of estate thus remitted, and not the title to the land, where such claim was not secured by the decedent on such land. *O'Connor v. Vineyard*, 91 Tex. 488, 497, 44 S. W. 485.

Thus a decedent in his lifetime sold and conveyed to another certain land without reservation of lien. After the death of the vendor, his granddaughter, who was his sole heir and legatee, received a conveyance of such land from the heirs of the purchaser in consideration of the release of her claim for purchase money against the vendee's estate. It was held that by such purchase the granddaughter of the vendor did not take the title in trust for her ancestor's estate, but that she held the absolute fee subject to the claim of the estate to the debt, in case it should be needed for purposes of administration; that a subsequent sale and conveyance by the administrator of her testator of the interests of the estate in such land passed only the claim of the estate to the purchase money and did not convey title to the land. *O'Connor v. Vineyard*, 91 Tex. 488, 44 S. W. 485, reversing 43 S. W. 55, and citing *Rutherford v. Stamper*, 60 Tex. 447.

(b) Sale under Second Order Directing Sale of Only One-Half the Quantity.

The court ordered the sale of a lot belonging to an estate, and afterwards, and before the sale, ordered the sale of one-half of the same lot. The administrator's report and the order of confirmation showed a sale under the latter order, but the report mentioned the whole lot. The order of confirmation did not specifically mention the lot. Held, that the second order avoided the first, and that the order of confirmation showed that the court was affirming the second order; and, inasmuch as the confirmation did not show that the court had its attention called to, and acted upon, the unauthorized sale of the whole lot

upon approving it, title to the half of the lot did not pass. *Fishback v. Page*, 43 S. W. 317, 17 Tex. Civ. App. 183. *Pace v. Fishback*, 10 Tex. Civ. App. 450, 31 S. W. 424.

(c) Where Administrator Owned Life Interest; Deed Construed.

An administrator, acting under a void order of court, sold a lot belonging to the estate and covenanted as administrator with the purchaser, "his heirs and legal representatives, to warrant and forever defend this title to the aforesaid lot against the claim or claims of any and all persons lawfully claiming or to claim the same or any part thereof to the extent that I am bound to do according to law as such administrator and no further." The administrator in his individual capacity held a life estate in one-sixth of the lot. Held, that the life estate passed to the purchaser by the deed of the administrator. *Millican v. McNeill*, 102 Tex. 189, 114 S. W. 106; *Schnabel v. McNeill*, 102 Tex. 196, 114 S. W. 108, citing *Cook v. Caswell*, 81 Tex. 678, 17 S. W. 385; *Cole v. Grigsby* (Civ. App.), 35 S. W. 680, affirmed in 89 Tex. 223.

Held, also, that the fact that the title to the five-sixths interest had been acquired by limitations as against the remaindermen entitled to the one-sixth interest after the termination of the life estate did not preclude the remaindermen from claiming the one-sixth interest when limitations had not run for the required time after the death of the administrator to bar their right to the remainder. *Schnabel v. McNeill* (Civ. App.), 110 S. W. 558.

Held, also, that the fact that the estate had been partitioned and distributed to the heirs and accepted by them did not preclude the heirs as remaindermen from claiming the one-sixth remainder interest, where such interest was not included in the partition, and there was nothing to show that the proceeds of the administrator's sales of the land had been applied

to the payment of the debts of the estate or other purposes of administration, or had been taken into account in the partition. *Schnabel v. McNeill* (Civ. App.), 110 S. W. 558.

(d) Operation of Deed to Husband.

An administrator's deed to husband vests legal title in him and wife's title thereto is only equitable. *Saunders v. Isbell*, 5 Tex. Civ. App. 513, 515, 24 S. W. 307; *Edwards v. Brown*, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87; *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909.

(e) Sale of Community Property.

Rev. St. 1895, art. 2375, provides that sheriffs' deeds in execution sales shall be for all the right, title, interest, and claim which the defendant has in the property. Article 1340 provides that in foreclosure sales the order shall be for a sale as under execution. A deed of trust conveyed community property, which was executed by the widow, duly qualified as administratrix of such property; and the decree of foreclosure thereunder, and the order of sale, all referred to the title represented by the widow, while the deed was for all her right, title, and interest in the property. Held, that the deed conveyed all the title represented by her as administratrix of the community property. *Ostrom v. Arnold*, 58 S. W. 630, 24 Tex. Civ. App. 192.

The community estate of the surviving wife of the deceased having been subject to the administration, the title to her half passed by the administrator's sale. *Moody v. Looscan* (Civ. App.), 44 S. W. 621, affirmed in 93 Tex. 647, no op.; *Corzine v. Williams*, 85 Tex. 499, 22 S. W. 399, affirming 21 S. W. 267; *Soye v. McCallister*, 18 Tex. 80, 99.

(f) Where Purchaser Also Held Vendor's Lien.

Where land belonging to an estate was sold by order of the court for the payment of an established claim secured by vendor's lien which had been

previously established by a judgment, and the purchaser was the owner of the claim, he did not occupy the position of a person without interest in the sale, and where the sale was made for less than his claim and approved by the court, his claim was protanto paid, and he acquired an equitable title to the land subject to a lien for the payment of the costs of the sale. *Adams v. Richardson Estate*, 5 Tex. Civ. App. 439, 27 S. W. 29.

(g) Where Mortgage for Purchase Money Is Taken Back.

Where a mortgage for the purchase money is given back to the vendor on delivery of the deed, the fee remains in the vendor until the purchase money is paid. The same rule applies to a deed given by an administrator; the fee in such case remaining in the heirs. *Burgess v. Millican*, 50 Tex. 397; *Dunlap v. Wright*, 11 Tex. 597.

(h) Under Paschal's Digest, Article 1327.

Paschal's Digest, art. 1327, providing that the deed of administrator, shall vest in the purchaser the right or title of the testator or intestate, does not define the estate thereby conveyed. *Burgess v. Millican*, 50 Tex. 397.

(i) Under Sale of Interests in Public Lands.

Title as against rights of heir or third person, see ante, "Right, Title and Interest in Particular Instances, II, G, 6, c, (6).

Right of Third Person Locating Certificate in Consideration of a Portion of the Land.—Where an administrator contracted with a third party to locate a land certificate belonging to the estate, in consideration of a portion of the land, and such contract was approved by the court, and after the location the administrator, by order of court, made to the locator a deed in severalty of his interest, which was approved by the court, and in a

partition of the estate thereafter made in which all the heirs were duly represented, the partition was made in recognition of such deed to the locator, whatever interest the heirs had in such locative part of the land passed to the locator by virtue of such proceeding. *Halbert v. DeBode*, 15 Tex. Civ. App. 615, 40 S. W. 1011.

Under Sale of Certificate and Land upon Which Located.—An administrator's sale was of a headright certificate of deceased, as well as of the land on a certain creek, on which it seemed to have then been located. One location for one-third of a league was made, for which the patent was issued, and another certificate was issued for the unlocated balance of two-thirds of a league and one labor. The latter certificate was lost, and a duplicate by virtue of which the land in controversy was patented was issued in its stead. Held, that by the administrator's sale the purchaser acquired the whole of the right of the estate, and that this right attached to the right of the certificates in their changed forms, and to the land on which they were finally located. *Moody v. Looscan* (Civ. App.), 44 S. W. 621.

Sale of Located but Unpatented Certificate; Right to Survey.—Where an administrator, by order of the probate court, sells a located, but unpatented, land certificate for the payment of debts, the purchaser acquires the certificate with all its incidents, and among them any survey which may have been made under it. *Peevy v. Hurt*, 32 Tex. 146. As to priority against the inheritable right of the heir in such case, see ante, "Right, Title and Interest in Particular Instances," II, G, 6, c, (6).

Land and Not Certificate Sold Here.—Minutes of a probate court showed that an appraisement and administrator's report of sale of all property of an estate ordered to be sold itemized a headright certificate for 640 acres as

having been appraised and sold, and that on the report of sale being approved by the court, and ordered on the records, the administrator executed to the purchaser a deed conveying the land included in the certificate, and reciting that the land was offered at the sale ordered by the probate court. Whether the certificate was located before or after the order for sale did not appear, but the land was surveyed and patented prior to the sale. Held, that the land, and not the certificate by virtue of which the patent thereto was issued, was sold. *Lubbock v. Binns*, 50 S. W. 584, 20 Tex. Civ. App. 407.

Sale of Part of Certificate; Locative Right of Purchaser.—A sale of a part of a land certificate (as a half interest) gives the vendee the right to locate such interest for himself, under the law allowing two surveys to be made upon a certificate. *Farris v. Gilbert*, 50 Tex. 350.

Relocation Vesting Title in Vendees under First Location.—An administrator's location of land to which the heirs were entitled being invalid, a subsequent relocation vested title thereby acquired in the vendees of the administrator under the first location, and their grantees. *Pendleton v. Shaw*, 18 Tex. Civ. App. 439, 44 S. W. 1002.

Sale of Soldier's Certificate.—Where an evident intention of probate proceedings was to convey whatever rights to land certificate were acquired under a soldier's discharge, issued in 1836, it must be held, after a lapse of forty years, that right to such land certificate was sold, though at date of probate sales, it seemed not to have been located. *Ingram v. Walker*, 7 Tex. Civ. App. 74, 77, 26 S. W. 477; *Sypert v. McCowen*, 28 Tex. 635.

Idem Sonans.—Where administration was granted on the estate of Willis A. Farris, and a certificate to certain land read the same as the act which authorized its issuance, "Willis

A. Forris," and the certificate purported to be sold by the administrator was that of Willis A. Farris, the sale passed title to the certificate of Forris; it being evident that the same person was intended. *Lyne v. Sanford*, 82 Tex. 58, 19 S. W. 847.

(j) Under Sale by Commissioners Who Are Also Heirs.

Though a county court has exceeded its jurisdiction in appointing commissioners to sell land of a deceased person, said commissioners being the heirs of deceased, their deed conveys all their interest to the purchaser. *Berger v. Arnold* (Civ. App.), 24 S. W. 527.

7. Collateral Attack.

a. When Collateral; When Direct.

Where a creditor who had purchased the property at an execution sale against the heir, filed a petition, objecting to the confirmation of a sale of the same property by the administrator of the ancestor, on the ground that the claims, for the payment of which said sale was made, were, at the time at which they were allowed and approved by the court, barred by the statutes of limitations, it was held to be a direct proceeding to set aside and annul the judgment and orders of the county court, and not a collateral attack. *Smart v. Panther*, 42 Tex. Civ. App. 262, 266, 95 S. W. 679, citing *Buchanan v. Bilger*, 64 Tex. 589; *Crawford v. McDonald*, 88 Tex. 626, 630, 33 S. W. 325, affirming 33 S. W. 325.

"That such proceeding was instituted within a reasonable time there can be no doubt. The orders of the court approving said claims as legal charges against the estate of J. H. King, deceased, were entered, respectively, November 7, 1901, and January 30, 1902, and the suit to set aside such orders was filed April 24, 1902. Appellee showed such an interest in the land involved as entitled him to maintain such a proceeding, and, under the law as it now exists, the suit was properly commenced in the county court.

Franks v. Chapman, 60 Tex. 46; *Buchanan v. Bilger*, 64 Tex. 589." *Smart v. Panther*, 42 Tex. Civ. App. 262, 95 S. W. 679.

Where plaintiffs filed suit, to try title to recover certain land, or to obtain a decree declaring the defendants to be trustees, of the title for the plaintiffs, the allegation being that the order of sale had been obtained through the fraud and collusion of the administrator and the purchaser, it was held that, in so far as the plaintiffs sought to try and set aside the legal title conveyed by the sale, it was a collateral attack, and could not be maintained; but that (the facts being sufficient) the plaintiffs were entitled to charge the defendants as trustees of the legal title for their benefit and to have a decree rendered declaring them so to be. This did not violate the principle that the proceedings of court of competent jurisdiction may not be collaterally attacked, since the proceedings leading to the sale and investing the purchaser with legal title might be permitted to stand, and yet the holder of the legal title constituted a trustee for the benefit of the equitable owner. *Storer v. Lane*, 1 Tex. Civ. App. 250, 20 S. W. 852. See, also, *Martin v. Robinson*, 67 Tex. 368, 381, 3 S. W. 550; *Fisher v. Wood*, 65 Tex. 199, 204.

A suit to cancel and annul a deed executed in pursuance of the proceedings of the probate court, which are alleged to have been fraudulent and void, and to cast a cloud on plaintiff's title, is not a collateral attack on such probate proceedings, but a direct effort to vacate the deed, which may be done when fraud has been perpetrated, though the probate orders stand. *McC Campbell v. Durst*, 73 Tex. 410, 11 S. W. 380; *Storer v. Lane*, 1 Tex. Civ. App. 250, 256, 20 S. W. 852. See, also, *Holland v. Ferris* (Civ. App.), 107 S. W. 102, in which attack was held to be collateral.

b. Who May Attack Sale.

A sale of a decedent's land by order of the county court can not be collaterally attacked for fraud by one having no interest in decedent's estate. *Grant v. Hill* (Civ. App.), 29 S. W. 247; *Grant v. Hill* (Civ. App.), 30 S. W. 952.

Proceedings for the sale of realty of a deceased person to pay debts can not be collaterally attacked by a stranger to the title, where the jurisdiction of the court is unquestionable. *Baker v. De Zavalla*, 1 Posey, Unrep. Cas. 621.

c. When Lies; General Doctrine.

Probate courts being courts of competent jurisdiction in the matter of the sale of lands of deceased persons, it is the general doctrine that sales ordered and confirmed by such courts are not subject to collateral attack because of mere defects and irregularities in the proceedings not going to the jurisdiction of the court, but only for those errors and omissions which go to the jurisdiction of the court and render its orders and decrees wholly void. *Toliver v. Hubbell*, 6 Tex. 166; *Poor v. Boyce*, 12 Tex. 440; *Howard v. Bennett*, 13 Tex. 309, 316; *Murchison v. White*, 54 Tex. 78, 84; *Fleming v. Seeligson*, 57 Tex. 524; *Rutherford v. Stamper*, 60 Tex. 447, 449; *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550; *Lyne v. Sanford*, 82 Tex. 58, 63, 19 S. W. 847; *Saul v. Frame*, 3 Tex. Civ. App. 596, 22 S. W. 984; *Templeton v. Ferguson*, 89 Tex. 47, 33 S. W. 329, affirming 32 S. W. 148; *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325, affirming 33 S. W. 325; *Holland v. Ferris* (Civ. App.), 107 S. W. 102, 105; *Guilford v. Love*, 49 Tex. 715; *Halbert v. Carroll* (Civ. App.), 25 S. W. 1102, 1103; *Halbert v. De Bode* (Civ. App.), 28 S. W. 58, 60; *Baker v. De Zavalla*, 1 Posey 621, 639; *Burdett v. Silsbee*, 15 Tex. 604, 617; *Dancy v. Stricklinge*, 15 Tex. 557; *Lynch v. Baxter*, 4 Tex.

431; *George v. Watson*, 19 Tex. 354, 370; *Peterson v. Lowry*, 48 Tex. 408; *Perry v. Blakey*, 5 Tex. Civ. App. 331, 334, 23 S. W. 804; *Edwards v. Halbert*, 64 Tex. 667, 670; *Davis v. Touchstone*, 45 Tex. 490, 497; *Kerlicks v. Keystone Land, etc., Co.* (Civ. App.), 21 S. W. 623, 624; *Withers v. Patterson*, 27 Tex. 491; *Holland v. Nance*, 102 Tex. 177, 114 S. W. 346; *Alexander v. Maverick*, 18 Tex. 179; *Gillenwaters v. Scott*, 62 Tex. 670; *Halbert v. Martin* (Civ. App.), 30 S. W. 389; *Heath v. Layne*, 62 Tex. 686, 687; *Wells v. Polk*, 36 Tex. 120, 127; *Jackson v. Houston*, 84 Tex. 622, 19 S. W. 799; *Hurley v. Barnard*, 48 Tex. 83; *Cassels v. Gibson* (Civ. App.), 27 S. W. 725; *Hudson v. Jurnigan*, 39 Tex. 579, 589; *Flenner v. Walker*, 5 Tex. Civ. App. 145, 23 S. W. 1029.

Upon collateral attack in which it is stated that the administration was a nullity unless it was averred and proved on the trial that the facts existed which made the administration necessary, the word null or void is to be taken in the sense of voidable, for the presumption is, until the contrary is shown, that the facts necessary to give jurisdiction to the court and validity to the proceedings were made to appear to the court which granted the administration. *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550.

An innocent purchaser can not be held responsible for the errors, irregularities and omissions of the officers entrusted with the keeping of the records of proceedings in the probate courts, especially when it is matter of judicial and common notoriety that they have so illy and imperfectly performed that duty, in perhaps the great majority of cases. *Dancy v. Stricklinge*, 15 Tex. 557, 560; *Lynch v. Baxter*, 4 Tex. 431; *Withers v. Patterson*, 27 Tex. 491.

The purchaser at the sale is not bound to look beyond the decree of the court. *Lynch v. Baxter*, 4 Tex.

431; *Burdett v. Silsbee*, 15 Tex. 604; *Dancy v. Stricklinge*, 15 Tex. 557; *Alexander v. Maverick*, 18 Tex. 179; *George v. Watson*, 19 Tex. 354, 370.

Where there is an order of sale, sale, report, and confirmation, and evidence that the purchase money was paid, irregularities in the proceedings taken in making a probate sale will not affect the validity of such sale. *Peterson v. Lowry*, 48 Tex. 408.

Void Where Court Had No Jurisdiction.—Though often said that an order of the county court for the sale of an estate, and a sale under such order, are effectual to pass the title to the purchaser, yet such expressions are predicated on the assumption that, in making the order, the jurisdiction of the court was rightfully called into exercise, and that the order itself was a valid one. *Withers v. Patterson*, 27 Tex. 491.

An order of a sale made without jurisdiction may be collaterally attacked, even as against bona fide purchaser. *Withers v. Patterson*, 27 Tex. 491, 500.

Want of jurisdiction in the court ordering a probate sale is fatal to the title obtained under such proceedings. They are void. *Stone Land, etc., Co. v. Boon*, 73 Tex. 548, 11 S. W. 544.

Though authorized, under certain circumstances, to order a sale of land of a decedent, yet, if the court orders the sale when the circumstances required do not exist, its order is without jurisdiction and without authority. *Withers v. Patterson*, 27 Tex. 491.

Distinction between Case of General Jurisdiction and Jurisdiction Only for Special Purpose or under Particular Circumstances.—In *Withers v. Patterson*, 27 Tex. 491, 497, the court says: "There exists, in the minds of some, a loose idea, that because the court has jurisdiction to order the sale of land, its jurisdiction is exercised whenever it orders a sale; and it is said

that if a court determines any question of fact necessary to support its jurisdiction, its determination or judgment can never be collaterally impeached. This can not be universally true; because in the case of an administration upon the estate of a living man, the court necessarily determines that the man is dead, and yet the man may be shown to have been alive at the time of the judgment; and in such case, although every step in the proceedings by which the man's estate is sold may have been taken with the most perfect regularity, and although the purchaser buys in good faith, no title passes or can pass. This shows that the court only exercises its jurisdiction when the facts exist which authorize it to do the thing in question. And the question whether the jurisdiction of a court has been exercised or not, is solved by ascertaining whether or not the facts existed which authorized the court to act as it did act."

And again in *Withers v. Patterson*, 27 Tex. 491, 499, the court says, in relation to the jurisdiction of the probate court to order a sale of lands: "Its power to order the sale of land of an estate lies within very narrow limits. It can order the sale of the land of an estate for the payment of debts and expenses of administration: to raise the amount of the allowance for the surviving wife and children, and, in certain cases, for the purposes of partition and distribution amongst the heirs. The court has no power conferred upon it by law to sell the land of an estate for any other purpose." And the court further says that, if a sale is ordered by the probate court for any other purpose, the order and the sale are nullities, and, being such, "may be impeached collaterally." *Merriweather v. Kennard*, 41 Tex. 273, 277.

Fraud Apparent upon the Record.—

See post, "Fraudulent Sales," II. G. 7, d, (3).

d. Particular Grounds of Attack Considered.**(1) Sales under Void and Irregular Administrations.****(a) Generally.**

If an order of sale of the estate, made in the course of a void and not merely irregular or erroneous administration, however regular in form, is a nullity; and a purchaser at a sale under such order, though in good faith and without notice, would acquire no title. *Withers v. Patterson*, 27 Tex. 491. See, also, *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550.

(b) Effect of Recognition by Court.

Where a person is recognized as administrator by the county probate court, and makes a sale under order of such court, the regularity of his appointment can not be questioned collaterally, so as to invalidate the sale. *Saul v. Frame*, 3 Tex. Civ. App. 596, 22 S. W. 984; *Moseley v. Stucken*, 26 Tex. Civ. App. 290, 296, 62 S. W. 1103, affirmed in 95 Tex. 683, no op.; *Pendleton v. Shaw*, 18 Tex. Civ. App. 439, 44 S. W. 1002, affirmed in 93 Tex. 693, no op.; *Herndon v. Kuykendall*, 58 Tex. 341, 348; *Baker v. Coe*, 20 Tex. 429.

(c) After Authority Has Terminated or Lapsed; Second and Other Administrations.

Sale by Administrator after Expiration of Term without Order of Extension.—See ante, "Same; Defects and Irregularities Not Going to the Jurisdiction," II, G, 6, a, (8); "Land Sold under Previous Order, or under Previous Administration," II, G, 2, b.

Where an administrator was appointed, an order of sale given, the same made and confirmed, the final account rendered, and the administrator discharged, the probate court was without jurisdiction to grant letters on the same estate; and, having done so, a sale thereunder was a nullity. *Hurt v. Horton*, 12 Tex. 285.

Where an estate appears to have been fully administered and the administrator is discharged, the probate court has no authority to grant a further administration of the estate, unless a necessity is shown for such further administration; and a sale of land under an order of the court under such latter administration is void in the hands of an innocent purchaser, and his title may be impeached collaterally. *Withers v. Patterson*, 27 Tex. 491.

An intestate died in 1836, leaving only real property. Administration was granted in 1846, on an application which did not show jurisdiction, and in 1853 administration d. b. n. was granted on application failing to show special reasons therefor, and a debt allowed, to satisfy which said real estate was sold. Held, that both administrations were void, and that the order of sale, being void, may be attacked collaterally, especially where it appears that the object of the administration was the personal benefit of the applicant. *Paul v. Willis*, 69 Tex. 261, 7 S. W. 357.

Administration having been opened on the estate of a decedent, in 1838, in the county of his residence and death, a grant of administration de bonis non upon his estate, in 1852, in a different county, which the petition showed to have been unnecessary, is illegal and void, for want of jurisdiction in the court; and a purchaser, under a sale by the administrator, acquires no title. *Wardrup v. Jones*, 23 Tex. 489.

Where an administration was taken out in Galveston county on estate of one who fell at massacre of Goliad (in another county) ten years prior thereto, and several years after last order was made in such administration, application was filed to reopen the administration, falsely stating that deceased died in Galveston county, a purchase at a sale of decedent's property thereunder acquired no title. *Paul v. Willis*, 69 Tex. 261, 264, 7 S. W. 357.

The husband died, and administration in the county of the domicile was granted to the wife, but there was no action upon it. Judgment was recovered against her on community debt, and there was a sale, leaving a large balance due. The wife died, and administration was taken out in the same county on her estate, and afterwards administration of the community property was granted to another, in a county where was real estate belonging to husband and wife, under which land was sold. Held, that said sale was valid. *Grande v. Herrera*, 15 Tex. 533. See, also, *Loving v. McKenney*, 7 Tex. 521, 523; *Fisk v. Norvel*, 9 Tex. 13, 18; *Hurt v. Horton*, 12 Tex. 285; *Frances v. Hall*, 13 Tex. 189, 192; *Soye v. McCallister*, 18 Tex. 80, 100; *Giddings v. Steele*, 28 Tex. 732.

And the fact that a second grant of administration on an estate is general, and not confined to the goods, etc., de bonis non, and makes no mention of a previous administration, can not affect the power of the court to order a sale. *Grande v. Herrera*, 15 Tex. 533, 534.

Where First Representative Refuses to Act.—The person named in a will as executrix openly declared her purpose to have nothing to do with the estate, refused to return an inventory, and requested the court to appoint her son as administrator de bonis non. As such administrator, the son sold land under order of court. Held, that the purchaser was protected as against a collateral attack upon the legality of the administration. *Willis v. Ferguson*, 59 Tex. 172.

Presumption as to Close of Administration.—The fact that 10 years elapsed, during which no order was made by a probate court in the administration of a decedent's estate, can not avail, on a collateral attack, to defeat a subsequent sale of decedent's realty under the court's order. *Boslet v. Thomas*, 80 S. W. 115, 35 Tex. Civ. App. 144.

Where it was questionable whether the intestate resided, at the time of his death, in the county where administration was granted, and there was also a considerable lapse of time, during which the record of the probate court showed no act of administration, it was held that neither the authority of the court nor of the administrator could be drawn in question, in a collateral action, for the purpose of invalidating the title of a purchaser at the administrator's sale. *Burdett v. Silsbee*, 13 Tex. 604, affirmed in 98 Tex. 611, no op.; *Burdett v. Silsbee*, 15 Tex. 604, 617. See, also, *Templeton v. Ferguson*, 89 Tex. 47, 33 S. W. 329, affirming 32 S. W. 148; *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325, affirming 33 S. W. 325; *Shirley v. Warfield*, 12 Tex. Civ. App. 449, 34 S. W. 390. See the title EXECUTORS AND ADMINISTRATORS, ante, p. 364.

What Constitutes Final Close of Administration.—An entry that the final account of an administrator be admitted and filed, and that he be discharged upon paying costs, is not such a final close of the administration as will defeat the title of a bona fide purchaser at a sale by such administrator, upon order granted eight months afterwards. *Alexander v. Maverick*, 18 Tex. 179, 197.

(d) Delay in Granting First Administration.

The facts that administration was not granted until more than ten years from decedent's death, and that the records of the probate court fail to show whether he was a resident of the county or had property there, or whether any claim against the estate was ever presented, allowed, or filed, do not invalidate the administrator's sale of land to pay debts on collateral attack by the heirs. *Flenner v. Walker*, 5 Tex. Civ. App. 145, 23 S. W. 1029, following *Lyne v. Sanford*, 82 Tex. 58, 61, 19 S. W. 847; *Saul v. Frame*, 3

Tex. Civ. App. 596, 22 S. W. 984; *Martin v. Robinson*, 67 Tex. 368, 383, 3 S. W. 550. See, also, *Blair v. Cisneros*, 10 Tex. 34, 35; *Fisk v. Norvel*, 9 Tex. 13, 15; *Withers v. Patterson*, 27 Tex. 491, 494; *Boyle v. Forbes*, 9 Tex. 35, 36; *Frances v. Hall*, 13 Tex. 188, 189; *Wardrup v. Jones*, 23 Tex. 489; *Cochran v. Thompson*, 18 Tex. 652; *Merriwether v. Kennard*, 41 Tex. 273; *Duncan v. Veal*, 49 Tex. 603, 604.

(2) Absence of Valid Debts; Sale without Necessity or for Improper and Unauthorized Purpose.

In trespass to try title, where defendants claim under sale of the premises by order of the probate court to pay a claim against the estate of a decedent, plaintiff will not be permitted to show that the estate against which such claim was allowed was not chargeable therewith. *Looney v. Linney* (Civ. App.), 21 S. W. 409.

It is no ground for collateral attack upon an administrator's sale of a land certificate that the claim for which it was sold was barred on its face and would not support an administration. *Lyne v. Sanford*, 82 Tex. 58, 64, 19 S. W. 847; *Firebaugh v. Ward*, 51 Tex. 409; *Capt v. Stubbs*, 68 Tex. 222, 4 S. W. 467.

Where claims against an estate have been presented to and approved by the probate court they stand as judgments and the sale ordered for the purpose of paying such claims can not be collaterally attacked, even though it is apparent upon their face that they were barred by the statute of limitations or were otherwise invalid. *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550. See, also, *Moore v. Hillebrant*, 14 Tex. 312; *Heffner v. Brander*, 23 Tex. 631; *Firebaugh v. Ward*, 51 Tex. 409.

It is not necessary that the record in a probate court show a necessity for a sale of real estate, and though a sale be ordered and made without a necessity existing when the order was

made, the order is conclusive until set aside by proceedings having that object directly in view, and a purchaser, without fraud or collusion, will be protected by the sale if the decree under which it was made be the decree of a court of competent jurisdiction. *Lynch v. Baxter*, 4 Tex. 431. Accord, *Gillenwaters v. Scott*, 62 Tex. 670.

An administrator's sale of a tract of land to pay expense of locating lands of the estate, the expenses being considered as one-third in value of the land so located, is not assailable collaterally as being a partition giving the locator one-third. *Casseday v. Norris*, 49 Tex. 613.

(3) Fraudulent Sales.

Early Dicta.—In a number of the early cases there are expressions holding or intimating that probate sales may be collaterally impeached upon the ground of fraud. See *Burdett v. Silsbee*, 15 Tex. 604, 617; *Finch v. Edmonson*, 9 Tex. 504; *Alexander v. Maverick*, 18 Tex. 179, 194; *Herndon v. Kuykendall*, 58 Tex. 341, 350; *Grant v. Hill* (Civ. App.), 29 S. W. 247, in which the court contradicts itself as to this proposition. See, also, *Saul v. Frame*, 3 Tex. Civ. App. 596, 22 S. W. 984; *Flenner v. Walker*, 5 Tex. Civ. App. 145, 23 S. W. 1029; *Holland v. Ferris* (Civ. App.), 107 S. W. 102.

Present Doctrine.—The dicta found, among the earlier decisions, to the effect that sales made collusively and fraudulently by administrators are void, are found in cases in which, by special pleadings, the sales were directly attacked and sought to be avoided, and not in actions of trespass to try title, or other collateral proceedings. The later decisions of the supreme court have settled the doctrine to be that collusive and fraudulent sales, by which the administrator and purchaser have sought to defraud the estate of land, are not void on account of that fraud, but are merely voidable upon direct attack. *McCamp-*

bell v. Durst, 15 Tex. Civ. App. 522, 534, 40 S. W. 315, writ of error dismissed (see 91 Tex. 147); *McC Campbell v. Durst*, 73 Tex. 410, 11 S. W. 380; *Rutherford v. Stamper*, 60 Tex. 447, 449; *Fisher v. Wood*, 65 Tex. 199, 204; *Jackson v. Houston*, 84 Tex. 622, 625, 19 S. W. 799; *Lyne v. Sanford*, 82 Tex. 58, 64, 19 S. W. 847; *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550; *Capt v. Stubbs*, 68 Tex. 222, 223, 4 S. W. 467; *Heath v. Layne*, 62 Tex. 686, 691; *Firebaugh v. Ward*, 51 Tex. 409; *Hurley v. Barnard*, 48 Tex. 83, 87; *Grant v. Hill* (Civ. App.), 30 S. W. 952, 954.

Same; Illustrations.—That the administration and sale of certificate was fraudulent, and that the claim was barred on its face, and as a debt it would not support an administration, are proper objections to be urged in a direct attack upon the administration, but can not be heard in a collateral proceeding. *Lyne v. Sanford*, 82 Tex. 58, 64, 19 S. W. 847; *Firebaugh v. Ward*, 51 Tex. 409, 414; *Capt v. Stubbs*, 68 Tex. 223, 4 S. W. 467.

Where, after lapse of many years, a petition for an administration is presented to a probate court, sufficient to invoke its jurisdiction, and administration is granted, claims presented and allowed, though barred upon their face, stand as judgments, and, though fraudulent, neither decrees directing sales of property to pay them, nor decrees confirming such sales, are open to collateral attack. *Martin v. Robinson*, 67 Tex. 368, 381, 3 S. W. 550.

The attorney of an administrator procured an order of court directing the administrator to sell for cash the lands of the estate, and entered into an arrangement by which the purchaser took the title for the benefit of the attorney, and paid nothing therefor. The final account, accompanying the petition for the discharge of the administrator, sworn to by the attorney, showed that the proceeds of the sale of the lands had been used in

the payment of the expenses of the sale and administration and in the payment of an allowance to the widow. The attorney paid the expenses, but not the allowance. The purchaser deeded one-half of the lands to the attorney, and gave to the widow a deed to the other half, with a blank left for the insertion of the name of the grantee. The object of the attorney in procuring the sale of the land was to free it from the claims of creditors. Held: (1) That a fraud was committed against the devisees of the will of deceased entitling them to charge the attorney as constructive trustee. (2) That their cause of action accrued when the administrator's sale was had and not when the deed was made to the attorney. (3) That the administrator's deed was not void, but only voidable, and passed the legal title. *McC Campbell v. Durst*, 15 Tex. Civ. App. 522, 40 S. W. 315 (see 91 Tex. 147, writ of error dismissed).

Where Fraud Goes to Jurisdiction or Is Apparent upon the Record.—

Decrees of a probate court, through which a sale of a decedent's property has been made, although obtained by fraud, must stand if the fraud does not go to the jurisdiction of the court, unless they are set aside by some proceeding appellate in its character, if relief is sought in the district court. *Fisher v. Wood*, 65 Tex. 199.

A decree confirming an administrator's sale procured by fraud is not void where the proceedings were regular on their face but voidable in a suit directly against the parties claiming under the administrator's deed. *McC Campbell v. Durst*, 73 Tex. 410, 11 S. W. 380.

Fact That Fraud May Be Inferred, Insufficient.—An administration, and an administrator's sale of the estate of an immigrant to Texas, who died after the war with Mexico, and was a citizen soldier, are not void and subject to collateral attack on the ground

of fraud, because such fraud may be inferred from the course and result of the proceedings, without other proof, if a want of jurisdiction is not shown. *Shirley v. Warfield*, 12 Tex. Civ. App. 449, 34 S. W. 390; *Vogelsang v. Daugherty*, 46 Tex. 466.

(4) Sale of Property Not Subject to Sale.

Homestead.—Where a tract of land has lost its homestead character, and becomes a part of the assets of the deceased owner's estate, the heirs of the owner can not attack in a collateral action the proceedings for the sale thereof for the payment of debts. *Dignowity v. Baumblatt*, 85 S. W. 834, 38 Tex. Civ. App. 363.

Soldier's Land or Scrip.—An administrator's sale to pay debts is not subject to collateral attack on the ground that deceased was a volunteer in the Texas army from a foreign country, and that his estate was therefore exempt from administration by creditors, under Act January 14, 1841, where the evidence leaves it uncertain as to whether deceased was a resident of Texas at the date of the declaration of independence, March 2, 1836, and hence a citizen of the republic, under section 10 of the "General Provisions" of the constitution. *Flenner v. Walker*, 5 Tex. Civ. App. 145, 23 S. W. 1029.

(5) Defects and Irregularities in Proceedings to Sell.

(a) Disqualification of Judge.

Where the exhibit forming part of the application for the sale shows the interest of the county judge, his order of sale is void, and may be attacked collaterally or otherwise whenever any right is asserted by virtue thereof. *McNally v. Haynes*, 59 Tex. 583; *Burks v. Bennett*, 62 Tex. 277, 280.

(b) Noncompliance with Statutes, Generally.

See, also, ante, "Effect of Defects Not Going to the Jurisdiction," II, G,

6, a, (6); "Same; Defects and Irregularities Not Going to the Jurisdiction," II, G, 6, a, (8); "Right to Rely upon Order of Sale and Confirmation," II, G, 6, a, (9), (a).

Noncompliance with the terms of the statute by an administrator in selling land under an order of court, can not be attacked in a collateral proceeding. *Halbert v. Martin* (Civ. App.), 30 S. W. 389; *Heath v. Layne*, 62 Tex. 686; *Burdett v. Silsbee*, 15 Tex. 604; *Hudson v. Jurnigan*, 39 Tex. 579; *McCampbell v. Durst*, 15 Tex. Civ. App. 522, 40 S. W. 315 (see 91 Tex. 147).

"Such departures from statutory requirements constitute irregularities, which in a direct proceeding may entitle parties at interest to have the sale set aside; but they do not deprive the probate court of jurisdiction, and subject a sale so made to collateral attack. *Jackson v. Houston*, 84 Tex. 622, 19 S. W. 799, and cases cited; *Hurley v. Barnard*, 48 Tex. 83; *Guilford v. Love*, 49 Tex. 715; *Lyne v. Sanford*, 82 Tex. 58, 19 S. W. 847." *Casels v. Gibson* (Civ. App.), 27 S. W. 725.

(c) Preliminary Steps Defective.

Where the statute under which a sale is ordered does not specifically prescribe the steps which shall be taken before the order can be made, a sale so made will only be voidable if the steps taken preliminary to the order to make the sale were in some respects defective; for the court was called upon to adjudicate the sufficiency of these very things before the order was made, and, however erroneous its judgment may have been, it was not void. *Gillenwaters v. Scott*, 62 Tex. 670, 673, citing *Alexander v. Maverick*, 18 Tex. 179; *Guilford v. Love*, 49 Tex. 715, 735; *George v. Watson*, 19 Tex. 354, 370; *Withers v. Patterson*, 27 Tex. 491; *Giddings v. Steele*, 28 Tex. 732, 750; *McNally v. Haynes*, 59 Tex. 583, 595.

(d) Clerical Omissions and Misprisions.

Clerical omissions and misprisions can not invalidate probate proceedings, especially after long lapse of time and in case of administration apparently honestly conducted. *Webb v. Sellers*, 27 Tex. 423, 427.

An administrator's sale of land under an order of court will not be held invalid years afterwards, when the administration seems to have been conducted fairly, merely because the baptismal name of the administrator or intestate is stated differently in different parts of the proceedings; it being plain that the same person was intended. *Webb v. Sellers*, 27 Tex. 423.

Petition Not Marked "Filed."—An administrator's petition for the sale of land found among other papers of the estate in the clerk's custody, showing that it was acted on by the court and administrator, will be received after fifty years as if it had been marked "Filed." *Pendleton v. Shaw*, 44 S. W. 1002, 18 Tex. Civ. App. 439.

(e) Want of Petition or Application.

See ante, "Same; Defects and Irregularities Not Going to the Jurisdiction," II, G, 6, a, (8). See, also, ante, "Necessity for Written Petition," II, G, 5, h, (1).

It is not necessary to show that the order of sale was made upon a written application before admitting in evidence the order of sale and confirmation thereof. *Louder v. Schluter*, 78 Tex. 103.

Even though the record should show affirmatively that there was no written petition for an order of sale, it would merely be an irregularity and not such a jurisdictional defect as would render the judgment subject to collateral attack. *Alexander v. Maverick*, 18 Tex. 179, 196; *Robertson v. Johnson*, 57 Tex. 62, 67; *Saul v. Frame*, 3 Tex. Civ. App. 596, 604, 22 S. W. 984.

Under Act of 1846.—Order of sale and sale, made without prerequisite of

act of 1846, which required that petition be filed and a return of citation were void, and may be impeached in collateral proceeding. *Finch v. Edmonson*, 9 Tex. 504, 514.

(f) Defective Petition; Failure to Show Proper or Sufficient Grounds for Sale.

An order of sale can not be collaterally attacked for defects in the petition, where enough is shown to give the court jurisdiction. *Poor v. Boyce*, 12 Tex. 440; *Gillenwaters v. Scott* 62 Tex. 670; *Weems v. Masterson*, 80 Tex. 45, 55, 15 S. W. 590. See, also, *McNally v. Haynes*, 59 Tex. 583, 585.

It is no ground for collateral attack upon an administrator's sale of a land certificate that the application shows no cause for administration or reason for the sale of the certificate. *Lyne v. Sanford*, 82 Tex. 58, 19 S. W. 847.

Those interested must be conclusively presumed to have had notice of the application such as the law prescribed, and the decrees of the probate court in a collateral proceeding must be deemed conclusive of the fact that the sale was made for a lawful purpose and in a lawful manner in the absence of some evidence in the record showing to the contrary, other than the fact that the application was defective. *Weems v. Masterson*, 80 Tex. 45, 54, 15 S. W. 590.

Where a judge of probate granted to an administrator license to sell real estate, the petition not alleging a necessity for the sale, it was held that the sale could not be attacked collaterally, and the purchaser, in the absence of fraud, would be protected. *Poor v. Boyce*, 12 Tex. 440. See, also, *Weems v. Masterson*, 80 Tex. 45, 54, 15 S. W. 590.

Objection was made that the application showed no cause for administration and no reason for a sale of the certificate. The application showed that the estate was indebted and asked for the sale of a certificate for the

purpose of paying debts. Held, that what ever might be the objections to the application in this respect, they could not be heard in a collateral proceeding. *Lyne v. Sanford*, 82 Tex. 58, 63, 19 S. W. 847; *Hurley v. Barnard*, 48 Tex. 83, 87.

"In *Gillenwaters v. Scott*, 62 Tex. 670, 672, the grounds on which the sale of land was applied for by the administrator were not sufficient under the law to authorize the sale, but the condition of the estate was such that a proper application might have been made, and it was held that the order of sale and confirmation were not subject to collateral attack on account of the defective application. *Kleinecke v. Woodward*, 42 Tex. 311, 312, asserts the same rule as the other cases." *Weems v. Masterson*, 80 Tex. 45, 54, 15 S. W. 590.

The orders of a court having jurisdiction of an estate, made in 1871, directing a sale of certain property of the estate, and after sale confirming the same as reported, can not be attacked collaterally on the ground that, so far as the application showed, there was no necessity for the sale, and no debts of the estate unpaid. The law then in force did not prescribe what the application for sale should contain, as it now does. *Storer v. Lane*, 1 Tex. Civ. App. 250, 20 S. W. 852.

"In the case of *Lynch v. Baxter*, 4 Tex. 431, it appeared that an application to sell land was made, which did not show that there was not sufficient personal property to pay the debts and charges against the estate and which did not describe the land, and in a collateral proceeding it was claimed that the order to sell, sale, and confirmation were nullities, because the record of the probate court did not show a necessity for the sale of the land." It was held: "If the sale was without necessity existing at the time the order was made for such sale, still the order was conclusive un-

til it had been set aside by proceedings having that object directly in view; and the purchaser, having purchased without fraud or collusion with the administrator, would be protected by the sale if the decree under which it was made was the decree of a court of competent jurisdiction." *Weems v. Masterson*, 80 Tex. 45, 53, 15 S. W. 590.

(g) Want of Notice or Process.

See ante, "Necessity for Notice," II, G, 5, g, (1).

Objections to an order of sale, when offered to support a deed, for want of notice are only available in a direct proceeding, and can not be urged when the sale is collaterally attacked. *Lyne v. Sanford*, 82 Tex. 58, 19 S. W. 847.

That the order of sale was obtained and the certificate sold by the administrator without notice is no ground for a collateral attack upon the sale of a land certificate by an administrator. *Lyne v. Sanford*, 82 Tex. 58, 63, 19 S. W. 847; *Hurley v. Barnard*, 48 Tex. 83, 87; *Heath v. Layne*, 62 Tex. 686, 691; *George v. Watson*, 19 Tex. 354, 368.

(h) Want of Exhibit Showing Condition of Estate; Defective Exhibit.

See, also, ante, "Verified Exhibit of Property, Debts and Expenses," II, G, 5, h, (2), (b).

It will not vitiate an order of sale when attacked collaterally that no statement of the condition of the estate accompanied the application for order to sell. *Lyne v. Sanford*, 82 Tex. 58, 19 S. W. 847; *Kleinecke v. Woodward*, 42 Tex. 311.

Such statutory requirement is directory merely. *Jackson v. Houston*, 84 Tex. 622, 625, 19 S. W. 799; *Kleinecke v. Woodward*, 42 Tex. 311, 314; *Robertson v. Johnson*, 57 Tex. 62, 64; *Gains v. Barr*, 60 Tex. 676, 679.

Where an order for the sale of a decedent's real estate is made on petition by the administrator de bonis non to pay debts, it is no objection to the

purchaser's title in collateral proceedings that the petition on which the sale was made was not accompanied by a schedule of the debts, or that the debts were not ranked, as required by Act 1840, as acknowledged claims against the estate. *Howard v. Bennett*, 13 Tex. 309.

Failure to comply with Rev. St. 1895, art. 2123, requiring an application by administrators for leave to sell land for payment of debts to show the estimated expense of the administration and give a list of all the property on hand liable for the payment of debts, etc., can only be taken advantage of by exceptions made at the proper time, and does not render the application insufficient to support an order of sale. *Texas Land & Loan Co. v. Dunovant's Estate*, 87 S. W. 208, 38 Tex. Civ. App. 560.

A sale of land by an administrator is not void because his application did not comply with Rev. St., art. 2069, by containing a statement of the charges and claims against the estate, such requirements being merely directory. *Jackson v. Houston*, 84 Tex. 622, 19 S. W. 799. See, also, *Fisher v. Wood*, 65 Tex. 199, 204.

(i) Want of Inventory and Appraisal.

See ante, "Inventory and Appraisal," II, G, 5, k.

It is no objection to an administrator's deed that the original inventory of his intestate's estate did not contain the land conveyed, it being presumed that a supplementary inventory containing the land was filed as authorized by the statute. *Jamison v. Dooley*, 79 S. W. 91, 34 Tex. Civ. App. 428, affirmed 82 S. W. 780, 98 Tex. 206.

It is not necessary that the land should have been inventoried before admitting in evidence the order of sale and confirmation thereof. Omission of the land from the inventory will not invalidate a sale otherwise valid. *Louder v. Schluter*, 78 Tex. 103, 14 S. W. 205;

Meyer v. Paxton, 78 Tex. 196, 14 S. W. 568.

(j) Objections Going to the Order of Sale, Want of Order, etc.

aa. Necessity for Order.

See ante, "Necessity for Order of Sale," II, G, 5, j, (1).

bb. Defective or Insufficient Description in Order of Sale.

See, also, ante, "Description of Land," II, G, 5, j, (3), (b), et seq.

The failure of the order of sale to describe the land to be sold does not render the sale void; and administrators' sales have been upheld against collateral attacks where there was no attempt to identify the land, either in the application to sell or the order of sale. *Wells v. Polk*, 36 Tex. 120, 121; *Davis v. Touchstone*, 45 Tex. 490, 497; *Perry v. Blakey*, 5 Tex. Civ. App. 231, 336, 23 S. W. 804.

C. owned an 11-league grant of land, originally made to G. Four and two-thirds leagues were sold by C., and he died possessed of the remainder. His administrator inventoried this land with others, and, to satisfy claims against the estate, applied for an order to sell "all of the lands belonging to the estate." The application was granted, and, while several tracts were ordered sold in subdivisions, the remainder of the G. grant was ordered sold as "all the right, title, and interest of [C.] deceased to about 6 or 7 leagues of land, more or less, situated partly in W. county and partly in M. county, Texas, being part of an eleven-league tract of land originally granted to [G.]" (following thus far the description in the inventory, and continuing:) "As the said land consists of detached and separate parcels of various sizes, and located in different places within the said tract, whose several contents are unknown, the administrator shall sell the whole right, title, and interest to the same at once." Held, that the words, "as

the said land consists of detached and separate parcels," etc., were not a part of the description, but expressed the reason why the court ordered the sale to be made of the entire interest, instead of subdividing it; and, disregarding them, the order, as against a collateral attack, sufficiently identified the land; the words, "all the right, title, and interest of [C.]," expressing the quality of the estate to be conveyed, and the words, "about 6 or 7 leagues of land, more or less," designating the quantity. Judgment (Civ. App.), 39 S. W. 614, reversed. *Macmanus v. Orkney*, 40 S. W. 715, 91 Tex. 27.

Want of Survey.—An order for a probate sale can not be collaterally attacked because land sold without survey or definite description. *Macmanus v. Orkney*, 91 Tex. 27, 34, 40 S. W. 715.

Order Aided by Application.—In a collateral attack based upon alleged defects in the order of sale the application may be looked to to explain an order made upon it for sale of the property. *Farris v. Gilbert*, 50 Tex. 350.

Where an administrator petitions for an order to sell a land certificate, or so much of it as may be necessary to enable him to pay claims against his intestate's estate, alleging in his application that the estate owns no other property except such certificate, and the court orders the administrator to sell the land belonging to the estate as prayed for in his petition, and a report is made of the sale of the certificate, and the sale is confirmed, such proceedings constitute a valid sale on the payment of the purchase money, since the order of the court, taken in connection with the application on which it was made, may be considered as authorizing the sale as applied for by the administrator. *Farris v. Gilbert*, 50 Tex. 350.

(k) Violation of Statute or Order in Making Sale.

aa. Sale and Report by Agent.

See, also, the title EXECUTORS AND ADMINISTRATORS, ante, p. 364.

An administrator's sale and report made by another as agent of such administrator can not be collaterally attacked after confirmation by the court. *Harris v. Shafer* (Civ. App.), 21 S. W. 110; *Brown v. Christie*, 27 Tex. 73.

"The agent may have made the sale in this case, and the administrator may have been standing by, directing it; in such case the sale would not be illegal. If necessary to support the judgment, this and any other essential fact not disputed by the record would be presumed. *Guilford v. Love*, 49 Tex. 715; *Hurley v. Barnard*, 48 Tex. 83, 88. There must be an existing administration and an administrator. The court can not have a sale made by a commissioner appointed for that purpose. Such a proceeding would be extrajudicial. *Rose v. Newman*, 26 Tex. 131." *Harris v. Shafer* (Civ. App.), 21 S. W. 110, 113, reversed in 86 Tex. 314.

bb. Sale at Wrong Time or Place.

See, also, ante, "Time and Place of Sale," II, G, 5, 1, (6).

The judgment of the probate court confirming a sale made under order of such court can not be attacked in suit by devisees against purchasers by evidence dehors the record, to the effect that the sale was not in fact made at the place required by law. *Crawford v. McDonald*, 88 Tex. 626, 33 S. W. 325, affirming 33 S. W. 325, citing *Brown v. Christie*, 27 Tex. 73, 77.

cc. Sale in Gross Instead of in Parcels.

A decree of confirmation is not void because the report shows a sale in gross where the statute and order directed a sale in parcels. *McC Campbell v. Durst*, 73 Tex. 410 11 S. W. 380.

dd. Departure from Terms Prescribed by Statute or Order.

An administrator's sale is not made void by the administrator's violation of terms of sale prescribed by law and order of sale. *Perry v. Blakey*, 5 Tex. Civ. App. 331, 337, 23 S. W. 804; *Sypert v. McCowen*, 28 Tex. 635.

The failure of an administrator, empowered by an order of court to sell land, to comply with the statute in fixing the terms of sale, can not be taken advantage of in a collateral proceeding. *Halbert v. Martin* (Civ. App.), 30 S. W. 388.

Failure to Comply with Requirements as to Cash or Credit.—See, also, ante, "Cash or Credit," II, G, 5, 1, (10), (b).

That an administrator violated the terms of the law and the order of the court as to the terms of credit in making a sale of the intestate's land did not necessarily render the sale void. *Cruse v. O'Gwin*, 48 Tex. Civ. App. 48, 106 S. W. 757; *Sypert v. McCowen*, 28 Tex. 635; *Perry v. Blakey*, 5 Tex. Civ. App. 331, 23 S. W. 804.

The fact that a sale of land was for cash, while the law provides that such sale be on credit, is a mere irregularity, and is not ground for a collateral attack on the sale. *Cassels v. Gibson* (Civ. App.), 27 S. W. 725, citing *Fishback v. Pace*, 17 Tex. Civ. App. 183, 43 S. W. 317, affirmed in 93 Tex. 639, no op.; *Perry v. Blakey*, 5 Tex. Civ. App. 331, 23 S. W. 804; *Brown v. Christie*, 27 Tex. 73.

Although, under the statute in force in 1842, all sets of land by an administrator were required to be on credit, the mere fact that the deed recites a cash consideration will not subject the sale to a collateral attack. *Berryman v. McDonald*, 49 Tex. Civ. App. 81, 107 S. W. 944; *Fishback v. Pace*, 17 Tex. Civ. App. 183, 43 S. W. 317, affirmed in 93 Tex. 639, no op.

Failure to Sell for Cash, as Ordered.—An administrator who was author-

ized by order of the county court to sell land of the estate for cash, received from the purchaser, not cash, but a receipt against his own individual debt and other lands in payment. He reported, however, to the court that he had sold for cash, and the deed executed by him recited the receipt of payment in full in cash. Held, such a sale was not void, but voidable only, at the suit of those interested, begun before the tribunal and within the time limited by law. *Heath v. Layne*, 62 Tex. 686.

The fact that the administrator violated the terms of sale prescribed by law and the order of court, by conveying part of the land to a creditor in payment of his claim, does not render the sale void, so as to subject it to collateral attack. *Perry v. Blakey*, 5 Tex. Civ. App. 331, 23 S. W. 804.

"In *Giddings v. Steele*, 28 Tex. 732, 752, the district judge charged that, if the purchaser at the administrator's sale had not paid for the certificate, his title would be void. The supreme court held that this was error. The sale there was, it is true, upon twelve months' credit; but, if failure to exact payment of the money in a cash sale would of itself render the deed void, failure to take the note of the purchaser in a credit sale, and to exact payment of it, would have like effect." *McC Campbell v. Durst*, 15 Tex. Civ. App. 522, 534, 40 S. W. 315, distinguishing *Judson v. Sierra*, 22 Tex. 365. See, also, *Wornell v. Williams*, 19 Tex. 180; *Sypert v. McCowen*, 28 Tex. 635; *Perry v. Blakey*, 5 Tex. Civ. App. 231, 23 S. W. 804.

(1) Inadequacy of Price.

Inadequacy of price will not render an administrator's sale void, but only voidable, and it will remain good as to all parties until set aside, at the instance of some one or more of the heirs or creditors, in a direct proceeding instituted for that purpose. *Capt v. Stubbs*, 68 Tex. 222, 4 S. W. 467, cit-

ing *Fisher v. Wood*, 65 Tex. 199; *Murchison v. White*, 54 Tex. 78; *Mikeska v. Blum*, 63 Tex. 44; *Rutherford v. Stamper*, 60 Tex. 447.

(m) Administrator Purchasing at His Own Sale.

See, also, ante, "Who May Purchase at Sale," II, G, 5, m.

An administrator's sale can not be collaterally attacked on the ground that the administrator himself was indirectly the purchaser of the land; the remedy being direct and timely proceedings by the persons interested in the estate, in a reasonable time. *Rutherford v. Stamper*, 60 Tex. 447; *Dodd v. Templeman*, 76 Tex. 57, 13 S. W. 187; *Cruse v. O'Gwin*, 48 Tex. Civ. App. 48, 106 S. W. 757; *McCulloch v. Renn*, 28 Tex. 793; *Murchison v. White*, 54 Tex. 78.

Sales by an administrator to himself, through the intervention of another, for the joint benefit of himself and the administrator, are not void upon account of that fraud, but are merely voidable upon direct attack. *McC Campbell v. Durst*, 15 Tex. Civ. App. 522, 534, 40 S. W. 315, writ of error dismissed (see 91 Tex. 147).

Under Rev. St., art. 2083, forbidding an administrator to purchase either directly or indirectly any property of the estate sold by him, and providing that if he does, the sale may be set aside on the complaint of any person interested, attempt to set aside such purchase must be by direct proceeding. *Byars v. Thompson*, 80 Tex. 468, 15 S. W. 1087.

(n) Objections Going to the Report of Sale.

aa. Return Not Made in Time.

"The important matter in this requisition of the statute is, that an account of sale shall be returned to the court for its action; the time of thirty days, which is fixed upon during which the administrator is required to perform this act, is directory, and may

become material in reference to other circumstances; but not in the abstract, as presented in this case." *Brown v. Hobbs*, 19 Tex. 167, 169.

bb. Want of Verification.

See ante, "Report of Sale," II, G, 5, o.

No presumption that an administrator did not swear to report of sale arises from failure to indorse affidavit to report; statute requiring administrator to swear to report is merely directory. *Hurley v. Barnard*, 48 Tex. 83, 88.

cc. Failure to Enter Report of Sales on Minutes.

See ante, "Report of Sale," II, G, 5, o.

dd. Misdescription; Erroneous Recitals; Clerical Mistakes, etc.

An inventory and order of sale referred to "4,000 acres of the T. survey, in T. county, now supposed to be B. county." The report of sale referred to 4,409 $\frac{1}{8}$ acres of said survey in B. county, and showed that four persons purchased separate tracts thereof, not identified, but aggregating 4,409 $\frac{1}{8}$ acres. Held, that as the entire survey was sold, and as the tracts conveyed aggregated the entire survey, though only described by the number of acres in each tract, and not in compliance with the statutes, the sales were not void and subject to collateral attack. *Harris v. Dunn* (Civ. App.), 45 S. W. 731.

(o) Objections Going to the Order of Confirmation; Want of Confirmation, etc.

As to the conclusiveness of the order of corporation, see ante, "Conclusiveness of Order of Confirmation," II, G, 5, p, (15), (f).

aa. Want of Confirmation.

See ante, "Necessity for Confirmation," II, G, 5, p, (2).

bb. Confirmation at Same Term as Report.

A probate sale is not subject to col-

lateral attack because the order of confirmation was made at the same term of court at which the report was made, without a continuance thereof for one term, as required by law. *Storer v. Lane*, 1 Tex. Civ. App. 250, 20 S. W. 852.

cc. Insufficient Description; Misrecitals; Clerical Mistakes, etc.

See ante, "Description of Property Sold," II, G, 5, p. (6); "Erroneous Recitals; Clerical Mistakes, etc.," II, G, 5, p. (7).

Where the probate court orders a sale of all the land of an estate to pay debts, and there are several purchasers of the different tracts, the fact that the order confirming the sale does not identify the land sold to each purchaser will not render the sale void, so as to subject it to collateral attack, but it will be presumed that the confirmation related to the land conveyed to each purchaser by the administrator's deed, which had been previously executed. *Perry v. Blakey*, 5 Tex. Civ. App. 331, 23 S. W. 804.

dd. Failure to Enter Confirmation on Minutes.

An executor's sale can not be collaterally attacked because the confirmation of the sale was not entered on the minutes of the court when an indorsement of confirmation was made on the return. *Moody v. Butler*, 63 Tex. 210.

Article 1853, Rev. Stat. 1895, provides that probate orders not entered of record shall be a nullity; art. 1845 makes probate docket a record; hence, an order entered on such docket, though not carried in the minutes, is valid. *West v. Keeton*, 17 Tex. Civ. App. 139, 143, 42 S. W. 1034.

Speaking upon this point, the court says: "Under this same assignment the probate sale of the 75-acre interest is attacked, upon the ground that the order of confirmation was only written upon the probate docket

by the judge, and not carried into the minutes by the clerk. There can be no question that prior to the adoption of the Revised Statutes of 1879 this probate sale would have been held valid upon collateral attack. *Simmons v. Blanchard*, 46 Tex. 266; *Moody v. Butler*, 63 Tex. 210; *Neill v. Cody*, 26 Tex. 286, 290; *Calloway v. Nichols*, 47 Tex. 327. The principles announced in the above cases prevail under the Revised Statutes of 1879, carried into the revision of 1895." *West v. Keeton*, 17 Tex. Civ. App. 139, 142, 42 S. W. 1034.

e. Presumption and Proof.

(1) General Doctrine as to Presumptions in Favor of Validity.

Courts give a liberal construction to statutes authorizing sales of real estate by executors and administrators, and, the jurisdiction being established, every reasonable presumption will be indulged in support of the proceedings to uphold the titles acquired under such sales. This is especially true as to matters in pais; and while the rule is general, it is applied most frequently to cases in which the action of the court is called in question in some collateral proceeding. *Lynch v. Baxter*, 4 Tex. 431, 445; *Grant v. Hill* (Civ. App.), 29 S. W. 247; *Alexander v. Maverick*, 18 Tex. 179; *Burdett v. Silsbee*, 15 Tex. 604, 617; *Dancy v. Strickling*, 15 Tex. 557; *Herndon v. Kuykendall*, 58 Tex. 341, 348; *Guilford v. Love*, 49 Tex. 715; *Tom v. Sayers*, 64 Tex. 339; *Louder v. Schluter*, 78 Tex. 103, 106, 14 S. W. 205, 207; *Perry v. Blakey*, 5 Tex. Civ. App. 331, 23 S. W. 804; *Davis v. Touchstone*, 45 Tex. 490; *Withers v. Patterson*, 27 Tex. 491; *Hurley v. Barnard*, 48 Tex. 83; *Poor v. Boyce*, 12 Tex. 440; *Sypert v. McCowen*, 28 Tex. 635, 638; *Pleasants v. Dunkin*, 47 Tex. 343, 355; *Groesbeck v. Bodman*, 73 Tex. 287, 291, 11 S. W. 322; *Grant v. Hill* (Civ. App.), 30 S. W. 952; *Baker v. Coe*, 20 Tex. 429, 436.

(2) Where Transaction Ancient, Record Silent, etc.

Although the ancient records of the probate courts may fail to show that everything was done which the law required in making sales of property of the estates of deceased persons and minors, yet if the sale is proved, and there is no evidence to impeach its fairness, the presumption is that the officers of the court and the representative of the estate did their duty; and this presumption, owing to the uncertain manner in which the records of said courts have been made and kept, controls the presumption that the records of courts show all the proceedings thereof. *Dancy v. Strickling*, 15 Tex. 557; *Crain v. Crain*, 18 Tex. 81, 100; *Baker v. Coe*, 20 Tex. 429, 436.

Presumptions must be indulged in favor of those proceedings, especially when they are ancient and titles have been acquired and transmitted under them, otherwise the lapse of time, instead of healing, as it should, the defects of these titles, would gradually undermine and eventually destroy them. *Baker v. Coe*, 20 Tex. 429, 436.

If the record is silent, the presumption is in favor of regularity and validity. To hold that everything necessary to authorize a probate court to direct the sale of property and to confirm a sale made must appear on the court's records would be to deny to such courts a general jurisdiction in probate matters and to subject them to the rules applicable to special tribunals alone. *Weems v. Masterson*, 80 Tex. 45, 54, 15 S. W. 590. See *Baker v. Coe*, 20 Tex. 429, 436.

To support an ancient deed of an administrator, the sale will be presumed to have been properly conducted, nothing appearing to impeach it. *Pendleton v. Shaw*, 44 S. W. 1002, 13 Tex. Civ. App. 439; *White v. Jones*, 67 Tex. 638, 640, 4 S. W. 161; *Bartlett v. Cocke*, 15 Tex. 471.

After a lapse of twenty years it is too late to inquire into question whether an administration and sale under it, were invalid for fraud. *Kleinecke v. Woodward*, 42 Tex. 311, 315.

In this case it appeared that during the 34 years following the date of the administrator's sale while the records were in existence, no question as to the validity of the sale appears was made, and that more than 60 years had elapsed from the date of that sale before appellants' suit attacking it was instituted. Under such circumstances and in the absence of proof to the contrary, it was held that it would be presumed that every requirement of the law necessary to the validity of the sale was complied with. *Fields v. Burnett*, 49 Tex. Civ. App. 446, 108 S. W. 1048, 1052, affirmed, no op., citing *White v. Jones*, 67 Tex. 638, 640, 4 S. W. 161; *Baker v. Coe*, 20 Tex. 429, 435; *Veramendi v. Hutchins*, 48 Tex. 531; *Garner v. Lasker*, 71 Tex. 431, 9 S. W. 332; *Maxson v. Jennings*, 19 Tex. Civ. App. 700, 48 S. W. 781, affirmed in 93 Tex. 646, no op.

(3) Where Matter Would Ordinarily Appear of Record; Necessity for Production of Record.

Presumptions from lapse of time will not be indulged unless it is shown that the record can not be produced; and the presumption must be consistent with the case made. *Pace v. Fishback*, 10 Tex. Civ. App. 450, 31 S. W. 424.

This is true as to those matters which would ordinarily appear of record. Thus, confirmation of a sale will not be presumed unless it is first made to appear that the record of a confirmation can not be produced. *Pace v. Fishback*, 10 Tex. Civ. App. 450, 31 S. W. 424.

(4) Presumption in Case of Erasures, Interlineations, etc.

The interlineations of the orders of the probate court, ordering and ap-

proving the sale of the land in this case, held not to be such as to cast suspicion upon the validity of the deed and call for further explanation than was made. *Jamison v. Dooley*, 34 Tex. Civ. App. 428, 430, 79 S. W. 91, affirmed in 48 Tex. 206.

(5) Recitals Not Enlarged by Presumption to Defeat Title.

Recitals in an order of sale will not be enlarged by presumption for the purpose of defeating a probate sale, where the record shows order, sale and confirmation. *Louder v. Schluter*, 78 Tex. 103, 106, 14 S. W. 205, 207.

(6) Presumptions Indulged in Absence of Proof, Not against the Record.

Presumptions are indulged in the absence of proof and not against proof. *Withers v. Patterson*, 27 Tex. 491, 496; *Anderson v. Lockhart*, 2 Posey 63, 69; *Guilford v. Love*, 49 Tex. 715.

Where a record shows the absence of facts and existence of which is necessary to empower the probate court to order the sale of the decedent's property, a decree based upon their supposed existence is void. *Anderson v. Lockhart*, 2 Posey 63, 68.

Even though the grant of letters was valid, yet if it was apparent by the record that the special circumstances, authorizing the court to order the sale, did not in fact exist, the order of sale was void; and, in a collateral action, it might be shown to be void by the record of the court, even as against a purchaser without notice other than the record imported. *Withers v. Patterson*, 27 Tex. 491; *Johns v. Northcutt*, 49 Tex. 444.

Where the record is not silent as to the cause upon which the court acted in ordering the sale, presumptions of regularity are of no aid to the decree, since they are indulged in the absence of proof and not against proof. *Guilford v. Love*, 49 Tex. 715, 741; *Anderson v. Lockhart*, 2 Posey 63, 70.

In *Withers v. Patterson*, 27 Tex. 491, 496, it is said: "It is to be borne in mind that while the county court has the power to order the sale of land belonging to an estate which is committed to it for the purpose of administration, it has no general power to sell the lands of any estate. It can order the sale for the payment of debts and expenses of administration, to raise the amount of the allowance for the surviving wife and children, and in certain cases for the purposes of partition and distribution among heirs. The court has no power conferred upon it under the law to sell the land of an estate for any other purpose.' Speaking of a sale for other purposes, 'such a sale being a nullity may be impeached collaterally; and when the want of power in the court to order the sale is shown by the record itself, then the constructive notice which the record furnishes the purchaser makes the nullity effective as to him and destroys his claim of title.' Again, page 501." *Johns v. Northcutt*, 49 Tex. 444, 456. See, also, *Anderson v. Lockhart*, 2 Posey 63, 69; *Guilford v. Love*, 49 Tex. 715; *Horan v. Wahrenberger*, 9 Tex. 313, 319; *Fisk v. Norvel*, 9 Tex. 13; *Duncan v. Veal*, 49 Tex. 603.

(7) Record Notice as to What Matters; to What Extent Record Prevails against Presumption.

See ante, "The Record as Notice," II, G, 6, a, (9), et seq.

(8) Presumption Rebuttable by Facts.

Where there was evidence introduced showing defects in proceedings which were requisite to the authority of the administrator to sell lands, the court, after instructing the jury that the law presumed everything legally necessary to have been done by the probate court, should have given the further charge that such presumption was overcome by facts which prove the contrary. *Graham v. Hawkins*, 38 Tex. 628.

(9) Presumption and Proof of Particular Matters.**(a) Appointment and Qualification of Administrator and Authority to Sell.**

A party relying on an administrator's sale need not, in a collateral proceeding, prove the appointment of the administrator. *Evans v. Martin*, 6 Tex. Civ. App. 331, 25 S. W. 688, following *Rindge v. Oliphint*, 62 Tex. 682.

A purchaser of property at a sale by an administrator, whose authority at the time was recognized by the court, is not bound, on his title being afterwards brought in question in a collateral action, to show that the administrator was qualified to act. *Dancy v. Stricklinge*, 15 Tex. 557; *Herndon v. Kuykendall*, 58 Tex. 341, 348; *Saul v. Frame*, 3 Tex. Civ. App. 596, 604, 22 S. W. 984; *Pendleton v. Shaw*, 18 Tex. Civ. App. 439, 44 S. W. 1002, affirmed in 93 Tex. 693, no op.; *Lynch v. Baxter*, 4 Tex. 431.

See probate proceedings held to show, as against collateral attack, that title to a land certificate passed from the estate of decedent by administrator's sale, though the order granting letters appeared to be for guardianship of the persons and estates of the minor heirs, rather than for administration, the county records having been burned, and it not appearing that a previous order appointing the administrator might not have been made. *Moseley v. Stucken*, 26 Tex. Civ. App. 290, 62 S. W. 1103, affirmed in 95 Tex. 683, no op.

In this case the person acting as administrator had been recognized as such by the court, and the court had issued an order directing him to sell the land, and had thereafter made an order confirming the sale. The transcript and the supplemental evidence failed to show that he had not been appointed. It was held that the presumption was in favor of the validity

of the administration, and that the title was good on collateral attack. *Moseley v. Stucken*, 26 Tex. Civ. App. 290, 296, 62 S. W. 1103, affirmed in 95 Tex. 683, no op.

Apart from the fact of the destruction of the county records by fire three years after the death of the decedent the action of the probate court (after the administrator had given bond and taken oath as administrator of the estate), recognizing him as such administrator, directing him to make the sale referred to, and approving his report of the sale, should be deemed equivalent to a formal appointment of him as such administrator. *Moseley v. Stucken*, 26 Tex. Civ. App. 290, 296, 62 S. W. 1103, affirmed in 95 Tex. 683, no op.

A transcript of proceedings before an alcalde in 1834, showing that A was recognized at that time as curator of B, and a return of sale of a quarter of a league of land sold by A as curator of B, together with a deed, of corresponding date, from A, as curator of B, to the purchaser, certified by said alcalde to have been executed before him in accordance with law, of same date, in the absence of any evidence to impeach the verity or good faith thereof, are good and sufficient to vest the title of B in the purchaser. *Baker v. Coe*, 20 Tex. 429.

(b) Presumption as to Whether Authority Has Terminated or Lapsed.

See ante, "After Authority Has Terminated or Lapsed;" Second and Other Administrations," II, G, 7, d, (1), (c).

(c) As to Execution of Bond.

An executor's sale can not be collaterally attacked because the record fails to show that he had given bond. *Moody v. Butler*, 63 Tex. 210.

It will be presumed that bonds were executed by administrators before making sale of a land certificate, though the transcript of the probate proceedings makes no showing on the

subject. *Saul v. Frame*, 3 Tex. Civ. App. 596, 22 S. W. 984.

(d) As to the Petition or Application to Sell.

See, also, ante, "Same; Defects and Irregularities Not Going to the Jurisdiction," II, C, 6, a, (8).

In order to uphold an administrator's sale of a land certificate the application to sell need not appear in the proceedings. *Saul v. Frame*, 3 Tex. Civ. App. 596, 22 S. W. 984; *Alexander v. Maverick*, 18 Tex. 179, 196; *Robertson v. Johnson*, 57 Tex. 62, 64.

In a collateral proceeding, it will be presumed that the application for an administrator's sale was made in accordance with the statute, and that the order directing the sale was valid. *Tom v. Sayers*, 64 Tex. 339; *Davis v. Touchstone*, 45 Tex. 490, 496; *Alexander v. Maverick*, 18 Tex. 179, 192; *Withers v. Patterson*, 27 Tex. 491.

In a collateral attack on an administrator's deed, a recital in the order of sale by the probate court that an application to sell has been made is sufficient proof of such application, though it does not appear in the records of the probate court. *Perry v. Blakey*, 5 Tex. Civ. App. 331, 23 S. W. 804; *Alexander v. Maverick*, 18 Tex. 179, 192; *Withers v. Patterson*, 27 Tex. 491; *Davis v. Touchstone*, 45 Tex. 490, 496.

The order of sale is conclusive, in collateral proceedings, of the fact that an application was made and conditions shown necessary to give the court jurisdiction. *Ball v. Collins* (Sup.), 5 S. W. 622, 623.

Independent of recitals in order for sale of land by administrator, it will be presumed that court acted regularly in ordering sale of land by administrator, and that application for order to sell real estate was made and presented to court. *Perry v. Blakey*, 5 Tex. Civ. App. 331, 335, 23 S. W. 804; *Davis v. Touchstone*, 45 Tex. 490; *Withers v. Patterson*, 27 Tex. 491; *Hurley v. Barnard*, 48 Tex. 83, 87.

Presumptions That Petition Was Lost.

—Where no petition for a probate sale is found among papers on file, presumption is that it was lost. *Hurley v. Barnard*, 48 Tex. 83, 87.

Authenticity; Absence of File Mark.

—A petition for sale of land, old and time worn, acted on by the court, and found in the proper custody, was admissible in support of a probate sale, though bearing no file mark. *Pendleton v. Shaw*, 18 Tex. Civ. App. 439, 44 S. W. 1002, affirmed in 93 Tex. 693, no op. See, also, *Dunn v. State*, 6 Tex. 542; *Holman v. Chevallier*, 14 Tex. 331, 337; *Eggenberger v. Brandenberger*, 74 Tex. 274, 11 S. W. 1099; *Lee v. Wharton*, 11 Tex. 61; *Franklin v. Tiernan*, 62 Tex. 92; *Moody v. Butler*, 63 Tex. 210.

Presumption as to Sufficiency.—See ante, "Defective Petition; Failure to Show Proper or Sufficient Grounds for Sale," II, G, 7, d, (5), (f).

(e) As to Existence of Facts Authorizing Sale.

The probate court having general jurisdiction in administrations, if the record in an administration ordering sale does not negative the existence of the facts authorizing the order for sale, the law conclusively presumes, in a collateral attack, that such facts were established by the evidence before the court when such order was made; and evidence of matters dehors the record will not be received. *Templeton v. Ferguson*, 89 Tex. 47, 33 S. W. 329, affirming 32 S. W. 148.

"In the case of *Lynch v. Baxter*, 4 Tex. 431, 531, it was determined that it is not essential to the title of the purchaser of property at an administrator's sale, that the record should show a necessity for the sale. The order of sale is conclusive of that question until it be set aside by a proceeding having that object directly in view, and the purchaser, in the absence of fraud, will be protected." *Poor v. Boyce*, 12 Tex. 440, 449.

As to Existence of Debts.—See, also, ante, "Purchaser Not Bound to Notice Entire Record; Record Notice of What Matters," II, G, 6, a, (9), (d).

That the record does not show indebtedness does not negative the existence of debts against an estate. The presumption is that there were debts. *Templeton v. Ferguson*, 89 Tex. 47, 33 S. W. 329, affirming 32 S. W. 148; *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550; *Murchison v. White*, 54 Tex. 78, 80; *Hardy v. Beaty*, 84 Tex. 562, 19 S. W. 778; *Harris v. Shafer* (Civ. App.), 21 S. W. 110, 112, reversed in 86 Tex. 314.

In trespass to try title defendants claimed through an administrator's sale. The record of the probate proceedings on which administration was granted did not show that there were debts against the estate. Held, this did not create a presumption that there were no debts, and will not sustain a finding that there was no necessity for the sale, and that therefore the administration was void. *Harris v. Shafer* (Civ. App.), 21 S. W. 110.

Where the petition for administration is silent as to existence of debts against decedent, and the application for the order of sale has been lost, and its contents not shown, it will be presumed, on collateral attack, that the court found debts; the fact that the final account did not show any debts antedating the administration being insufficient to rebut such presumption. *Templeton v. Ferguson*, 89 Tex. 47, 33 S. W. 329, affirming *Ferguson v. Templeton* (Civ. App.), 32 S. W. 148.

An administrator's sale of a land certificate was made and was confirmed by the probate court in 1851. Forty years thereafter, and after the death of the administrator and destruction of the probate records, the validity of the judgment of confirmation was attacked in a collateral proceeding upon the ground that no community debts existed which would have

authorized the administration. Held, that testimony in a general way that there were no debts due by the community estate, given by a witness who was only ten years of age at the death of his father, the intestate, and by another not shown to have any actual knowledge of the facts, would not authorize a finding that no such debts existed. *Dickson v. Moore*, 9 Tex. Civ. App. 514, 30 S. W. 214, affirmed in 93 Tex. 728, no op.

Same; Effect of Lapse of Time.—See, also, ante, "After Authority Has Terminated or Lapsed; Second and Other Administrations," II, G, 7, d, (1), (c).

Where the record does not show that there were debts against the estate, nor that there were not, a court will not presume that there were no debts against estate unless lapse of time has been sufficient to authorize inference that debts are barred. *McCamant v. Roberts*, 80 Tex. 316, 327, 15 S. W. 580, 1054.

Where letters were granted fourteen years after the death of the person whose estate was put in administration, it was held that no presumption as to the existence of debts arose. *Duncan v. Veal*, 49 Tex. 603.

Where Order States Insufficient Ground of Sale.—The order of sale and confirmation are not rendered inadmissible because the order stated that it was advantageous to estate to sell the land. *Louder v. Schluter*, 78 Tex. 103, 14 S. W. 205.

(f) As to Existence of Order of Sale and Its Sufficiency.

Although no order of the probate court for the sale of land appears of record, it will be presumed from the order of confirmation that it was legally made. *Arnold v. Hodge*, 49 S. W. 714, 20 Tex. Civ. App. 211; *Bartley v. Harris*, 70 Tex. 181, 7 S. W. 797. See, also, *Gillenwaters v. Scott*, 62 Tex. 670.

"Under some circumstances the or-

der of confirmation and administrator's deed might raise the presumption that the order of sale had been made, and that the power to sell had been conferred upon the administrator. As stated by this court in *Tucker v. Murphy*, 66 Tex. 355, 359, 1 S. W. 76, 'this, however, is but a presumption of fact, indulged upon the idea that time has made it impracticable to make such proof of the actual existence of the power as may be made in regard to matters recently transpiring. Whether such presumption will or may be indulged in a given case, must depend upon the facts presented.'" *Ball v. Collins* (Sup.), 5 S. W. 622, 624.

An administrator's sale of realty will be sustained against collateral attack, though there was no proof of an entry in the record books of the probate court of an order of sale, if there was some paper filed in such court indicating that the sale had been approved. *Cruse v. O'Gwin*, 48 Tex. Civ. App. 48, 106 S. W. 757.

"In *Baker v. Coe*, 20 Tex. 429, 436, on the doctrine of presumptions, it is held that when the proceedings in the court were of long standing, and when the records were kept in an uncertain manner, even an order of sale would be presumed." *Hudson v. Jurnigan*, 39 Tex. 579, 589.

No presumption can be indulged in a collateral proceeding against the validity of a probate order directing the sale of testator's land. *Tom v. Sayers*, 64 Tex. 339; *Alexander v. Maverick*, 18 Tex. 179; *Guilford v. Love*, 49 Tex. 715.

Where an order directing an administrator to sell land was not shown by any probate record or recital, nor by anything tending to show a confirmation of the sale, its existence could not be presumed. *Cruse v. O'Gwin*, 48 Tex. Civ. App. 48, 106 S. W. 757.

(g) As to Confirmation.

See, also, ante, "What Constitutes

and Sufficiency of Confirmation," II, G, 5, p. (4); "Proof of Confirmation; Presumption," II, G, 5, p. (14).

The court could not presume that an administrator's sale was confirmed, without its first appearing that the record of a confirmation could not be produced. *Pace v. Fishback*, 10 Tex. Civ. App. 450, 31 S. W. 424; *Tucker v. Murphy*, 66 Tex. 355, 359, 1 S. W. 76.

Where the petition admitted that a sale of the land had taken place under an order of the court, and that a deed had been made by the administrator to the purchaser, but failed to state affirmatively that there had been a confirmation, it was held to be a fair presumption that there had been. Such being the case, the proceedings were not void, and could not be attacked as attempted. *Looney v. Linney* (Civ. App.), 21 S. W. 409, 410, citing *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550.

Evidence here held sufficient to raise presumption as against collateral attack, that court confirmed administrator's sale of land of estate. *Perry v. Blakey*, 5 Tex. Civ. App. 331, 336, 23 S. W. 804.

(h) Genuineness of Judge's Signature.

The judge's signature to an order for the sale of land of deceased's estate, dating over 50 years back, coming from the proper custody, will be presumed genuine, though not found on the record. *Pendleton v. Shaw*, 44 S. W. 1002, 18 Tex. Civ. App. 439.

(i) As to Property Sold.

An order of the probate court recited that an administrator's petition for leave to sell the property of the estate stated under oath that the application was at the request of decedent's heirs, and ordered the administrator to sell all the property of the estate with appraisement. The appraisers reported that they appraised "bounty claim in favor of Moses Merritt for 1,280 acres, No. 2,699, at \$40." The account of sales showed that the

"the Moses Merritt claim for 1,280 acres was sold to J. A. Southmayd for \$40." The court approved the sale as made. The administrator's deed, dated September 1, 1845, recited the sale at a certain time and place as required by law of "the aforesaid bounty claim for 1,280 acres granted to Moses Merritt by the government of Texas," etc., "together with all the land secured thereby, rights, issues, profits, and claim to the same belonging." The deed further recites that the administrator "advertised for sale all the property," and "amongst other property the bounty land claim of Moses Merritt for 1,280 acres of land, No. 2,699, issued by the Secretary of War," and, further, "the said bounty land claim for 1,280 acres was struck off and sold," and the deed conveyed "the aforesaid bounty claim. * * *" Field notes, dated July 25, 1845, show that the land in controversy was located by virtue of the bounty warrant. Held, that the proceedings contained descriptive matter sufficient to convey the title to the land, in the absence of evidence that land was not sold, and after this lapse of time it must be presumed that a valid sale was made of that which the estate possessed, and which was subject to sale; and not that a void sale was made of the land certificate after the land had been located, and the certificate therefore, merged in the land and not subject to sale. *Whittaker v. Thayer*, 101 Tex. 456, 108 S. W. 1157, 86 S. W. 366. See, also, *East v. Dugan*, 79 Tex. 329, 15 S. W. 273.

(j) Execution and Validity of Deed.

Where there was an agreement in the case made by counsel containing a direct admission that there was a deed from the administrator, dated June 2, 1851, and there was a decree ordering the administrator to execute the deed, after this lapse of time, and in the absence of contrary testimony, a presumption is afforded of its execution. *Jack v. Cassin*, 9 Tex. Civ. App. 228, 28 S. W. 832.

Deed by Only One of Several Administrators.—After lapse of 50 years, the records having been destroyed, it will be presumed that land was duly sold under order of court authorizing execution of deed by one administrator. *Miles v. Dana*, 13 Tex. Civ. App. 240, 36 S. W. 848.

Where there were two administrators when proceedings of sale were had, order of court for one of them to sell, and sale reported by him and confirmed, will be held, as against collateral attack, to pass title to property as effectually as if both had acted. *Corley v. Anderson*, 5 Tex. Civ. App. 213, 218, 23 S. W. 839.

(k) As to Payment or Performance by Purchaser.

See, also, ante, "Proof of Payment; Presumptions," II, G, 5, s, (2).

In Absence of Confirmation.—While the statute in force May, 1846 (*Hart. Dig.*, art. 1018), was silent as to the necessity of confirmation by the court of an administrator's sale of chattels, it was evidently intended that the probate court should have the power to approve or disapprove such sale; to act upon the price or security taken. In absence of confirmation of such sale, it devolves upon the purchaser, or party asserting title under such sale, to show payment or that security was given—compliance with the statute in all material provisions. *Harris v. Brower*, 3 Tex. Civ. App. 649, 22 S. W. 758, affirmed in 93 Tex. 685, no op.

A land certificate was sold May, 1846, at probate sale, by the widow of the owner, who was his administratrix. Return was made of the sale as upon approved security, but no action upon the report of sale was taken by the court. No conveyance was made to the purchaser. In 1888, the widow and other heirs brought suit for the land which had been secured under the certificate, against remote vendees. Held, that it devolved upon the defendants to prove compliance with the terms of

the sale; no such proof being made, the plaintiffs, having the legal title, were entitled to recover, the defendants not showing any equity; the lapse of time did not effect the rights of the plaintiffs to recover. *Harris v. Brower*, 3 Tex. Civ. App. 649, 22 S. W. 758, affirmed in 93 Tex. 685, no op.

There being no decree of confirmation, "the presumptions usually invoked in favor of a judgment could not be indulged; but to sustain the sale, it must have been shown that the vendee was entitled to a confirmation by compliance with the statute by following its directions in all material particulars. *Peters v. Caton*, 6 Tex. 554; *Graham v. Hawkins*, 38 Tex. 628; *Neill v. Cody*, 26 Tex. 286; *Littlefield v. Tinsley*, 26 Tex. 353; *Brown v. Christie*, 27 Tex. 73, 77." *Harris v. Brower*, 3 Tex. Civ. App. 649, 653, 22 S. W. 758, affirmed in 93 Tex. 685, no op.

Effect of Lapse of Time.—An administrator's sale will be presumed to be valid, and its terms complied with by the purchaser, where 10 years elapse after its confirmation by the county court without complaint from anybody interested in the estate. *Sypert v. McCowen's Ex'rs*, 28 Tex. 635.

When ten years had elapsed since an administrator's sale and its confirmation by the county court, and no re-sale was attempted by the administrator, nor any complaint heard from him, or from the heirs, creditors, or any one else interested in the estate, this court inclines strongly to the opinion that, in the absence of proof showing a conveyance by the administrator, or a compliance by the purchaser with the terms of sale, a jury would be warranted in finding, as against a stranger to the estate claiming adversely to it, and to all claiming under it, that the purchaser did comply with the terms of the sale, and thereby acquire all the interest of the

estate in the land. It was error, therefore, in such a case for the court below to instruct the jury to find for the defendant on account of the failure of the plaintiff, who claimed under the administrator's sale, to prove a conveyance by the administrator or a compliance by the purchaser with the terms of the sale. *Sypert v. McCowen*, 28 Tex. 635.

8. Proceedings to Set Aside Sales.

a. Who May Attack Sale.

(1) Generally, Parties in Interest.

It is a well-established principle that the right to avoid a sale for fraud, made by virtue of proceedings of a court having jurisdiction of such matters, is not avoidable to those who are not interested in the estate. If the proceedings are fraudulent they are voidable but not void and the sale is good as to all parties until set aside at the instance of heirs or creditors in a direct proceeding instituted for that purpose. *Grant v. Hill* (Civ. App.), 30 S. W. 952, 954, citing *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550; *Lyne v. Sanford*, 82 Tex. 58, 61, 19 S. W. 847; *Capt v. Stubbs*, 68 Tex. 222, 223, 4 S. W. 467; *Heath v. Layne*, 62 Tex. 686, 691; *Firebaugh v. Ward*, 51 Tex. 409, 414; *Hurley v. Barnard*, 48 Tex. 83, 87.

A probate sale can not be set aside unless the suit be brought by the proper parties directly for that purpose, in the proper court, and in a reasonable time. *Rutherford v. Stamper*, 60 Tex. 447, 450; *Fisher v. Wood*, 65 Tex. 199; *Bauman v. Chambers*, 17 Tex. Civ. App. 242, 249, 42 S. W. 564; *Jackson v. Houston*, 84 Tex. 622, 624, 19 S. W. 799; *Dodd v. Templeman*, 76 Tex. 57, 62, 13 S. W. 187; *Byars v. Thompson*, 80 Tex. 468, 473, 15 S. W. 1087; *Storer v. Lane*, 1 Tex. Civ. App. 250, 256, 20 S. W. 852; *Dugan v. Cole*, 2 Tex. 381, 382; *Carter v. Reynolds*, 6 Tex. 560.

Under Rev. St. art. 2083, forbidding an administrator to purchase either

directly or indirectly any property of the estate sold by him, and providing that if he does, the sale may be set aside on the complaint of any person interested, only persons interested can complain of such purchase. *Byars v. Thompson*, 80 Tex. 468, 15 S. W. 1087.

Where the heirs of a decedent request and procure a sale of the decedent's land for the purpose of closing the administration, their title passes to the purchaser by estoppel, and a stranger to the proceedings, especially after long lapse of time, can not impeach the sale. *Whitaker v. Thayer*, 38 Tex. Civ. App. 537, 86 S. W. 364.

An administrator's deed for land sold under order of court, is impeachable for fraudulent collusion between an administrator and a purchaser only by legal representative of estate or heirs or devisees. *Pearson v. Burditt*, 26 Tex. 157, 172.

(2) Heirs and Devisees.

If the heir in his own name institute suit in the district court to recover property fraudulently sold by the administrator of the estate, and in such suit allege and show that there were no debts against the estate, and that the administration upon it was fraudulently procured, the suit, perhaps, may be maintained, but it is upon the ground that there are no debts against the estate and no administrator. But it would seem that if the administration were legal and valid, and were still open, the suit would not be maintainable, even if the sale by the administrator was fraudulent; for in that state of the case the property, on a cancellation of the fraudulent sale, would not accrue to the heir, but would fall back into the estate for administration. *Evans v. Oakley*, 2 Tex. 182; *DeWitt v. Miller*, 9 Tex. 239; *Burdett v. Silsbee*, 15 Tex. 604; *Rose v. Newman*, 26 Tex. 131; *Giddings v.*

Steele, 28 Tex. 732. See the title EXECUTORS AND ADMINISTRATORS, ante, p. 364.

Where an administrator's sale is invalid, and the administrator has settled his final account and been discharged, the heir and not an administrator de bonis non, is the proper person to take advantage of the invalidity. *Hurt v. Horton*, 12 Tex. 285.

(3) Devisee of Heir.

Under Rev. St. art. 2083, providing that it shall be unlawful for an administrator to purchase, either directly or indirectly, property of the estate sold by him, and that, if he does, the sale may be set aside upon the complaint of any person interested in the estate, the devisee of the heir of an estate can not complain of a sale by the administrators of her testator's ancestor's estate, as she is not interested in it. *Byars v. Thompson*, 80 Tex. 468, 15 S. W. 1087.

(4) Purchaser under Judgment against Heir.

Where land of an intestate was sold under a judgment against one of the heirs and purchased by the judgment creditor, the latter had such an interest in the land as entitled him to maintain a proceeding in the county court to set aside a sale of the land to pay debts of the deceased, alleged to have been wrongfully allowed against decedent's estate. *Smart v. Panther*, 42 Tex. Civ. App. 262, 95 S. W. 679.

(5) Administrator De Bonis Non.

A suit in equity will lie by an administrator de bonis non to set aside a fraudulent sale of the property made by the administrator in collusion with the vendee, though the sale was formally made under order of court. *Cochran's Adm'r's v. Thompson*, 18 Tex. 652; *Giddings v. Steele*, 28 Tex. 732. See, also, *Evans v. Oakley*, 2 Tex. 182; *Robinson v. Peyton*, 4 Tex. 276, 382; *Burdett v. Silsbee*, 15 Tex. 604.

(6) Persons Estopped to Attack Sale.**(a) Applies to Parties; Not to Witnesses.**

The doctrine of estoppel applies to parties, not to a mere witness, and can not be invoked to prevent a witness from testifying that a deed under which defendant claims, executed by himself, the witness, as an executor, was in fact intended to convey his individual interest. *Mayfield v. Robinson*, 22 Tex. Civ. App. 385, 55 S. W. 399, affirmed in 93 Tex. 646, no op.

Where, in a suit for land by plaintiffs as heirs of Mrs. H., who was the devisee of H., her husband, a son of H., who was also independent executor of his estate, was made a defendant, not as executor, but as claiming some interest in the land, and upon his disclaimer was dismissed from the suit, it was competent for him to testify that the land had belonged to his father and himself as partners and that his father had conveyed to himself by a deed that was lost, and that a deed under which defendant claimed, executed by himself as executor, was intended to convey his individual interest, the witness not being such a party to the suit as comes within art. 2302, Rev. Stat. *Mayfield v. Robinson*, 22 Tex. Civ. App. 385, 55 S. W. 399, affirmed in 93 Tex. 646, no op.

(b) Estoppel of Heir Who Procures Sale or Accepts Benefits; Acquiescence, Laches, Ratification, etc.**aa. Generally.**

Parties procuring an administrator's sale and sharing in the proceeds are estopped to disturb rights of purchasers. *Grande v. Chaves*, 15 Tex. 550, 554; *Stafford v. Harris*, 82 Tex. 178, 185, 17 S. W. 777; *Ryan v. Maxey*, 43 Tex. 192, 195, distinguishing *Fitzgerald v. Turner*, 43 Tex. 79, and *Dalton v. Rust*, 22 Tex. 133; *Cravens v. Booth*, 8 Tex. 243; *Dancey v. Strickling*, 15 Tex. 557; *Saunders v.*

Howard, 51 Tex. 23; *Walker v. Lawler*, 45 Tex. 532; *Stephenson v. Marsalis*, 11 Tex. Civ. App. 162, 171, 33 S. W. 383.

Where heirs of a decedent request and procure a sale of the decedent's land for the purpose of closing the affairs of the administration, their title passes to the purchaser by estoppel, and a stranger to the proceedings, especially after long lapse of time, can not impeach the sale. *Whitaker v. Thayer*, 86 S. W. 364, 38 Tex. Civ. App. 537; *Delk v. Punchard*, 64 Tex. 360.

Heirs of the wife who have recognized and acquiesced in the disposition of the community property by the administrator of the husband in the course of the administration, and in a deed made by him under an order of the court, are estopped to attack the title of the grantee. *Halbert v. Carroll* (Civ. App.), 25 S. W. 1102.

Where in the course of a community administration the administrator contracted for the location of a land certificate belonging to the estate, and in pursuance of orders of the court conveyed to the locator his part of the land under such contract, and such proceedings were approved by the court and recognized in the partition of the estate between the heirs, such heirs can not be heard to assert an interest in such locative part because the certificate was community property in which their deceased mother had a one-half interest. *Halbert v. DeBode*, 15 Tex. Civ. App. 615, 40 S. W. 1011.

Where the heirs acquiesced in a sale of one-third of a land certificate to defray the expense of surveying the other two-thirds, and occupied the land and enjoyed the fruits thereof for 29 years, they are estopped to question the jurisdiction of the probate court to order the sale. *Hudson v. Jurnigan*, 39 Tex. 579.

Where an executor without the au-

thority of the court or will sold land to devisees' satisfaction, paying them proceeds, there being no debts, his sureties are not liable to them for value of the land. *Homes v. O'Connor*, 9 Tex. Civ. App. 454, 455, 29 S. W. 236.

bb. Where Heirs Procure Order and Sell Land as Commissioners.

Though a county court has exceeded its jurisdiction in appointing commissioners to sell land of a deceased person, said commissioners being heirs of estopped from setting up any claim to interest to the purchaser and they are estopped from sitting up any claim to the land which they, acting as commissioners, sold to him. *Berger v. Arnold* (Civ. App.), 24 S. W. 527. See, also, *Rose v. Newman*, 26 Tex. 131; *Ryan v. Maxey*, 43 Tex. 192; *Stafford v. Harris*, 82 Tex. 178, 17 S. W. 777.

cc. Estoppel of Married Women.

Where a married woman and her husband, in the final settlement of the estate of the wife's father, in consideration of the relinquishment by the administrator of his fees, agree to ratify all sales of land made by the administrator, she is estopped to assert title to land held under a deed from the administrator. *Halbert v. Martin* (Civ. App.), 30 S. W. 389.

One of two minors died leaving a large estate incumbered by debts incurred by their guardian; the heirs of the deceased minor applied for partition, which was resisted by the guardian insisting that he should be kept harmless from debts he had incurred on account of the deceased. The heirs then united in an application to the probate court for sale of lands to pay the debts and for partition of the remainder. Upon this the court ordered sale of some lands to pay debts, and the remainder, lands and slaves, was partitioned among the heirs. Held, that the married women participating in the proceedings were concluded by

the sale under said order. To hold that they were not estopped would be to allow them to perpetuate a fraud. *Ryan v. Maxey*, 43 Tex. 192.

dd. When Infant Bound by the Acts of His Guardian.

That a guardian of a minor received his distributive share on sale by administrator does not deprive the minor of the right, under Revised Statutes, articles 290, 297, to avoid the sale. *Wipff v. Heder* (Civ. App.), 41 S. W. 164.

Fact that the proceeds of unauthorized sale of land belonging to the estate were used for support of certain heirs while minors does not estop them from claiming their full shares in action against the executor. *Box v. Word*, 65 Tex. 159, 165.

A guardian of an infant was cognizant of proceedings in the probate court by the administrator, resulting in an order for a sale of real estate and he accepted the proceeds of the sale, and did not institute any proceedings to reverse the judgment. Held, that the infant was bound by the acts of the guardian. *Dancy v. Stricklinge*, 15 Tex. 557.

ee. Where Heir Represented by Guardian Ad Litem.

An heir, represented in a partition by an attorney appointed by the court, in close of an administration, void for want of jurisdiction of probate court, was not estopped from attacking a sale made by the administrator from which he received no benefit. *Dodge v. Phelan*, 2 Tex. Civ. App. 441, 448, 21 S. W. 309.

ff. When Estopped to Deny Capacity of Administrator but Not His Fraud.

An administrator re-established by suit a land certificate which had been rejected by the traveling board of land commissioners, and which, but for his action, must have been lost to the estate, and afterwards sold the certifi-

cate under order of the probate court for the payment of claims against the estate. The heir of intestate sued to recover the land from the purchaser, alleging that the probate court appointing the administrator had no jurisdiction to grant administration of the estate, that there was fraud between the administrator and the purchaser in procuring the letters, that there was fraud in the sale of the certificate or in procuring the order of sale, and that the sale was void. Held, that the heir was estopped from denying the capacity of the administrator, but was not estopped from averring and proving that there was fraud in the sale or in procuring the order of sale. *Giddings v. Steele*, 28 Tex. 732, citing *Portir v. Cummins*, 14 Tex. 171, 175; *Poor v. Boyce*, 12 Tex. 440.

gg. Acceptance of Part Remaining Unsold.

Where an administrator's sale of land belonging to the estate was void, that the heirs received and disposed of the remainder of the estate without protesting against the invalid sale did not estop them from afterward asserting the invalidity of the sale. Judgment (Civ. App.), 110 S. W. 552, reversed. *Wilkins v. Geo. W. Owens & Bros.*, 102 Tex. 197, 114 S. W. 104, judgment modified in (Sup.), 115 S. W. 1174, and (Civ. App.), 117 S. W. 425.

It was agreed between the executor of an independent will and the creditors of the testator that the latter should enforce their claims out of certain land that had been devised to a minor, and that the testator's homestead, which had also been devised to said minor, should not be taken by the creditors. Thereupon a decree was rendered divesting the minor's title to said land. After the minor attained majority he sold the homestead, and received the proceeds of the sale. Held, that he was not thereby estopped from disputing the validity of

said decree. *Allen v. Von Rosenberg* (Sup.), 16 S. W. 1096.

(c) Estoppel of Administrator.

aa. Estoppel to Deny Fact of Sale.

An administrator is estopped to deny that there was a sale, where he has procured a judgment for the purchase price, and foreclosure of vendor's lien on the land. *Miller v. Anders*, 51 S. W. 897, 21 Tex. Civ. App. 72.

bb. Estoppel of Administrator to Claim against His Own Deed.

An administrator, acting under a void order of court, sold a lot belonging to the estate and covenanted as administrator with the purchaser, "his heirs and legal representatives, to warrant and forever defend this title to the aforesaid lot against the claim or claims of any and all persons lawfully claiming or to claim the same or any part thereof to the extent that I am bound to do according to law as such administrator and no further." The administrator in his individual capacity held a life estate in one-sixth of the lot. Held, that the life estate passed to the purchaser by the deed of the administrator and he was estopped to assert title to the same. *Millican v. McNeill*, 102 Tex. 189, 114 S. W. 106. See, also, *Corzine v. Williams*, 85 Tex. 499, 22 S. W. 399, affirming 21 S. W. 267; *Frisby v. Withers*, 61 Tex. 134.

cc. Estoppel by Agreement, Participation, Acquiescence, Laches, etc.

Where property belonging to an estate was sold to satisfy a mortgage debt, and the purchaser entered into an arrangement with the administrators whereby he was to extinguish that and another mortgage, and they were to deed him the property, etc., and such arrangement was approved by the court, held, that the administrators could not afterwards be heard in court to assail the arrangement, on the ground that they might thereby lose their commissions on the amount of sale. *James v. Corker*, 30 Tex. 617.

Where Administrator Party to Fraud.—In an action by heirs and distributees to cancel a deed of a part of decedent's land to defendant, who acquired the same under a contract with the administrator and the widow, and who agreed to pay all the debts and settle the estate as the consideration, the court properly refused to charge that there could be no recovery if the contract was collusively entered into by the widow and the administrator when two of the plaintiffs were not parties to the contract; but the court should have charged that the administrator, who was also an heir though not a party to the suit, could not recover as against his co-worker in the fraud, if he connived in the fraud. *McC Campbell v. Durst*, 73 Tex. 410, 11 S. W. 380.

Acquiescence; Laches.—Administrator's long acquiescence in a sale of estate property may be set up as an estoppel in pais against him to prevent a recovery of the property for the estate. *Thomas v. Greer*, 6 Tex. 371, 372.

An administrator who receives in pledge slave sold by estate, and subsequently delivers him to purchaser from pledgor, is estopped from recovering him as estate property. *Thomas v. Greer*, 6 Tex. 372, 378.

Where Administrator Has Obtained Judgment and Foreclosure.—Where administrator obtained judgment on note given by purchaser of land and foreclosure of vendor's lien, sale is complete, although deed had not been delivered to purchaser; neither administrator nor heirs can rescind sale and claim title to land. The procuring of said judgment by the administrator perfected the sale and estopped the heirs from asserting that there was no sale. *Morris v. Turner*, 5 Tex. Civ. App. 708, 24 S. W. 959; *Coddington v. Wells*, 59 Tex. 49; *Dalton v. Rust*, 22 Tex. 133; *Terrell v. McCown*, 91 Tex. 231, 43 S. W. 2.

(d) Estoppel of Purchasers and Privies.

Partner in Purchasing Firm.—

Where, after the confirmation by the probate court of a sale of property by an administrator to a firm on peculiar terms of credit without personal security, one who was fully cognizant thereof, and became a partner in the firm, is bound by the conditions of the sale, and estopped from objecting thereto that it had not been made in conformity to the statute. *Allen v. Atchison*, 26 Tex. 616.

Widow of Purchaser.—An insolvent estate owned lands which were sold by the administrators to one who would have inherited had there been a residue after paying the debts. The sale was reported as for cash, and the debts (except of the fifth class) were owned or controlled by the administrators. An agreement was made by which the purchaser was to sell off the land as he could, apply proceeds to taxes and the debts, and to divide the residue with the administrators. The purchaser died before all the lands were sold. His widow repudiated the trust. Held, that she was not interested in the estate so as to question the rights acquired by the administrators in their dealings with her husband touching the property he had so purchased. A purchaser holding under the administrators could assert his rights under them—i. e., the administrators could convey such right as they had acquired. *Byars v. Thompson*, 80 Tex. 468, 15 S. W. 1087.

(e) Person Obtaining Injunction and Forcing Sale under Bond.

Where an injunction issued, restraining the sale of land under a claim established by the defendant and a sale was ordered upon making a bond to secure the plaintiff, and under such order, sale was made, it was error, in subsequent proceedings, to hold the sale a nullity in favor of the plaintiff on his successful establishment of

his superior right to the security of the lien upon the land so sold. *Watt v. White*, 46 Tex. 338.

b. Grounds for Setting Aside Sale.

See ante, "Bona Fide Purchasers," II, G, 6, a; "Collateral Attack," II, G, 7.

(1) Setting Aside of Will.

The validity of sales of property of estates of deceased persons, by order of the county court in due course of administration, is not affected by subsequent proceedings which result in setting aside the will under which the estate was administered, unless fraud be proven. *Kellum v. Smith*, 18 Tex. 835.

(2) Fraud.

See ante, "Same; Effect of Purchaser's Knowledge of Fraud, Defects, Irregularities, etc.," II, G, 6, a, (7).

Fraud is good ground, in equity, for setting aside a probate sale. *Finch v. Edmonson*, 9 Tex. 504, 512; *Pearson v. Burdett*, 26 Tex. 157.

(3) Want of Necessity for Sale.

Fact that an estate from which land was sold at an administrator's sale had assets much greater in value than required to liquidate is properly plead in suit attacking the sale. *Bennett v. Kibler*, 76 Tex. 385, 389, 13 S. W. 220.

(4) Sale at Wrong Time or Place.

See, also, ante, "Time and Place of Sale," II, G, 5, 1, (6).

An executor's sale made on day other than that named in advertisement should be set aside. *Trousdale v. Trousdale*, 35 Tex. 756, 759.

(5) Administrator Purchasing at His Own Sale.

See ante, "Right of Personal Representative to Purchase," II, G, 5, m, (3).

Where the administrator buys at his own sale through the intervention of a nominal purchaser, the sale may be attacked in a direct proceeding, but not collaterally. *Dodd v. Templeman*, 76 Tex. 57, 13 S. W. 187; *Rutherford v. Stamper*, 60 Tex. 447; *Fisher v. Wood*, 65 Tex. 199, 200.

In an action to recover and partition land, defendant may show that plaintiff's title is derived through an administrator's sale which is void because made to a third person for the benefit of the administrator. *Baumann v. Chambers*, 42 S. W. 564, 17 Tex. Civ. App. 242.

If an executor becomes the purchaser for himself, or for himself and another, at a sale of property ordered by the probate court, such sale may be set aside by the probate court upon the application of persons interested in the estate. *Fisher v. Wood*, 65 Tex. 199, 205.

A probate sale will be set aside where the vendee was an attorney for an administrator and never paid the purchase price. *Herndon v. Kuykendall*, 58 Tex. 341, 349.

(6) Inadequacy of Price.

Administrator's sale may be set aside upon showing of gross inadequacy of price. *Hardin v. Smith*, 49 Tex. 420, 424.

(7) Objections Going to the Report, Delay in Making, etc.

See, also, ante, "Report of Sale," II, G, 5, o.

Delay in Making Report.—A sale by an administrator will not be set aside, solely on the ground that he neglected to return it within the statute limit of 30 days, unless the delay has occasioned some injury. *Brown v. Hobbs*, 19 Tex. 167.

False or Erroneous Report.—An administrator's sale may be avoided in direct proceeding by showing that his report of sale was false and fraudulent. *Wipff v. Heder*, 6 Tex. Civ. App. 685, 692, 26 S. W. 118.

The fact that a sale made by an administrator was on credit, and was reported to the court as made for cash, will avoid the sale in a direct proceeding. *Wipff v. Heder*, 6 Tex. Civ. App. 685, 26 S. W. 118.

(8) Objections Going to the Confirmation, Want of Confirmation, etc.

Misnomer as to Purchaser.—See ante, "To Whom Conveyance Directed to Be Made," II, G, 5, p. (8).

(9) Failure of Purchaser to Pay or Perform.

Where an administrator sells an unlocated land certificate, the fact that the purchaser did not pay for it would not entitle the heir to recover the land; his only remedy would be the recovery of the amount of the price from the administrator. *Giddings v. Steele*, 28 Tex. 732.

c. Jurisdiction.

(1) Of District Court.

On Probate Side; at Law.—A district court, in 1873, had no jurisdiction on the probate side of a motion to set aside an order of sale of realty, made by the probate court in the proper exercise of its jurisdiction, before the same was transferred from the county to the district court, since, in its legal effect, such motion was an application to a court of limited jurisdiction to vacate its own order, made within its appropriate jurisdiction. *Saunders v. Howard*, 51 Tex. 23.

Under the constitution of 1876, district courts have no original jurisdiction or general control over county courts and the decrees of the probate court, through which a sale of property belonging to a decedent's estate has been made, can not be set aside by an original proceeding in the district court. *Fisher v. Wood*, 65 Tex. 199; *Rutherford v. Stamper*, 60 Tex. 447, 450; *Franks v. Chapman*, 60 Tex. 46; *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550. See, also, *Burdett v. Silsbee*, 15 Tex. 604; *Alexander v. Maverick*, 18 Tex. 179; *Withers v. Patterson*, 27 Tex. 491; *Lawles v. White*, 27 Tex. 250; *Murchison v. White*, 54 Tex. 78; *Guilford v. Love*, 49 Tex. 715; *Bauman v. Chambers*, 17 Tex. Civ. App. 242, 42 S. W. 564.

Equitable Jurisdiction and Powers.

—Even if the proceeding be brought on the equity side of the court it can not effect a judgment rendered by a court of law, for the reason that it has no revisory power over such courts and can not therefore act upon them or their judgments. *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550.

But while it is true that a court of equity can not act directly upon the judgment of the court of law, it can act upon the party who has obtained through fraud something to which he is not entitled. In such case a court of equity would have the power in an independent proceeding to act directly on the purchaser while the apparent title still remains in him to prevent his reaping the benefits of his fraud and to wrest from him the title which he has fraudulently obtained. *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550. See, also, *Poor v. Boyce*, 12 Tex. 440; *Dancy v. Stricklinge*, 15 Tex. 557; *George v. Watson*, 19 Tex. 354, 369.

The decisions thoroughly establish the doctrine, that though the proceedings appear to have been perfectly regular, "and though the orders of the court remain undisturbed the wrongdoer nevertheless will not be permitted to enjoy the fruits of his wrong, but will be adjudged to have taken the title as constructive trustee for the persons defrauded, and made to yield up the property. The right of the injured persons, however, is as clearly held to be of a character which must be set up by special pleading in a direct proceeding, and can not be made effectual under the general allegations of the petition, or of the plea of 'not guilty' in trespass to try title. *Rutherford v. Stamper*, 60 Tex. 447, 450; *Fisher v. Wood*, 65 Tex. 199, 209; *Dodd v. Templeton*, 76 Tex. 57, 62, 13 S. W. 187; *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550; *Capt v. Stubbs*, 68 Tex. 222, 4 S. W. 467;

Murchison v. White, 54 Tex. 78; *Pearson v. Burditt*, 26 Tex. 157; *Kleinecke v. Woodward*, 42 Tex. 311." *McCampbell v. Durst*, 15 Tex. Civ. App. 522, 534, 40 S. W. 315 (writ of error dismissed 91 Tex. 147).

In the exercise of their equity powers, district courts have authority where the rights of bona fide purchasers have not interfered to cancel a conveyance made by an executor in violation of the order of the probate court, confirming a sale of land, if such relief is necessary for the protection of devisees, heirs or creditors of the estate, and they have such authority notwithstanding a similar power must exist in the probate court. *Fisher v. Wood*, 65 Tex. 199; *Bauman v. Chambers*, 17 Tex. Civ. App. 242, 249, 42 S. W. 564.

Though the district court has no jurisdiction in an original proceeding to set aside a sale of lands of an estate made under a decree of the probate court, yet, where such lands were purchased by the executor for himself and another in pursuance of a fraudulent combination to deprive those entitled to an interest therein of their rights, such court will charge such property in their hands with a trust, and constitute them trustees for those entitled to the estate. *Fisher v. Wood*, 65 Tex. 199; *Bauman v. Chambers*, 17 Tex. Civ. App. 242, 42 S. W. 564.

Such a purchaser may, in an equitable proceeding, be held to hold the property so bought subject to the rights of the real owners, and such rights can be adjudged. *Bauman v. Chambers*, 17 Tex. Civ. App. 242, 249, 42 S. W. 564.

This does not violate the principle that proceedings of a court of competent jurisdiction may not be collaterally attacked; for the proceedings leading to the sale and investing the purchaser with the legal title may stand, and yet the holder of the legal title may be constituted a trustee for

the benefit of the equitable owner. *Storer v. Lane*, 1 Tex. Civ. App. 250, 20 S. W. 852.

A charge of fraudulent combination between an administrator and others to prevent competition in the sale of property belonging to the estate gives jurisdiction to the district court. *Dobbin v. Bryan*, 5 Tex. 276.

Though an estate be in course of administration by an executrix acting without bond under will, the district court, if the amount in controversy be sufficient, will have jurisdiction in a suit brought against the executrix by one of the legatees joined by her husband to set aside for fraud a deed made by such a legatee to the executrix. *Hickman v. Stewart*, 69 Tex. 255, 5 S. W. 833.

Where Proceeding Involves Revisal of Final Settlement.—It is competent to have a first settlement revised and corrected in the district court, therefore in an action to set aside a void order and sale, and to obtain a distribution of the estate, it was held that where proceeds of void probate sale were carried into final settlement of administrator it was competent to have settlement revised and corrected in district court which, in reversing settlement, may decree distribution. *Miller v. Miller*, 10 Tex. 319, 334.

(3) Of County Court.

The county court has no jurisdiction of an action by the widow and children of a decedent, brought after the administration is closed, against decedent's administrator and his attorney, to set aside for fraud, sales of real estate made through the probate court. *Nicholson v. Harvey* (Civ. App.), 25 S. W. 458; *Timmins v. Bonner*, 58 Tex. 554, 559.

d. Venue.

A suit to set aside a pretended probate sale of land need not be instituted in the county where the land lies, but may be instituted in the county where

administration was granted. *Finch's Heirs v. Edmonson*, 9 Tex. 504. See, also, *McC Campbell v. Durst*, 15 Tex. Civ. App. 522, 530, 40 S. W. 315 (see 91 Tex. 147, writ of error dismissed); *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550, an action to recover three different tracts of land located in three different counties.

e. Parties.

(1) Necessity for Proper Parties.

In order that sale may be set aside, the necessary parties and pleadings must be before the court. *Dodd v. Templeman*, 76 Tex. 57, 13 S. W. 187.

(2) Parties Plaintiff.

See ante, "Who May Attack Sale," II, G, 8, a, et seq.

(3) Parties Defendant.

In a proceeding to annul a sale of realty by the administrator of an estate, all parties interested by purchase or otherwise in such realty are necessary parties. *Saunders v. Howard*, 51 Tex. 23.

Judgment vacating an order of sale of lands of an estate and order of confirmation can not affect purchaser at sale who is not party and proceeding to vacate. *Burks v. Bennett*, 62 Tex. 277, 280.

f. Joinder of Causes and Parties.

It is not competent for an administrator de bonis non, nor even for parties "interested in the estate," to combine in one suit an action against the former administrator, to set aside an order obtained by him, with an action against a third party to recover land conveyed under such order. *McDonald v. Alford*, 32 Tex. 35, 36.

In a proceeding to review an administrator's sale of land, persons purchasing from the grantee can not be joined as parties. *Roy v. Whitaker* (Civ. App.), 50 S. W. 491.

"Those who bought property from the purchasers at sales made by the administrators are perhaps not necessary parties, under any view of the case, except that assuming the nullity

of the administration. But, even if they were improperly joined, the proper course would have been to dismiss them only, and not the whole suit. *Hill v. Faison*, 27 Tex. 428, 431. That the immediate purchasers from the administrator were necessary parties, in any view, will appear from the authorities before cited." *Roy v. Whitaker* (Civ. App.), 50 S. W. 491, 498, affirmed in 93 Tex. 649, no op.

g. The Petition.

(1) Necessary Averments.

In a proceeding to annul the title of a purchaser under a sale made by order of the probate court long after the time allowed for revising the judgment of the probate court had elapsed, the petition contained no averment of any fact that the probate court had no jurisdiction to order the sale or that the title of the purchaser was affected by any fraud in obtaining the order or in the making of the sale. Held, that the petition did not contain averments sufficient to authorize a decree annulling the title. *Chrisman v. Miller*, 15 Tex. 159, citing *Hall v. Jackson*, 3 Tex. 305.

Suit by heirs to recover property which had been sold by an administrator, charging the administrator and the first purchaser with fraud in obtaining the order of sale. Held, that the action could not be maintained against the defendant, who was a subsequent purchaser, without denial that he was an innocent bona fide purchaser, or an allegation charging him with fraud, or with notice of the alleged fraud of the administrator and first purchaser. *George v. Watson*, 19 Tex. 354, citing *Barnes v. Hardeman*, 15 Tex. 366.

(2) Matters to Be Specially Alleged.

In trespass to try title by heirs against one purchasing land at a void administrator's sale to recover the land, if the purchaser wishes to assert an equity of subrogation to the amount of his purchase money, he must plead

it. *Wilkin v. Owens*, 102 Tex. 197, 114 S. W. 104.

In an action by heirs to set aside a sale fraudulently made by one assuming to act as administrator, it was not necessary for them to allege that the defendant sold the land as administrator, nor that he was, or assumed to be, administrator at the time of the sale. *McGaffey v. Millard*, 17 Tex. 365.

(3) Form and Sufficiency of Averments.

Allegation of Residence of Deceased.—The act of 1840, respecting administration of the estates of deceased persons, provides that the succession shall be opened "in the county where the deceased resided, if he had a fixed domicile or residence in the republic; in the county where the deceased owned real estate, if he had neither domicile nor residence in the republic; in the county in which the effects of the deceased are, if he leave effects in different counties; or in the county in which the deceased has died, if he has no fixed residence nor any immovable effects within the republic at the time of his death." In a suit to annul a sale by an administrator appointed by the probate court of Red River county, for want of jurisdiction, the petition alleged "that the last place of residence of the deceased was in Lamar county," where he resided at the time of his death, and also alleged that he left property in Red River county. Held, that the petition should have alleged that Lamar county was his permanent or fixed residence, or that he had a "fixed domicile or residence in the republic." *George v. Watson*, 19 Tex. 354.

That Claims Were Barred.—In the absence of a special exception attacking the sufficiency of the petition to set aside a sale of a decedent's real estate to pay debts on the ground that facts were pleaded showing that the running of the statute of limitations

had not been suspended during its apparent operation, the general allegation in the petition that the claims for the payment of which the land was sold were barred, was sufficient to admit proof of such fact. *Smart v. Panther*, 42 Tex. Civ. App. 262, 95 S. W. 679.

Charging Fraud.—When facts are alleged which would constitute fraud, it is unnecessary to charge fraud as a conclusion. *Storer v. Lane*, 1 Tex. Civ. App. 250, 20 S. W. 852.

Plaintiff alleged, that Lane was the attorney for the administrator; that an account filed in 1860 showed the estate to be fully administered and a balance of money on hand; that in 1867 an application was made to sell the land certificate to pay expenses of administration, which on its face discouraged bidders by showing a want of knowledge of its actual ownership; that Lane, in whose handwriting were all the papers, in fact knew that the certificate was on file in the land office, and was cognizant of all the facts with respect to the administration; and that no occasion existed for the sale of the certificate. He became the purchaser at a grossly inadequate price, but did not record his deed until 1882. Unexplained, these allegations show fraud on the part of Lane and the administrator. The proceeding was a direct one to vacate the deed to Lane; and suit being against his heirs, general demurrer to the petition was erroneously sustained, although the orders in probate stand. *Storer v. Lane*, 1 Tex. Civ. App. 250, 20 S. W. 852.

h. The Answer.

(1) Matters of Defense.

(a) Counterclaim; Agreement for Set-Off, etc.

An action by an administrator to rescind his sale of a certain tract of the intestate's land, or to recover, in the alternative, on a note given for the purchase price, was brought 16 years

after the sale. The land was by order of the court to have been sold on 12 months' time, the purchaser's note and a mortgage on the land being taken as security. Only the purchaser's note was taken, and this had not been paid. Held, that defendant might plead as defense that the delay in the payment was caused by an agreement with plaintiff to include the note in a settlement of claims due defendant from the estate, and plead such claims in connection with the defense, though they could not have been set off in an action on the note. *Cundiff v. Corley* (Civ. App.), 27 Tex. 167.

Where in such case the defendant pays into court the purchase price, with interest, plaintiff can not rescind the sale. *Cundiff v. Corley* (Civ. App.), 27 S. W. 167.

(b) Plea of Bona Fide Purchaser.

Although the original purchaser may have been a party to the fraud by which the sale was brought about, yet a bona fide purchaser for value and without notice from such original purchaser takes a valid title which can not be assailed even in a court of equity. Where, therefore, a proceeding is brought against such second purchaser in the district court to recover the land his plea of bona fide purchaser for value and without notice is a good defense. *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550.

(c) Adverse Possession, Laches and Limitations.

Plea of Stale Demand.—One-third of a land certificate was sold in 1842, by order of a probate court, to defray the expense of surveying and patenting the other two-thirds. The heirs who had gone into possession of the land thus secured brought suit in 1871 against the purchasers of the land covered by the one-third of the certificate thus sold, and who had been in possession for 13 years. Held, that the claim of the heirs was stale. *Hudson v. Jurnigan*, 39 Tex. 579.

7 Tex—57

The cause of action of devisees to vacate the collusive and fraudulent sale of land by an administrator accrued when the sale was had, not when the purchaser thereat conveyed to the conspirators; and, such sale being in 1871, an action in 1883 to set aside the sale and charge the grantees as trustees was the assertion of a stale demand. *McC Campbell v. Durst*, 40 S. W. 315, 15 Tex. Civ. App. 522.

Limitations; Where Sale Attacked for Fraud.—Limitation would run against an effort to avoid sale of land belonging to an estate by an administrator de bonis non for fraud, if fraud appears or can be shown. *Baker v. De Zaralla*, 1 Posey 621, 638; *Kleinecke v. Woodward*, 42 Tex. 311; *Pearson v. Burditt*, 26 Tex. 157.

A suit brought by heirs to set aside, on the ground of fraud, an administration sale of property, made by the administrator of the father's estate, is in substance a bill of review which is barred in two years, and in case of minors in two years after their majority. *Kleinecke v. Woodward*, 42 Tex. 311; *Murchison v. White*, 54 Tex. 78, 86; *Gillenwaters v. Scott*, 62 Tex. 670; *Jackson v. Houston*, 84 Tex. 622, 625, 19 S. W. 799.

When Limitation Prescribed within Which to Correct Does Not Apply.—Where a probate sale is void for want of jurisdiction to order it, limitation prescribed within which to correct it does not apply. *Miller v. Miller*, 10 Tex. 319, 334.

Five Years Statute; Purchaser in Good Faith.—Defendant, under an administrator's deed, took possession of land in 1880. In 1882 he fenced the land, put it under cultivation, and placed valuable improvements thereon in good faith. He held peaceable and adverse possession and paid the taxes thereon until 1890. Held, that an action for the recovery of the land by the heirs of the estate was barred by the five years statute of limitations.

Halbert v. Martin (Civ. App.), 30 S. W. 389.

Sufficiency of Title to Support Plea.

—The title acquired at a sale under order of court regular on its face is sufficient, though voidable for fraud, to sustain the plea of the statute of limitations against an action to set aside the sale on that ground. *Pearson v. Burditt*, 26 Tex. 157.

Same; Where Purchaser Has Not Paid or Performed.—Mere lapse of time will not mature title in a purchaser of a land certificate at an administrator's sale, where he has not complied with the order of the probate court requiring him to give good and approved security for the payment of the purchase price, and there has been no confirmation of the sale by the probate court, and there is no showing that he had ever been in possession of the certificate, had it located, or paid the taxes on the land. *Harris v. Brower*, 3 Tex. Civ. App. 649, 22 S. W. 758.

Infancy.—An action to set aside orders of the probate court for the sale of real estate and directing a distribution of the proceeds brought about 18 years after the orders were made, but within a year after the plaintiff became of age, is not barred by the statute of limitations. *Kalteyer v. Wipff*, 52 S. W. 63, 92 Tex. 673.

Tacking Disabilities.—Plaintiff as heir sued in trespass to try title, alleging the facts relied upon to avoid the title of the defendant, which title was through administration sale. It was alleged, that the grantee of the certificate under which the land was patented died in 1842; that Patton administered on the estate in 1849; that he obtained an order to sell the land to pay the debts of the estate; that he reported the sale at March term, 1849, which was confirmed by the court; that on April 5, 1749, he executed a deed for the land to one Massey, the purchaser, for \$96, who on same day re-

conveyed to Patton for same consideration; that there was no statement of expenses or of claims shown with the application for order of sale; that there were no debts due by the estate, and no necessity for the sale; that the sale was fraudulently made with intent by the administrator that he should become the purchaser; and that the defendant had constructive notice that the sale was fraudulent. Suit was brought for the land, and to set aside the alleged fraudulent sale, on June 6, 1887. The defendant demurred, insisting upon limitation of ten years. Held, that the demurrer was properly sustained. The facts relied upon by the plaintiff to avoid the statute could prevail only by tacking disabilities. *Jackson v. Houston*, 84 Tex. 622, 19 S. W. 799, following *White v. Latimer*, 12 Tex. 61; *Thompson v. Cragg*, 24 Tex. 582.

(2) Admissions and Issues.

In a suit to set aside a sale of real estate of a deceased person to pay debts, an exception to the petition that "the allegations that the claims for the payment of which the sale was had were and are barred by limitations comes too late," and "that the objection, if tenable at all, should have been made before the order of sale to pay such claims was made," constituted an admission of the sufficiency of the allegations of the petition, and merely raised the question that the petition was not filed in time to authorize the maintenance of the suit. *Smart v. Panther*, 42 Tex. Civ. App. 262, 95 S. W. 679.

i. Issues, How Tried.

In a suit in the district court against an administrator and his vendee to annul a sale for land made by the former to the latter, and to vacate orders of the probate court confirming the sale, the issues of fact must be tried by a jury. *Gardner v. Spivey*, 35 Tex. 308.

j. Evidence.**(1) Presumption and Burden of Proof.****(a) As to Jurisdiction.**

See, also, ante, "Presumption and Proof," II, G, 7, e.

Where Proceeding Direct, and Record Shows Fraud.—Presumption that jurisdiction once established exists in favor of what does not appear in record can not be invoked to validate probate sale attacked for fraud by administrator and purchaser, both of whom are parties to direct proceeding to set aside sale, and record contains intrinsic evidence of fraud. *Herndon v. Kuykendall*, 58 Tex. 341, 350.

(b) As to Identity of Land.

An administrator having sold a little over 300 acres of land to satisfy the lien of an attachment, in pursuance of an order of the district court sitting in probate, it will be presumed that the land sold is the same as that entered as 318 acres on the inventory of the estate, if an entry thereon is essential to the validity of the sale. *Mayers v. Paxton*, 78 Tex. 196, 14 S. W. 568.

(c) Absence of Payment as Presumption of Fraud.

Absence of payment raises a presumption of fraud in an administrator's sale, where facts tending to show fraud as alleged are proved. *Thompson v. Shannon*, 9 Tex. 536, 538.

Where an administrator's sale was attacked on the ground of fraud between the administrator and purchaser, it being alleged that no money was paid, and there was evidence tending to establish the allegations of the petition, an instruction that absence of proof of payment of a consideration by the purchaser did not raise the presumption of fraud was erroneous. *Thompson v. Shannon*, 9 Tex. 536.

(d) As to Disposition of Proceeds of Illegal Sale.

It will not be presumed that an administrator uses the proceeds of an illegal sale of land to discharge the bur-

dens upon the estate. *Fishback v. Page*, 17 Tex. Civ. App. 183, 43 S. W. 317.

(e) Burden to Prove Notice of Equitable Title.

In a contest between one who has purchased the legal title and one holding an equitable title, the burden rests upon the latter to show that the former had notice of the superior equitable title when he purchased. *Saunders v. Isbell*, 5 Tex. Civ. App. 513, 24 S. W. 307; *Edwards v. Brown*, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87; *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909.

(2) Admissibility.**(a) Record and Parts of Record.**

Certified Copies Where Record of Appointment Lost.—Certified copies of papers filed by an administrator and acted on by the court, and of court proceedings recognizing him as administrator, were receivable in support of sale of land of the estate by him, though the record of his appointment was lost. It will be presumed that he was lawfully appointed. *Pendleton v. Shaw*, 18 Tex. Civ. App. 439, 44 S. W. 1002, affirmed in 93 Tex. 693, no op.

Where Record Does Not Affirmatively Show Debts.—The record of probate proceedings whereby land was sold by the administrator in payment of debts is admissible in evidence in an action involving the title to the land, though the record does not affirmatively show that there were debts against the estate, where the letters were issued two years after the intestate's death, and the petition alleges that there were such debts. *McCarnant v. Roberts*, 80 Tex. 316, 15 S. W. 580.

Where Record States Unwarranted Ground of Sale.—The order of sale and confirmation thereof are not rendered inadmissible because the order stated that it was advantageous to the estate to sell the land as the ground of sale. *Louder v. Schluter*, 78 Tex. 103, 14 S. W. 205.

Admissibility of Order of Sale to Prove Notice Given as Required.—Recitals in an order and judgment authorizing administrators to sell land to pay debts, that notice was given as required by statute, is evidence of such notice only when the attack upon the judgment is collateral. *Texas Land & Loan Co. v. Dunovant's Estate*, 87 S. W. 208, 38 Tex. Civ. App. 560.

Same; to Prove Fact of Sale.—An order directing an administrator to sell land or slaves does not of itself amount to proof of a sale. The mere order of sale without proof also of a legal and valid sale under it can not divest title of those claiming under the deceased; nor can it of itself afford any evidence that the title had passed out of his representatives. Such order is in fact admissible in evidence to lay the foundation for the introduction of other evidence of the alleged sale, and though it does not amount to proof of the fact of sale still it is a necessary ingredient in that proof. It constitutes an indispensable link in the chain of evidence, which it is error for the court to exclude. *Neill v. Keese*, 5 Tex. 23, 33.

Same; to Identify Land.—Where in an action of trespass to try title the plaintiff claimed through an administrator's sale, the orders of the probate court directing the sale, though one contained an imperfect description of the land and the other contained no description, should be received in evidence, since such defects did not render the orders void. *Norwood v. Snell* (Civ. App.), 69 S. W. 642.

In trespass to try title plaintiff claimed title through a certain estate. The probate record showed that a certain person was appointed administrator of the estate, in place of a former administrator removed, that certain land belonging to the estate had been sold by the former administrator under an order of court, but that the administrator had not made

a deed to the purchaser. The purchaser applied to the court for a deed, setting out the facts and referring to the land as belonging to the estate lying in C. county and containing 329 acres, and the patent was filed therewith as an exhibit for a more particular description. The probate court ordered the administrator to deed to the purchaser in fee simple the land described in plaintiff's petition. The deed gave the same description as that contained in the patent. Held, that the probate orders sufficiently identified the land, and were admissible in evidence. *Shirley v. Walker* (Civ. App.), 110 S. W. 995.

Final Report of Administrator.—Where there was evidence that P. and his wife, as administrators of the estate of the executor's wife, had conveyed portions of the estate in controversy under order of the probate court, it was not error to admit the final report of P. as administrator. *McCown v. Terrell* (Civ. App.), 40 S. W. 54.

(b) Admissibility of Deed.

See, also, ante, "Admissibility," II, G, 5, q, (7), (d), aa, et seq.

In trespass to try title to land claimed by defendant under an administrator's deed, on objection that the grant of letters of administration was a nullity because, prior to their issuance, another person named in the will as executrix had continued to discharge the duties of executrix, and no vacancy existed in the administration authorizing the appointment of the administrator, the deed executed by the latter was excluded from the jury. It appeared from the evidence that whether the party named as executrix had continued to discharge her duties as such after the appointment of the administrator was controverted. Held, that the exclusion of the deed was error. *Willis v. Ferguson*, 46 Tex. 496.

On the 3d of March, 1840, the act regulating the duties of probate courts (Hart. Dig., art. 995, et seq.) had not

yet gone into effect as it had in the case of *Hall v. Hall*, 11 Tex. 526, 550, in which a similar case was held invalid, and a conveyance then made by a judge of probate to a purchaser at an administrator's sale, ordered by him, in which was recited the order of sale, the sale and the payment of the purchase money, and which was executed with witnesses, was the appropriate evidence of an administrator's sale under the laws then in force. *Pleasants v. Dunkin*, 47 Tex. 343.

(c) Variance.

In trespass to try title, the patent was made an exhibit, and on the trial its introduction in evidence by plaintiff was objected to, on the ground that it recited, that it was based on a certificate issued on the first day of January, 1839, while the transcript of the proceedings in probate, under which plaintiff derived title, showed that plaintiff claimed under the purchase of a certificate issued on the 11th of January, 1840. Held, that the exclusion of the patent as evidence was error. Since the patent had been made an exhibit, there could be no variance; and it was a question of fact, not affecting the admissibility of the patent, whether, notwithstanding the discrepancy of the date of the certificate and the patent, the latter did not refer to the certificate under which plaintiff claimed. *Pleasants v. Dunkin*, 47 Tex. 343.

In suit by heirs to set aside deed by one assuming to act as administrator, where it is not alleged that the defendant sold the land as administrator, the deed exercised by him in the capacity as administrator need not be rejected on ground of variance or surprise. *McGaffey v. Millard*, 17 Tex. 365, 366.

(d) Parol Evidence.

aa. To Contradict Recitals in Deed.

When an order of probate confirming an administrator's sale and the deed made in pursuance thereof are

attacked for fraud, and suit is brought by the heir to cancel the deed, alleging that the recitation therein which alleged payment of purchase money was false, parol evidence is admissible to contradict the recitals of the deed by showing that no consideration was ever paid. *McC Campbell v. Durst*, 73 Tex. 410, 11 S. W. 380.

Testimony of Purchaser.—An administrator and a legatee entered into a contract with an attorney whereby such attorney, in consideration of his services, should receive one-half of the assets of the estate after the settlement of all claims against it. The real estate was sold under order of the court, and purchased by a third person, who afterwards conveyed to the attorney. The legatees brought suit to cancel the deeds, alleging, as part of the fraudulent transaction by which the attorney acquired title to the land, that the purchaser paid no consideration therefor and received none from the attorney. Held, that the testimony of the purchaser proving such allegation was admissible, though it contradicted the recital of the deeds. *McC Campbell v. Durst*, 73 Tex. 410, 11 S. W. 380.

bb. Declaration of Administrator to Prove Fraud.

To Show Fraudulent Agreement with Purchaser.—The declarations of an administrator in possession of land formerly sold by him at administrator's sale, not made in the presence of the purchaser, are not admissible, in a proceeding to set aside the sale, to establish the charge of an agreement between the administrator and the purchaser that both should be equally interested in the purchase. *Johnson v. Richardson*, 52 Tex. 481.

cc. To Prove Sale for Confederate Money.

As to payments in Confederate money, see ante, "Mode and Medium," II, G, 5, s, (1).

A widow brought trespass to try title for land claimed by her as homestead. Defendants claimed the land under their vendor's purchase of it at a sale of the administrator of plaintiff's deceased husband. Held, that it was competent for the plaintiff to prove that the administrator's sale and deed were based on a Confederate money consideration. *Lacey v. Clements*, 36 Tex. 661.

dd. To Show Disposition of Proceeds.

On an issue as to the validity of an administrator's sale, evidence as to use of the proceeds was irrelevant, as such a sale would be valid, if debt existed, whether or not the executor properly used the proceeds. *Blanton v. Mayes*, 72 Tex. 417, 10 S. W. 452.

ee. Reconveyance by Purchaser to Administrator.

The fact that on the day an administrator sold land belonging to the estate the purchaser reconveyed it to the administrator in his individual capacity, while insufficient to vacate the sale in a collateral proceeding, was competent to explain the absence of an order confirming the sale. *Cruse v. O'Gwin*, 48 Tex. Civ. App. 48, 106 S. W. 757.

(e) Evidence to Show Ratification.

Proof that the plaintiffs, who were the testator's heirs, in consideration of the balance of the price of the land, ratified the executor's deed in writing, and released all claim to the land, is admissible to show ratification of such deed. *McCown v. Terrell*, 9 Tex. Civ. App. 66, 29 S. W. 484 (see 87 Tex. 470).

(3) Weight and Sufficiency of Evidence.

(a) To Authorize Submission of Issue.

Evidence held not to authorize the submission of an issue as to a sale by an administrator of land not inventoried or mentioned in the proceedings of the probate court relating to the estate. *Texas, etc., Lumber Co. v. Gwin*, 29 Tex. Civ. App. 1, 67 S. W.

892, 68 S. W. 721, affirmed in 95 Tex. 688, no op.

(b) To Prove Death of Decedent, Appointment and Qualification of Administrator.

Where the recitals in certified copies of the orders and judgments of court, in which a decedent's estate purported to be administered and which authorized the administrator to sell real estate, are offered in evidence with the deed, in a suit to try title, no other proof of decedent's death, nor of the appointment or qualification of his administrator, need be offered. *Barton v. Davidson* (Civ. App.), 45 S. W. 400.

See probate records, though fragmentary and partly lost, held to support a finding that the person executing certain deeds was administrator of an estate and authorized to execute them by order of the court. *Pendleton v. Shaw*, 18 Tex. Civ. App. 439, 44 S. W. 1002, affirmed in 93 Tex. 693, no op.

(c) To Prove That Administration Had Lapsed.

The fact that no inventory was filed for more than seven years after the administrator qualified, where the court afterwards exercised jurisdiction over the estate by approving the inventory, making an order of sale and confirming it, is not sufficient to sustain a finding that the administration had lapsed, and the administrator's sale was therefore invalid. *Harris v. Shafer* (Civ. App.), 21 S. W. 110.

(d) To Prove Debts.

An executor sold land of his testator, the validity of the sale depending on the existence of debts due from the estate. The taxes of the estate amounted annually to about \$8000, and at least part of one year's taxes were due at testator's death, which, with part of the taxes for another year, were paid during the executor's continuance in office. Another sum was probably paid by the executor. The executor, on the day before the taxes first mentioned were paid, borrowed

money for that purpose, mortgaging land of the estate. The administratrix, who succeeded the executor at his death, reported that the estate owed a considerable sum when she became administratrix, all which she had paid, except some taxes accruing since her appointment. Held sufficient evidence to justify a verdict that the estate was indebted at the time of the sale. *Bianton v. Mayes*, 72 Tex. 417, 10 S. W. 452.

(e) To Prove Want of Debts.

Where, in proceedings to set aside probate sale for fraud, alleging that there were no debts owing by the estate, it is sufficient prima facie proof to show by probate proceedings that no particular claim against the estate had been recognized by defendant. *Herndon v. Kuykendall*, 58 Tex. 341, 349.

(f) To Rebut Presumption of Sufficient Evidence.

Where the court records showing the evidence on which the county court acted in directing the execution of a deed by an administrator, in fulfillment of his intestate's bond for title, had been destroyed by fire, a bond for title offered in evidence, purporting to have been executed by the intestate, but differing essentially from the recitals of the judgment directing the execution of the deed, as stated therein, was insufficient to show that it was the bond on which the court acted, or rebut the presumption that the court had sufficient evidence before it on which to render the judgment on which the deed was executed. *Dutton v. Wright*, 38 Tex. Civ. App. 372, 85 S. W. 1025, affirmed in 101 Tex. 634, no op.

(g) To Prove Fraud.

In an action against a purchaser at an administrator's sale to have the sale set aside on the ground of a fraudulent collusion between the administrator and the vendee, a creditor

of the estate, who purchased it for the amount of the debt, where there was no direct evidence of fraud, but merely circumstances which would excite suspicions of fraud, the jury were properly instructed that mere suspicions were insufficient to establish fraud. *Kellum v. Smith*, 18 Tex. 835.

In a direct proceeding to set aside a sale made under proceedings in probate, evidence examined and held sufficient to support a finding that an administrator's sale was fraudulent. *Herndon v. Heirs of Kuykendall*, 58 Tex. 341; *Kellum v. Smith*, 18 Tex. 835, 850.

(h) To Identify Land or Certificate.

An application by an administrator for an order was to sell "the certificate for one league and labor issued to his intestate." The order was to sell "a land certificate for one league and labor of land which was granted to his intestate as a headright claim." The report of sale described it as "a certificate for one league and labor of land the headright of his intestate," and the order of confirmation described the property as "a certificate for one league of land granted by the government of ——— to M, as a colonist." Held, that when construed together in connection with the patent the descriptions were sufficient to identify the certificate. *Edwards v. Gill*, 5 Tex. Civ. App. 203, 23 S. W. 742.

In a proceeding by an heir to set aside an administrator's deed, the fact that the petition and judgment in favor of plaintiff embrace what is in the deed with slightly extended boundaries at one end will not reverse the judgment, defendants having admitted the property described in the petition to be the property in controversy. *Kalteyer v. Wipff* (Civ. App.), 49 S. W. 1055.

(i) Weight and Sufficiency of Deed as Evidence.

See ante, "Weight and Sufficiency of

Deed as Evidence," II, G, 5, q. (7), (d), bb.

(j) Held to Show No Equity.

In a suit by creditors of an estate ground of defects in the administrator's sale, no attempt or offer was made to refund the purchase money. The sale was necessary for the payment of debts and the debts were paid by the proceeds. The purchaser reposed on the guaranty of a conclusive decree, entered into possession and made valuable improvements on the land. Held, that the heirs were without equity. *Bartlett v. Cocke*, 15 Tex. 471.

(k) Instructions.

Where, in a suit by creditors of an estate to set aside an administrator's sale of land there was no evidence to show want of proper notice of sale and the recitals in the deed did not show the absence of notice, the refusal to charge on the issue of notice was not error. *Johnson v. Richardson*, 52 Tex. 481.

In a suit by creditors of an estate to set aside an administrator's sale on the ground of a fraudulent understanding between the administrator and the purchaser under which the administrator was to have an interest in the premises sold, the refusal to instruct that various circumstances enumerated were badges of fraud was not error for the issue was not as to the intention with which the sale was made but as to the existence of a fraudulent understanding between the administrator and purchaser and whether a deed was with the fraudulent design and whether an administrator's sale was made in pursuance of an understanding between administrator and purchaser are different questions. *Johnson v. Richardson*, 52 Tex. 481.

l. The Verdict.

Where the court told the jury that the suit was brought first to substitute a judgment and second, to set aside a sale, and charged that if they believed that the executor recovered judgment

as alleged and that it was destroyed they should find for plaintiff and that if they believed that a purchaser at an administrator's sale became a purchaser at a bona fide sale ordered and confirmed in probate court, they should find for defendant on the second issue, and that if they believed the sale was procured by any understanding between the purchaser and the administrator which was injurious to the estate or made to enable the administrator to become the owner of any part of the land, they should find for plaintiff on the second issue, a verdict, "We * * * find for defendant" is sufficiently responsive to the charge to show that the jury found for defendant on the main issue. *Johnson v. Richardson*, 52 Tex. 481.

m. The Judgment.

An agreed judgment setting aside a probate sale was binding upon the parties and subsequent purchasers from them, and such purchasers could not object to a decree petitioning the estate, for want of the presence of parties who claimed under the sale so set aside and had no other interest. *Kalteyer v. Wipff*, 92 Tex. 673, 52 S. W. 63, reforming and affirming 49 S. W. 1055.

n. Costs on Setting Aside Sale.

See ante, "Costs," II, G, 5, p. (13).

o. Effect of Setting Aside Sale.

(1) Revests Title; Land Falls Back into Administration.

Where lands of an estate have been sold under a decree of the probate court, and the sale confirmed, the effect of setting aside such a sale by such a court is to set aside the order of confirmation and revest the title in the devisees or heirs, subject, as before to administration. *Fisher v. Wood*, 65 Tex. 199; *Burdett v. Silsbee*, 15 Tex. 604; *De Witt v. Miller*, 9 Tex. 239, 247; *Robinson v. Peyton*, 4 Tex. 276; *Giddings v. Steele*, 28 Tex. 732, 733, a sale of a land certificate. See,

also, *Long v. Wortham*, 4 Tex. 381, 382; *Evans v. Oakley*, 2 Tex. 182.

(2) Purchaser as Trustee for Persons Defrauded.

See ante, "Same; Effect of Purchaser's Knowledge of Fraud, Defects, Irregularities, etc.," II, G, 6, a, (7).

(3) Return of Purchase Money.

Rights of Purchaser.—See ante, "Same; Effect of Purchaser's Knowledge of Fraud, Defects, Irregularities, etc.," II, G, 6, a, (7).

An invalid sale under order of court can not be set aside without a return of the purchase price. *Stephenson v. Marsalis*, 11 Tex. Civ. App. 162, 33 S. W. 383.

Where a person purchases land in good faith from an executor, he is, in the event of the sale proving void, entitled to recover the price paid, in so far as the estate or the beneficiaries have received benefit therefrom. *Mayes v. Blanton*, 67 Tex. 245, 3 S. W. 40.

A bona fide purchaser can recover back the price paid with interest thereon, and also money expended in payment of taxes. *Mayes v. Blanton*, 67 Tex. 245, 3 S. W. 40.

Where the purchase price of land sold by an administrator is applied to the discharge of debts against the estate, the purchaser is entitled to a refundment of the amount paid by him on the sale proving invalid. *Pace v. Fishback*, 10 Tex. Civ. App. 450, 31 S. W. 424; *Smithwich v. Kelly*, 79 Tex. 564, 576, 15 S. W. 486.

Where land belonging to an estate is sold under a void order of court, and the money received has been used to pay charges against the estate, on recovery of the land by the heirs, they will be obliged to pay the amount received, which is chargeable against their portion with interest thereon from the time at which the amount was applied in payment of charges. *Millican v. McNeill*, 102 Tex. 189, 114

S. W. 106; *Schnabel v. McNeill*, 102 Tex. 196, 114 S. W. 108; *Halsey v. Jones*, 86 Tex. 488, 25 S. W. 696, affirming 25 S. W. 697; *Northcraft v. Oliver*, 74 Tex. 162, 11 S. W. 1121; *Mayes v. Blanton*, 67 Tex. 245, 3 S. W. 40; *French v. Grenet*, 57 Tex. 273. See, also, *Morton v. Wellborn*, 21 Tex. 772; *Howard v. North*, 5 Tex. 290; *Bailey v. White*, 13 Tex. 114; *Johnson v. Caldwell*, 38 Tex. 217, 218; *Walker v. Lawler*, 45 Tex. 532; *McDonough v. Cross*, 40 Tex. 251; *Herndon v. Rice*, 21 Tex. 455.

By a decree of the probate court, the administrator of an insolvent estate was vested with the title to a head-right certificate at its appraised value, in part payment of a claim held by him against such estate. Held, that the heirs of the intestate could not recover the land on which such certificate was located, from persons holding under such administrator, without paying them the sum at which such certificate was appraised, with interest from the date of such decree. *Halsey v. Jones*, 86 Tex. 488; 25 S. W. 696, reversing 25 S. W. 697.

Since there was no money paid for the certificate and no payment made on the administrator's claim, entire debt continued a valid and subsisting claim against estate till barred by limitation and those claiming under intestate can recover the land from the administrator without paying appraised value of certificate and interest. *Halsey v. Jones* (Civ. App.), 25 S. W. 697, 700, affirmed in 86 Tex. 488.

An administrator, in 1893, sold a land certificate by order of court, which was afterwards discovered to be fraudulent. Held that, by the Spanish laws then in force, the purchasers were entitled to a repayment of the purchase money, to be enforced against the estate, or, if the settlement was closed, against the heirs and distributees, but had no claim against the administrator per-

sonally. *Mathews v. Allen*, 6 Tex. 330.

"Knowledge of the source from which the money came is an important fact in the determination of the right of the appellant to have returned to him so much of the purchase money as may have been received by the estate or expended for its benefit. The equity arises from the fact that the estate has had the benefit of his money, and now seeks to take from him the property for which it was paid. If the appellants were setting up an estoppel their knowledge might become a material fact. * * * (Howard v. North, 5 Tex. 290, 316; Herndon v. Rice, 21 Tex. 455, 456; Walker v. Lawler, 45 Tex. 532, 538; Story's Equity, 696, 707.)" *Mayes v. Blanton*, 67 Tex. 245, 249, 3 S. W. 40.

Lien Discharged by Purchasers.—

When a bona fide possessor or purchaser of an estate pays money in discharge of an existing incumbrance or charge upon the estate, having no notice of any infirmity in his title, he is entitled to be repaid the amount of such payment by the true owner seeking to recover the estate from him. *Walker v. Lawler*, 45 Tex. 532.

Where Mortgaged Property Sold as Property of Mortgagee; Subrogation.

—Where the mortgaged property has been sold for the purpose of paying the debts of the deceased mortgagee, a subvendee of a purchaser of the land at the probate sale will not be subrogated to the rights of the mortgagee, and so can not insist upon the repayment of the purchase money as a prerequisite to the recovery of the land by the mortgagor or his assignee. *McCammant v. Roberts*, 87 Tex. 241, 27 S. W. 86, reversing 25 S. W. 731.

Where Money Was Never Paid.—

Where there was an illegal sale of real estate by an administrator, and the deed given by the administrator recites that the sale was made on six

months' time, and there is no report by the administrator that he ever received the consideration, or applied it to the benefit of the estate, payment of money by the heirs before recovering the land from the illegal holders will not be required. *Fishback v. Page*, 43 S. W. 317, 17 Tex. Civ. App. 183.

Lien for Return of Purchase Money.

—An administrator's sale to pay debts, though void for uncertainty of description in the application, order, report, and confirmation of sale, was not tortious, and hence the purchaser who canceled a debt due from the estate in consideration of the transfer to him was entitled to a lien on all the lands of deceased for the return of the price. *Macmanus v. Orkney* (Tex. Civ. App.) 39 S. W. 614, reversed 40 S. W. 715, 91 Tex. 27.

A purported conveyance by an administrator, under direction of court, reciting that the grantor held a bond for a deed from the intestate, and acknowledging the receipt of the money, entitled the grantee to hold possession as against the heirs, and, a fortiori, against strangers, until the equity thereby created was satisfied; and this though the court had no authority to order the conveyance, and the land was such that the intestate was forbidden by law to convey it. *Maxson v. Jennings*, 48 S. W. 781, 19 Tex. Civ. App. 700.

Purchaser Wishing to Assert Equity Must Plead It.—

In trespass to try title by heirs against one purchasing land at a void administrator's sale to recover the land, if the purchaser wishes to assert an equity of subrogation to the amount of his purchase money, he must plead it. *Wilkin v. Owens*, 102 Tex. 197, 114 S. W. 104, distinguishing *Williams v. Wilson*, 76 Tex. 69, 13 S. W. 69, and following *Fuller v. O'Neil*, 69 Tex. 349, 6 S. W. 181; *Crow v. Fiddler*, 3 Tex. Civ. App. 576, 582, 23 S. W. 17, affirmed in 93 Tex. 658, no op.; *Mathews v. Moses*, 21 Tex. Civ.

App. 494, 496, 52 S. W. 113, affirmed in 93 Tex. 714, no op., and citing *Black v. Garner* (Civ. App.), 63 S. W. 918, affirmed in 95 Tex. 125, 94 Tex. 703, no op.

(4) Accounting for Rents, Profits and Improvements.

(a) Lien of Plaintiff for Rents and Profits.

Where an administrator's deed is set aside at the suit of one of three heirs against the other two and others claiming under the deed, and plaintiff is adjudged entitled to his share of the property, he is entitled to a lien on the rest for the amount found to be due him as his share of the rents collected by defendants. *Kalteyer v. Wipff* (Civ. App.), 49 S. W. 1055.

(b) Accounting between Administrator and Estate.

Where a sale of land made by an administrator is set aside, the amount paid by him from the proceeds of the sale on claims against the estate, with interest at the rate designated in each claim, and the cost of administration, not including commissions for the sale, with interest at the legal rate, should be credited to the administrator, and the rental value of the property, together with interest from the time each payment of rent would have been due, less the amount paid for taxes and reasonable repairs done thereon, should be charged to him. *Wipff v. Heder*, 6 Tex. Civ. App. 685, 26 S. W. 118.

(c) Accounting for Improvements.

See, also, ante, "Bona Fide Purchasers," II, G, 6, a.

A bona fide purchase at an administrator's sale which is void can support a claim for improvements made. *Burdett v. Silsbee*, 15 Tex. 604.

Where property of a deceased person was sold under order of the probate court, which was void because no necessity declared by Prob. Act 1848, authorizing such sales, existed, such

defect in the title did not prevent the purchasers from claiming the value of their improvements placed on the land under a bona fide claim as innocent purchasers. *Anderson v. Lockhart*, 2 Posey, Unrep. Cas. 63.

A purchaser at the second administration sale, although chargeable with notice of first sale, may be such purchaser in good faith as is entitled to payment for valuable improvements. *Brockenborough v. Melton*, 55 Tex. 493, 507.

(5) Liability of Bona Fide Purchaser from First Purchaser, to Estate upon Outstanding Negotiable Note.

Where defendants purchase land from one who bought at an administrator's sale held by order of the probate court, and give a negotiable note for a portion of the price, and the administration is set aside, they will not be compelled to pay such portion of the purchase money to the estate under the second administration, the note being outstanding. *Halbert v. Young's Heirs* (Sup.), 6 S. W. 747.

(6) Personal Liability of Administrator.

No suit lies against an administrator personally, for failure of title to land sold by order of court. *Mathews v. Allen*, 6 Tex. 330, 332.

9. Injunction against Sale.

Where the apparent title to land is in the name of a deceased person, and his administrator applies for and obtains an order to sell the same as the property of intestate, injunction is the proper remedy of the real owner, and not a contestation of the sale in the probate court, to be followed up by appeal or certiorari. *Fisk v. Wilson*, 15 Tex. 430.

10. Liability of Administrator for Wrongful Sale.

An administrator who sold land under orders of sale fraudulently procured by him from the probate court,

is in the absence of evidence that the purchasers were guilty of complicity with or had notice of the fraud, liable to the heirs of the intestate for the value of the land at the commencement of the suit with interest until payment is made. *McCown's Executors v. Foster*, 33 Tex. 241.

Where the widow of deceased had no notice of the pendency of administration of her husband's estate until it had been sold and the proceeds expended to meet a debt owed by deceased to the administrator and to defray expenses of administration, she could recover of the administrator the sum for which the property sold in satisfaction of her allowance for a year's support. *Clark v. English*, 36 Tex. Civ. App. 502, 82 S. W. 325.

An administrator, selling property in which the estate owned only a half interest, can not contend that, as he sold only the estate's interest, he was not liable to account to the owner of the other half for a share of the proceeds. *Schmitt v. Jacques*, 26 Tex. Civ. App. 125, 62 S. W. 956, affirmed in 94 Tex. 707, no op.

Where an administrator sold property as a part of the estate, which in fact belonged to another person, an action in conversion to recover the value of the property so sold was properly prosecuted against the administrator in his representative capacity, and not personally. *Schmitt v. Jacques*, 62 S. W. 956, 26 Tex. Civ. App. 125.

Where plaintiff sued in conversion to recover the value of his property, which had been sold by an administrator as part of the estate, he claimed, not through the estate, but adversely thereto; and hence a presentation of the claim to the administrator, and rejection by him, was not a necessary condition precedent to the right of action. *Schmitt v. Jacques*, 26 Tex. Civ. App. 125, 62 S. W. 956, affirmed in 94 Tex. 707, no op.; *Red River County*

Bank v. Higgins, 72 Tex. 66, 9 S. W. 745.

Where, in an action against an administrator after his discharge, for alleged fraud in the sale of land, and failure to account for the proceeds, it appears that the land was sold under an order of court, on a credit of 12 months, to pay a valid claim against the estate, and that the administrator never received the proceeds of such sale, there can be no recovery. *Mason v. Rodgers*, 83 Tex. 389, 18 S. W. 811.

Where an administrator took out an order of sale of land, made a sale, which was confirmed, and rendered a final account, and was discharged on taking out letters on the same estate and making an attempted sale on the same land, he was liable for the costs of such second proceedings. *Hurt v. Horton*, 12 Tex. 285.

Liability to Purchaser upon Setting Aside Sale.—See ante, "Personal Liability of Administrator," II, G, 8, o, (6).

11. Administrator's Sale Compared with Sale under Execution, Sale by Heirs, etc.

There is a wide difference between a sale under an ordinary execution, a few days after the death of the defendant (as was the fact in this case), and a sale under an order from the county court. The former may be had before the appointment of an administrator; the latter must be after such appointment, and, of course, after the estate has the benefit of the aid, counsel and management of a responsible trustee. The sale under the former must be for cash; under the latter it may be on credit or on such terms as the chief justice shall direct. Art. 1171. Under the former the sale is binding; under the latter it must be reported to the court, and may be set aside, if not fairly made, and a new one ordered. Art. 1176. Under the former the proceeds of the sale would go to the plaintiff in execution; under the latter they

would be applied first to the payment of such claims as had a preference over the judgment, and the balance only would be paid to the plaintiff. Art. 1190. *McMiller v. Butler*, 20 Tex. 402, 405.

There is a broad distinction between a sale by the heirs in their own right and one by an administrator, in his representative character, under an order of court, for the payment of debts. If the rights of the creditors are superior to those of the vendee holding by an unregistered deed, and

as, unquestionably, a purchaser from the administrator holds in privity with the original vendor as fully as a purchaser under like circumstances from the sheriff, there can be no good reason to uphold the title of the one and to deny that of the other. That the latter is within the protection of the statute, is not now an open question in the supreme court. *Taylor v. Harrison*, 47 Tex. 454, 460; *Ayres v. Duprey*, 27 Tex. 593; *Grace v. Wade*, 45 Tex. 522.

Executory Consideration.

See the title CONTRACTS, vol. 4, p. 589.

Executory Contracts.

See the titles CONTRACTS, vol. 4, p. 558; FRAUD AND DECEIT; FRAUDS, STATUTE OF; ILLEGAL CONTRACTS; MISTAKE AND ACCIDENT; RESCISSION, CANCELLATION AND REFORMATION; SALES; SPECIFIC PERFORMANCE; TRUSTS AND TRUSTEES; VENDOR AND PURCHASER.

Executory Deeds.

See the title DEEDS, vol. 6, p. 157.

Executory Devises.

See the titles REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; WILLS.

Executory Limitations.

See the titles DEEDS, vol. 6, p. 148; ESTATES, vol. 6, p. 982; PERPETUITIES; REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; WILLS.

Executory Remainders.

See the titles DEEDS, vol. 6, p. 148; ESTATES, vol. 6, p. 982; REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS; WILLS.

Executory Trust or Use.

See the title TRUSTS AND TRUSTEES.

Executrix.

See the title EXECUTORS AND ADMINISTRATORS, ante, p. 364.

EXEMPLARY DAMAGES.

BY RICHARD K. BRIDGES.

I. Definition, 911.

II. Nature and General Considerations, 912.

A. Nature, 912.

B. Doctrine of Ex Post Facto Animus, 912.

III. Award of Exemplary Damages, 912.

A. In General, 912.

B. Award in Particular Actions, 914.

1. On Contract, 914.

2. For Torts, 915.

a. In General, 915.

b. Specific Instances, 915.

(1) Wrongful Attachment, 915.

(2) Arrest and Flooding Lands, 916.

(3) Conversion, 916.

(4) Distress Warrant Sued Out Maliciously, 917.

(5) Wrongful Ejectment, 917.

(6) False Inducement to Pay Debt of Another, 917.

(7) Injunction Sued Out Maliciously, 918.

(8) Interference with Property Rights, 918.

(9) Lease of House to Prostitutes, 918.

(10) Malicious Prosecution, 918.

(11) Writ of Possession—Absence of Malice, 918.

(12) Refusal to Pay Over Money, 918.

(13) Right of Location, 918.

(14) Wrongful Sequestration, 918.

(15) Malicious Trespass, 919.

C. Persons Liable for Exemplary Damages, 920.

1. Public Officers, 920.

2. Corporations, 921.

3. Master and Servant, 921.

4. Attorney and Client, 923.

- 5. Principal and Agent, 923.
- D. Effect of Criminal Prosecution upon Award, 925.

IV. Measure of Exemplary Damages, 925.

- A. In General, 925.
- B. Discretion of Jury, 925.
- C. Attorneys' Fees, 927.
- D. Excessiveness, 927.
 - 1. In General, 927.
 - 2. Cases Illustrative, 928.

V. Pleading and Practice, 929.

- A. Averments of Petition, 929.
 - 1. In General, 929.
 - 2. Averments Sufficient, 931.
 - 3. Averments Insufficient, 933.
- B. Evidence, 933.
 - 1. Admissibility, 933.
 - 2. Sufficiency, 934.
 - 3. Burden of Proof, 935.
- C. Remittitur, 936.
- D. Instructions, 936.
- E. Verdict and Judgment, 941.
 - 1. Verdict, 941.
 - 2. Judgment, 941.

CROSS REFERENCES.

See the titles ASSAULT AND BATTERY, vol. 2, p. 80; ATTACHMENT, vol. 2, pp. 497, 514, 515, 527, 541, 561; ATTORNEY AND CLIENT, vol. 2, p. 587; BOYCOTT, vol. 3, p. 147; CARRIERS, vol. 3, p. 304; CARRIERS OF GOODS, vol. 3, p. 639; CARRIERS OF PASSENGERS, vol. 3, p. 985; CONSPIRACY, vol. 4, p. 372; TELEGRAPHS AND TELEPHONES.

As to liability for injury by vicious animals, see the title ANIMALS, vol. 1, p. 274, et seq. As to liability of carrier for charging excessive fare, see the title CARRIERS OF PASSENGERS, vol. 3, p. 809. As to liability of carrier for failure to keep its road in good condition, see the title CARRIERS OF PASSENGERS, vol. 3, p. 894. As to negligence causing death and questions of exemplary damages arising therefrom, see the title DEATH BY WRONGFUL ACT, vol. 5, p. 1216, et seq. As to wrongful levy of execution and levy on exempt property, see the title EXECUTIONS, ante, p. 229. As to liability for wrongful ejection of guest, see the title INNS AND INNKEEPERS. As to when excessive punitive damages are ground for new trial, see the title NEW TRIALS. As to when telegraph or telephone company may be liable in exemplary damages, see the title TELEGRAPHS AND TELEPHONES.

I. Definition.

When the ordinary rules of compensation are dispensed with the damages may be denominated exemplary for the reason that if high they deter from the commission of

similar offenses; but they also effect the purpose of compensation, and may therefore be regarded as the damages sustained from the wanton and aggravated outrage. *Cole v. Tucker*, 6 Tex. 266, 271.

II. Nature and General Considerations.

A. NATURE.

The very name exemplary damages carries with it the idea of punishment, not of compensation. *Harmon v. Callahan* (Civ. App.), 35 S. W. 705, 706; *Hays v. Houston, etc., R. Co.*, 46 Tex. 272; *Southern Cotton Press, etc., Co. v. Bradley*, 52 Tex. 587, 599.

"There is much confusion as to the grounds upon which exemplary damages are allowed. It is sometimes said that they are purely punitory. Again, it is claimed that they are the mere inclusion of elements of damage not allowed where there has been no malice, fraud, or oppression. Our decisions recognize the rule that exemplary damages are allowed as a matter of punishment, but at the same time, when a proper case is made, permit the jury in assessing their amount to take into consideration damages too remote to be considered strictly compensatory. *Mayer v. Duke*, 72 Tex. 445, 10 S. W. 565." *Trawick v. Martin-Brown Co.*, 79 Tex. 460, 464, 14 S. W. 564.

B. DOCTRINE OF EX POST FACTO ANIMUS.

While doctrine of ex post facto animus, as a basis for exemplary damages, seems to be an anomaly. *Dillingham v. Russell*, 73 Tex. 47, 11 S. W. 139.

III. Award of Exemplary Damages.

A. IN GENERAL.

See post, "Wrongful Attachment," III, B, 2, b, (1).

There is a large class of cases where the common law in giving relief loses sight of the principle of compensation, and gives damages by way of punishment, for acts of malice, vexation, fraud and oppression. *Smith v. Sherwood*, 2 Tex. 460, 463.

The authorities teach that damages may be given in peculiar cases, not merely to compensate, but to punish. There are offenses against morals to which the law has annexed no penalty as public wrongs and which would pass without reprehension did not the providence of the court permit the private remedy to become an instrument of public correction. *Graham v. Roder*, 5 Tex. 141, 149.

Statutory Provisions.—Under art. 16, § 26, const. 1876, and Pas. Dig., arts. 15-18, exemplary as well as compensatory damages are allowed. *Galveston, etc., R. Co. v. Le Gierse*, 51 Tex. 189.

The fact that a statute gives a right to recover damages in excess of the sum that might be recovered in a court of law in the ordinary administration of justice does not invalidate the statute; but the excess is exemplary damages. *Houston, etc., R. Co. v. Harry & Bros.*, 63 Tex. 256, 257.

Exemplary Damages as Dependent on Actual Damage.—In this state, before exemplary damages will be awarded, some actual damage must be shown arising from the party complained of to the party complaining, and the tort must be committed deliberately, recklessly, or by willful negligence, with a present consciousness of invading another's rights, or of exposing him to injury. *Smith v. Holland*, 4 App. Civ. Cases, §§ 251, 253, 16 S. W. 424. See post, "Verdict and Judgment," V, E.

"It has been repeatedly held by this court that when no actual damage is shown there can be no recovery of exemplary damages. *Flanagan v. Womack*, 54 Tex. 45; *Trawick v. Martin-Brown Co.*, 79 Tex. 460, 14 S. W. 564; *Jones v. Matthews*, 75 Tex. 1, 12 S. W. 823." *Girard v. Moore*, 86 Tex. 675, 676, 26 S. W. 945. See also, *McDonald v. International, etc., R. Co.*, 86 Tex. 1, 13, 22 S. W. 939; *Ritz v.*

Austin, 1 Tex. Civ. App. 455, 20 S. W. 1029, affirmed in 93 Tex. 694, no op.; *Adoue v. Wettermark*, 36 Tex. Civ. App. 585, 82 S. W. 797; *G. H. & S. A. R. Co. v. Turner*, 1 App. Civ. Cases, 344; *Carson v. Texas Installment Co.* (Civ. App.), 34 S. W. 762, 764; *Smith v. Dye* (Civ. App.), 51 S. W. 856; *King v. Sassaman* (Civ. App.), 54 S. W. 304; *Lacy v. Gentry* (Civ. App.), 56 S. W. 949; *Flanary v. Wood*, 32 Tex. Civ. App. 250, 73 S. W. 1072, affirmed in 97 Tex. 632, no op.; *Malin v. McCutcheon*, 33 Tex. Civ. App. 387, 76 S. W. 586; *Rogers v. O'Barr* (Civ. App.), 76 S. W. 593; *Lawson v. Goodwin*, 37 Tex. Civ. App. 484, 84 S. W. 279.

Where no actual damages can be recovered because of the institution of a suit, no exemplary damages are recoverable, however malicious the act in instituting the suit may have been. *Lightfoot v. Murphy*, 47 Tex. Civ. App. 112, 104 S. W. 511.

Actual Damages Reduced to Minimum.—Where there is provocation or other mitigation which reduces the actual damages to a minimum, there is generally no ground for punitive damages. *Jones v. Matthews*, 75 Tex. 1, 3, 12 S. W. 823.

Where actual recoverable damage has been sustained in replevin and settled for, without including claim for vindictive damage, recovery of former, whether nominal or not, is not prerequisite to recovery of latter. *Gregory v. Coleman*, 3 Tex. Civ. App. 166, 169, 22 S. W. 181.

"In cases where injury to property is claimed exemplary damages should not be allowed without allegation and proof of actual damage." *Trawick v. Martin-Brown Co.*, 79 Tex. 460, 464, 14 S. W. 564.

Injury Tainted with Fraud or Malice.—"It is certainly too well settled by the decision of this court, in accordance, we think, with the well-established rule of the common law, to be

now questioned, that where the injury complained of is tainted with fraud, malice, or willful wrong, exemplary damages may be recovered. (*Smith v. Sherwood*, 2 Tex. 460; *Graham v. Roder*, 5 Tex. 141; *Oliver v. Chapman*, 15 Tex. 400; *Kolb v. Bankhead*, 18 Tex. 228; *Hedgepeth v. Robertson*, 18 Tex. 858; *Reed v. Samuels*, 22 Tex. 114; *Neill v. Newton*, 24 Tex. 202.)" *Shaw v. Brown*, 41 Tex. 446, 449; *Cole v. Tucker*, 6 Tex. 266; *Bradshaw v. Buchanan*, 50 Tex. 492, 494; *Jacobs, etc., Co. v. Crum*, 62 Tex. 401, 414; *International, etc., R. Co. v. Garcia*, 70 Tex. 207, 208, 7 S. W. 802; *Erie Tel., etc., Co. v. Kennedy*, 80 Tex. 71, 72, 15 S. W. 704; *Connor v. Sewell*, 90 Tex. 275, 38 S. W. 35; *Texas, etc., R. Co. v. Self*, 2 App. Civ. Cases, § 439; *Frank v. Tatum* (Civ. App.), 26 S. W. 900, 902, reversed in 87 Tex. 204; *Harmon v. Callahan* (Civ. App.), 35 S. W. 705, 706.

The recovery of exemplary damages must be predicated on the acts and intent of the party from whom they are claimed, and not on the effect that the acts may have on the party claiming such damages. *Harmon v. Callahan* (Civ. App.), 35 S. W. 705, 706.

In an action to recover the value of the running gear of a gin alleged to have been wrongfully, willfully, and maliciously taken by G. and converted to his own use, it was shown in evidence that G. went to the premises of the plaintiff and removed the gear, representing to the tenant of the plaintiff that he had purchased the gear. There was other evidence tending to show a negotiation for the sale of the property, which had not been concluded at the time of the taking. Held, that the trespass committed partook, though very slightly, of the elements of fraud and oppression, and therefore presented a proper case for exemplary damages. *Gordon v. Jones*, 27 Tex. 620.

Gross Negligence.—Exemplary dam-

ages are recoverable for an injury caused by negligence so gross as to show absolute want of care or extreme indifference. *Cook v. Horstman*, 2 Willson, Civ. Cas. Ct. App. § 772.

In suit for damages to horse from barbed-wire fence, the existence of gross negligence in its construction authorizes the recovery of exemplary damages. *Connellee v. Doake*, 4 Tex. App. Civ. Cases, § 98, 16 S. W. 175.

In an action for injuries caused to three horses by a fence, where the evidence shows that the fence was of an unusually dangerous character, being built of barbed wire, the posts being 15 feet apart, and no plank or any other thing attached to indicate its locality, the negligence is so gross that exemplary damages can be recovered. *Cook v. Horstman*, 2 Willson, Civ. Cas. Ct. App. § 772.

The driving of a horse and vehicle through city streets at a rate showing a reckless disregard of the safety and rights of persons on the streets evinces such a condition of mind as constitutes legal malice, and entitles one injured thereby to exemplary damages. *Foley v. Northrup*, 47 Tex. Civ. App. 277, 105 S. W. 229.

B. AWARD IN PARTICULAR ACTIONS.

1. On Contract.

See post, "Conversion," III, B, 2, b, (3).

Common-Law Rule.—At common law there could be no recovery of exemplary damages for breach of contract except in case of breach of promise of marriage. *Hooks v. Fitzenrieter*, 76 Tex. 277, 13 S. W. 665; *Houston, etc., R. Co. v. Shirley*, 54 Tex. 125, 142.

Present Rule in Texas Same as at Common Law.—"The allowance of exemplary damages in suits on contract is not supported by authority,

and the innovation is one which we are not prepared to make." *Houston, etc., R. Co. v. Shirley*, 54 Tex. 125, 142.

"The general rule is, that for breach of contract exemplary damages are not recoverable." *Burnett v. Edling*, 19 Tex. Civ. App. 711, 713, 48 S. W. 775, affirmed in 93 Tex. 636, no op.

See, also, *Tignor v. Toney*, 13 Tex. Civ. App. 518, 35 S. W. 881; *San Antonio, etc., R. Co. v. Kniffin*, 4 Tex. Civ. App. 484, 489, 23 S. W. 457.

Exceptions—Action for Breach of Promise to Marry.—Plaintiff in action for breach of contract, other than a promise to marry, cannot recover exemplary damages. *Peterson v. Thomas* (Civ. App.), 24 S. W. 1124; *Thomas v. Peterson* (Civ. App.), 24 S. W. 1125.

Breach of Contract and Tort Growing Out of Same Transaction.—There is high authority for the doctrine that "the allowance of exemplary damages for the breach of a contract is a departure from the true principles of the law of damages and of public policy." *Field on Dam.*, p. 28, note; *Houston, etc., R. Co. v. Shirley*, 54 Tex. 125, 148. In Texas, however, the right to sue for "a breach of a contract and for a tort, when both grow out of the same transaction and can be properly litigated together," is recognized. *Hooks v. Fitzenrieter*, 76 Tex. 277, 279, 13 S. W. 230.

"Counsel for appellee insist that appellant was not entitled to exemplary damages, and refer us to the case of *Houston, etc., R. Co. v. Shirley*, 54 Tex. 125, to the effect that such damages are not recoverable upon a breach of contract. In the case before us, there was a breach of contract, certainly; but there was much more. The plaintiff was, with every circumstance of contumely, excluded from a business in which he had an interest, and from premises in which he had a right to work, at least for the

time being. The defendant appears to have taken the law into his own hands, and to have closed the partnership in a manner entirely too summary to be sanctioned by a court of justice." *Ball v. Britton*, 58 Tex. 57, 63.

Breach of Contract Accompanied by Violence.—Exemplary damages are not allowed for the breach of an ordinary contract, or for the ordinary wrongful taking or conversion of property. But the breach of a contract or the taking or conversion of property may be accompanied by such willful acts of violence, malicious or oppressive conduct, as would subject the wrongdoer to exemplary damages. *Tignor v. Toney*, 13 Tex. Civ. App. 518, 522, 35 S. W. 881.

Measure of Damages in Absence of Fraud or Malice.—In all cases growing out of the nonperformance of contracts, and in those of infringement of rights, or nonperformance of duties created or imposed by law, in which there is no element of fraud, willful negligence or malice, the compensation recovered in damages consists solely in the direct pecuniary loss, which includes, in mere money demands, interest for the detention of the amount claimed and the costs of the suit brought for the recovery of the demand. *Smith v. Sherwood*, 2 Tex. 460, 464; *Graham v. Roder*, 5 Tex. 141, 148.

2. For Torts.

a. In General.

If a tort is committed deliberately recklessly or by willful negligence, with a present consciousness of invading another's right, or of exposing him to injury, exemplary damages may be recovered. *Jacobs, Bernheim & Co. v. Crum*, 62 Tex. 401.

In an action for tort committed wantonly, maliciously, or characterized by gross negligence, attended with any circumstances of insult, outrage or oppression, the wronged party may recover exemplary damages. *Mis-*

souri Pac. Ry. Co. v. Cox, 2 Willson, Civ. Cas. Ct. App. § 288.

In cases of trespass or tort accompanied by oppression, fraud, malice, or negligence so gross as to raise a presumption of malice, the jury have discretion to award exemplary damages by way of punishment to the wrongdoer. *Smith v. Sherwood*, 2 Tex. 460; *Lesk v. Pollard*, 1 White & W. Civ. Cas. Ct. App. § 117.

Exemplary damages may be awarded in case of a tort if there is an element of malice, fraud, or wantonness, and it is not necessary that all such ingredients be present. *Lesk v. Pollard*, 1 White & W. Civ. Cas. Ct. App. § 117. See post, "Discretion of Jury," IV, B.

Rule When Action Survives against Representative of Tort Feasor.—Where an action for a tort survives against the representative of the deceased tortfeasor, vindictive damages should never be allowed, no matter how aggravated the trespass. *Wright's Adm'x v. Donnell*, 34 Tex. 291.

Committed by Mistake, without Malice.—Exemplary damages "are allowable only where there is misconduct and malice, or what is equivalent to it. A tort committed by mistake, in the assertion of a supposed right, or without any such recklessness or negligence as evinces malice or conscious disregard of the rights of others, will not warrant the giving of any damages for punishment, where the doctrine of such damages prevails." *Jacobs, etc., Co. v. Crum*, 62 Tex. 401, 415; *Smith v. Holland*, 4 App. Civ. Cases, §§ 251, 253, 16 S. W. 424.

b. Specific Instances.

(1) Wrongful Attachment.

See the title ATTACHMENT, vol. 2, p. 296.

To authorize a verdict for exemplary damages for wrongful attachment, there must be absence of probable cause and malice in suing out the writ. *Lister v. Campbell* (Civ. App.), 46 S.

W. 876; *Faroux v. Cornwell*, 40 Tex. Civ. App. 529, 90 S. W. 537; *Tynburg & Co. v. Cohen*, 67 Tex. 220, 2 S. W. 734; *Biering First Nat. Bank*, 69 Tex. 599, 7 S. W. 90.

In an action for damages against a sheriff for wrongfully seizing goods, exemplary damages can not be allowed, in absence of ill feeling or improper motive. *Weaver v. Ashcroft*, 50 Tex. 427.

If an illegal levy and seizure of the property is oppressive, and the conduct of the officer malicious toward the claimant and owner of the exempt property, exemplary damages may be recovered against not only the officer, but any other person who knowingly encouraged or directed the malicious act. *Brown v. Bridges*, 70 Tex. 661, 8 S. W. 502. See post, "Public Officers," III, C, 1.

Damage Must Be Actual.—See ante, "In General," III, A.

Nominal damages for wrongful attachment will not warrant a recovery of exemplary damages. *Seal v. Holcomb*, 48 Tex. Civ. App. 330, 107 S. W. 916.

Where no actual damage results from the wrongful suing out and levying of an attachment, exemplary damages can not be recovered. *Stewart v. Smallwood*, 46 Tex. Civ. App. 467, 102 S. W. 159.

(2) Arrest and Flooding Lands.

Where a petition sought damages for the flooding of plaintiff's land, and sought recovery for the arrest of plaintiff by defendant, merely as growing out of and pertaining to the acts of flooding, it was proper for plaintiff to set up only exemplary damages as arising from the arrest. *Cody v. Lowry* (Civ. App.), 91 S. W. 1109.

(3) Conversion.

See the title TROVER AND CONVERSION.

One who willfully appropriates property of another, with knowledge of its ownership, is liable for exemplary

damages. *Jackson v. Poteet* (Civ. App.), 89 S. W. 980.

Exemplary damages are not allowed for the breach of an ordinary contract, or for the ordinary wrongful taking or conversion of property. But the breach of a contract or the taking or conversion of property may be accompanied by such willful acts of violence, malicious or oppressive conduct, as would subject the wrongdoer to exemplary damages. *Tignor v. Toney*, 13 Tex. Civ. App. 518, 522, 35 S. W. 881. See ante, "On Contract," III, B, 1.

Exemplary damages may be recovered for conversion, where malice is shown. *Frank v. Tatum* (Civ. App.), 26 S. W. 900. See cases cited in *San Antonio, etc., R. Co. v. Kniffin*, 4 Tex. Civ. App. 484, 23 S. W. 457, 460.

Rights of Assignee.—An assignee of a right to money can not recover exemplary damages of one who wrongfully took it from his assignor. *Burris v. Gose*, 1 White & W. Civ. Cas. Ct. App. § 74.

This action, according to the pleadings of plaintiff, was for the value of coal converted by the defendant, the title to which remained in plaintiff, thus stating a tort; and it is well settled that such damages lie in suits for the tort known as conversion, in proper cases—that is to say, where the act constituting a conversion has been attended with circumstances of fraud, malice, or wanton disregard of the rights of plaintiff. *Cole v. Tucker*, 6 Tex. 266; *Oliver v. Chapman*, 15 Tex. 400, 409; *Houston, etc., R. Co. v. Shirley*, 54 Tex. 125; *Kolb v. Bankhead*, 18 Tex. 228; *Gordon v. Jones*, 27 Tex. 620, 623; *Gross v. Hays*, 73 Tex. 515, 11 S. W. 523; *San Antonio, etc., R. Co. v. Kniffin*, 4 Tex. Civ. App. 484, 489, 23 S. W. 457.

Conversion of Bill of Lading.—In an action against a railroad company, a petition alleging that defendant's agent wrongfully, willfully, and wan-

tonly took possession of and withheld a bill of lading on which lumber was shipped to plaintiff, and that the agent's acts were authorized and ratified by defendant, states a tort for which actual and exemplary damages may be recovered. *Alderson v. Gulf. C. & S. F. Ry. Co.* (Civ. App.), 23 S. W. 617.

Conversion of Share of Crop.—Exemplary damages can not be recovered in an action by one who cultivated defendant's land on shares, but whose share of the crop was wrongfully seized by defendant, in the absence of evidence of willful acts of violence or of malicious or oppressive conduct on the part of defendant. *Tignor v. Toney*, 13 Tex. Civ. App. 518, 35 S. W. 881.

Where there is probable cause for the conversion sued for, exemplary damages will not be allowed although defendant was actuated by ill-will or desire to injure. *Lay v. Blankenship & Co.*, 2 Posey 272, 273.

Conversion without Malice—Goods Destroyed.—Where defendant's merchandise burns while held by plaintiff under a seizure made wrongfully, but without fraud or malice, defendant can recover only the value of the merchandise. *Blum v. Martindale*, 1 White & W. Civ. Cas. Ct. App. § 1127.

(4) Distress Warrant Sued Out Maliciously.

To authorize a recovery of exemplary damages for unjustly suing out a distress warrant, such warrant must have been issued maliciously and without probable cause. *Gray v. Webb*, 3 Willson, Civ. Cas. Ct. App. § 331.

Verdict for Plaintiff for Rent.—Where plaintiff levies a distress warrant, and the jury find a verdict for him for the rent, exemplary damages against him for causing the levy are unwarranted. *Sheckles v. Bryant* (Civ. App.), 30 S. W. 934.

Goods Exempt, but Defendant Not a Party to Distress Warrant.—In an

action for the seizure and sale, under a distress warrant, of articles of household property, exempt from execution, a verdict for exemplary damages against defendant is unwarranted, in the absence of any evidence showing that he had directed the levy, or in any manner participated in the seizure, or that he had ever received any of the proceeds, or knew what property had been seized. *White v. Stribling*, 71 Tex. 108, 9 S. W. 81.

Liabilities of Sureties.—Exemplary damages are not recoverable against the sureties on a bond for a distress warrant. *Hamilton v. Kilpatrick* (Civ. App.), 29 S. W. 819, citing *Wallace & Co. v. Finberg*, 46 Tex. 35, 49; *Woods v. Huffman*, 64 Tex. 98, 100; *Mayer v. Duke*, 72 Tex. 145, 10 S. W. 565.

(5) Wrongful Ejectment.

See the title TRESPASS TO TRY TITLE AND EJECTMENT.

Where defendants, without right, ejected plaintiffs from land they were working under contract with defendants, and appropriated the crop, exemplary damages were proper. *Ellis v. Stine* (Civ. App.), 55 S. W. 758.

Where plaintiff sued for breach of purported lease contract, on ground of defendant's refusal to renew lease, exemplary damages could not be recovered unless plaintiff had been wrongfully ejected from premises. *Aranas Pass Land Co. v. Hanaford*, 4 Tex. Civ. App. 286, 290, 23 S. W. 566.

(6) False Inducement to Pay Debt of Another.

A corporation's state agent induced plaintiff to pay the claim of its debtor, representing that such debtor was solvent, that a mortgage transferred to plaintiff was ample security, and that if the money was paid the debtor would be permitted to continue business and pay plaintiff. The debtor was wholly insolvent, the mortgage was worthless, and on receipt of the money the agent, contrary to assurances, assigned the mortgage to the debtor, and took pos-

session of the stock and closed the business. Held sufficient to sustain a finding that the representations were known to be false and were made to deceive, entitling plaintiff to exemplary damages. (Civ. App.), *Western Cottage Piano & Organ Co. v. Anderson*, 76 S. W. 945, judgment reversed in 79 S. W. 516, 97 Tex. 432, reversed on different point.

(7) Injunction Sued Out Maliciously.

See the title INJUNCTIONS.

Exemplary damages can not be recovered for the malicious suing out of an injunction. *Galveston, H. & S. A. Ry. Co. v. Ware*, 74 Tex. 47, 11 S. W. 918; *Shackelford County v. Hounsfield* (Civ. App.), 24 S. W. 358.

Suing Out Injunction without Malice.

—Where a party, believing that he has the exclusive rights to a stream, obtains an injunction to restrain its use, and it turns out that he is mistaken, he is not necessarily liable to vindictive damages, but only to such actual damages as the party enjoined may have sustained. *Muller v. Landa*, 31 Tex. 265.

(8) Interference with Property Rights.

In an action against defendant and the superintendent of his pasture for preventing plaintiff from using lands belonging to him and situated within the pasture, it was proper to assess the exemplary damages against the defendants jointly. *Waggoner v. Wyatt*, 43 Tex. Civ. App. 75, 94 S. W. 1076.

(9) Lease of House to Prostitutes.

See the title LANDLORD AND TENANT.

Where the allegations in the petition showed a wanton and willful invasion of plaintiff's rights by the defendant in persistently leasing his houses to prostitutes after being warned not to do so, injury to feelings would constitute an element in exemplary damages which would properly be submitted to the jury. *Besso v. Southworth*, 71 Tex. 765, 10 S. W. 523.

(10) Malicious Prosecution.

A suit for malicious prosecution so far partakes of the nature of a criminal proceeding as to admit of the recovery of exemplary damages in the nature of a penalty. *McManus v. Wallis*, 52 Tex. 534, 547. See the title MALICIOUS PROSECUTION.

(11) Writ of Possession—Absence of Malice.

See the title POSSESSION, WRIT OF.

Where a fence belonging to plaintiff was wrongfully included in land set off by the sheriff in executing a writ of possession, and the fence was torn down and carried away by defendant, the person in whose favor the decree was rendered, the fact that defendant was placed in possession under a lawful writ would shield him from liability for exemplary damages. *Jackel v. Reiman*, 78 Tex. 588, 14 S. W. 1001.

(12) Refusal to Pay Over Money.

The mere refusal to pay over money detained when demanded would not, under the facts averred in this case, support a verdict for exemplary damages. *Malin v. McCutcheon*, 33 Tex. Civ. App. 387, 76 S. W. 586.

Refusal to pay over money collected may warrant recovery of exemplary damages where there are aggravated circumstances and special damages resulting therefrom. *Neill v. Newton*, 24 Tex. 202, 204. See, also, *Bracken v. Neill*, 15 Tex. 110, 113; *Moke & Bro. v. Brackett*, 28 Tex. 443, 448.

(13) Right of Location.

In an action for fraudulently inducing plaintiff to purchase the right of location on a tract of land, exemplary damages may be allowed. *Graham v. Roder*, 5 Tex. 141.

(14) Wrongful Sequestration.

See the title SEQUESTRATION.

Verdict for exemplary damages for wrongful sequestration authorized only when writ sued out wrongfully, maliciously and without probable cause.

Lynch v. Barns (Civ. App.), 79 S. W. 1084.

The fact that property was wrongfully seized under a writ of sequestration does not relieve from exemplary damages a plaintiff who wrongfully procures the writ and uses it for the purpose of obtaining possession of property that does not belong to him. *Land v. Klein*, 21 Tex. Civ. App. 3, 50 S. W. 638.

One who, knowing he has no title to land, under writ of sequestration, dispossesses another, is liable for exemplary damages. *Simpson v. Lee* (Civ. App.), 34 S. W. 1053; *Bledsoe v. Palmer* (Civ. App.), 81 S. W. 97. See, also, *Clark v. Pearce*, 80 Tex. 146, 15 S. W. 787.

Wrongful without Malice.—Where the suing out and levy of a writ of sequestration is malicious, exemplary damages may be awarded; where it is merely wrongful, without malice, actual damages only can be allowed. *Harris v. Finberg*, 46 Tex. 79.

Necessity for Actual Damages.—Exemplary damages for the wrongful suing out of a writ of sequestration can only be had in case of actual damages. *Rogers v. O'Barr & Dinwiddie* (Civ. App.), 76 S. W. 593.

Injury to Feelings as Element of Damages.—In an action for wrongfully suing out a writ of sequestration, injury to plaintiff's feelings can not be considered as an element of actual damages, though, where the writ was maliciously sued out, such injuries may be considered by the jury in assessing exemplary damages. *Crawford v. Doggett*, 82 Tex. 139, 17 S. W. 929.

An allegation in the petition for wrongful sequestration that plaintiff suffered physical and mental pain by reasons of the levy constitutes no basis for the recovery of actual damages, and hence exemplary damages can not be recovered under such a petition. *Carson v. Texas Installment Co.* (Civ. App.), 34 S. W. 762.

Liability of Sureties.—Sureties on sequestration or replevin bonds are not liable for exemplary damages on account of the malice of the principal. *McArthur v. Barnes*, 10 Tex. Civ. App. 318, 31 S. W. 212, citing discussion in *Blum v. Gaines*, 57 Tex. 135.

(15) Malicious Trespass.

On Personality.—That in actions for malicious trespasses on personal property vindictory or corrective damages may be awarded is a rule as old as it is firmly established. Compensation, in the legal and technical signification of the term, is not deemed a sufficient recompense for injuries of this character. *Cole v. Tucker*, 6 Tex. 266, 268.

Exemplary damages may be awarded in an action for malicious trespass on personal property, where circumstances of malice, oppression, or intentional wrong are shown. *Craddock v. Goodwin*, 54 Tex. 578.

On Realty.—Exemplary damages may in proper cases be recovered for a willful injury to land. *Ostrom v. San Antonio*, 33 Tex. Civ. App. 683, 77 S. W. 829, affirmed in 98 Tex. 627, no op.

Trespass by Mistake.—One who acts in good faith, under a reasonable, though mistaken, belief that he has the right to pass over, and use, another's land, is not a malicious trespasser, to be mulcted in exemplary damages. *Ulander v. Orman* (Civ. App.), 26 S. W. 1103.

A trespass committed on lands of plaintiff by servants of defendant, through mistake, and without intention on the part of defendant, affords no basis for the allowance of exemplary damages. *Dillon v. Rogers*, 36 Tex. 152.

Claimant a Corporation.—A telephone company brought an action against defendant for a malicious and oppressive trespass committed by destroying its telephone line. Held, that the fact that plaintiff was a corporation was no objection to its claim for exemplary damages. *International & G.*

N. R. Co. v. Telephone & Telegraph Co., 69 Tex. 277, 5 S. W. 517.

Damages to a Corporation from Insult.—A malicious and oppressive trespass upon the rights of a corporation may entitle it to exemplary damage, when the result of such trespass is to impair its credit and subject it to the expense of litigation; but a sense of wrong and insult, consequent on the trespass, which, as between natural persons, entitles one to redress by way of exemplary damages, has no application in a suit by a corporation. *International & G. N. R. Co. v. Telephone & Telegraph Co.*, 69 Tex. 277, 5 S. W. 517.

Cases Illustrative—Tearing Up Walk.—In an action against a telephone company for tearing up plaintiff's sidewalk, and cutting a hole in his awning, for the purpose of setting a telephone pole, it appeared that defendant's manager placed the pole where he did with the consent of the city engineer and the mayor, and there was no evidence that he intended to act otherwise than in a lawful manner. It did not appear that either plaintiff or his tenant objected at the time, and the pole was removed soon after the action was brought. Held, that it was erroneous to allow exemplary damages. *Erie Telegraph & Telephone Co. v. Kennedy*, 80 Tex. 71, 15 S. W. 704.

Loss of Slave.—In a case of aggravated trespass, resulting in the loss of the plaintiff's slave, the jury are authorized to give exemplary damages. *Hedgepeth v. Robertson*, 18 Tex. 858.

Killing Trespassing Hogs.—Vindictive damages may be given in trespass for a wanton violation of the plaintiff's rights, as by killing hogs that wandered repeatedly into an insufficiently fenced potato patch. *Champion v. Vincent*, 20 Tex. 811.

Search for Stolen Property without Legal Authority.—In an action for trespass, it appeared that defendant, without legal authority, and against

plaintiff's protest, entered his premises and searched for stolen property which there was no reason for believing to be there. Held, that exemplary damages were recoverable, and that, for the purpose of enhancing them, evidence of insulting language used at the time was admissible. *Weyer v. Wegner*, 58 Tex. 539.

C. PERSONS LIABLE FOR EXEMPLARY DAMAGES.

1. Public Officers.

See ante, "Wrongful Attachment," III, B, 2, b, (1). See the title PUBLIC OFFICERS.

An officer is not liable for exemplary damages, who in a proper manner and in good faith seizes property under a writ which he holds; but it affords no such protection to him when he willfully uses process in his hands to accomplish a purpose forbidden by law and thereby becomes its violator. *Cone v. Lewis*, 64 Tex. 331; *Smith v. Holland*, 4 App. Civ. Cases, §§ 251, 253, 16 S. W. 424. See the title PUBLIC OFFICERS.

A party can not recover exemplary damages against a sheriff for wrongfully seizing property under an execution, if the sheriff had no improper motive. *Anderson v. Larremore*, 1 White & W. Civ. Cas. Ct. App. § 948.

One injured by the wrongful seizure of goods by an officer, done with malice, or under aggravating circumstances, and in violation of a plain right, may recover punitive damages. *Rodgers v. Ferguson*, 36 Tex. 544.

Public officers, such as sheriffs and constables, are liable for exemplary damages when they overstep or abuse their powers. *Rodgers v. Ferguson*, 36 Tex. 544. See, also, *Weaver v. Ashcroft*, 50 Tex. 427; *Brown v. Bridges*, 70 Tex. 661, 8 S. W. 502.

Execution Void on Face.—Where a sheriff willfully and oppressively seizes property under execution void on its face, he is liable for exemplary dam-

ages. *Steel v. Metcalf*, 4 Tex. Civ. App. 313, 23 S. W. 474.

Sheriff Inducing Clerk to Alter Bill of Costs.—Punitive damages are allowable in an action against a sheriff who has induced the district clerk to insert in a bill of costs commissions upon a part of a forfeiture remitted by the governor, and, under the execution so altered, enforced collection of such commissions upon the remitted part of the forfeiture. *Shaw v. Brown*, 41 Tex. 446.

2. Corporations.

See the titles CORPORATIONS, vol. 4, p. 682; RAILROADS.

Corporations are liable for exemplary damages in actions of tort in the same manner and to the same extent as natural persons. *Hays v. Houston G. N. R. Co.*, 46 Tex. 272.

A corporation, as well as an individual, is liable in exemplary damages for the willful act or omission or gross neglect of its servants. *Texas, etc., R. Co. v. Woodall*, 2 App. Civ. Cases, § 471.

In order to authorize the recovery of exemplary damages from a corporation, it must appear that the corporation or its managing officers were guilty of fraud, malice, gross negligence, or oppression. *Texas & P. R. Co. v. Self*, 2 White & W. Civ. Cas. Ct. App. § 441.

To make a corporation liable for exemplary damages, acts authorizing the same must have been committed by the corporation itself or some superior officer representing it in corporate capacity; if committed by inferior officer, they must have been authorized or subsequently ratified. *Western Union Tel. Co. v. Brown*, 58 Tex. 170, 174; *St. Louis, etc., R. Co. v. McArthur*, 31 Tex. Civ. App. 205, 208, 72 S. W. 76, affirmed in 97 Tex. 645, no op.

If a railway corporation, or its officers by whom controlled, are guilty of some "fraud, malice, gross negli-

gence or oppression," it will be liable in exemplary damages, otherwise in actual damages only. *Texas, etc., R. Co. v. Woodall*, 2 App. Civ. Cases, §§ 471, 475.

Though, under the statute, actual damages may be recovered for death caused by the unfitness, gross negligence or carelessness of the servants or agents of a railway company, as well as for the negligence or carelessness of the proprietor, owner, charterer or hirer, exemplary damages will be allowed only for the willful act, omission or gross negligence of the "defendant" to the suit, for the willful act, omission, or gross negligence of one representing the corporation in its corporate capacity, not a mere ordinary agent or servant whose acts are not authorized or ratified. *Houston & T. C. Ry. Co. v. Cowser*, 57 Tex. 293. See, also, *Texas, etc., R. Co. v. Barnhart*, 5 Tex. Civ. App. 601, 23 S. W. 801, 24 S. W. 331.

Municipal Corporations.—The case would be exceptional, indeed, when vindictive or more than compensatory damages can be recovered against a municipal corporation. *Dill Mun. Corp.*, § 1284. *Ostrom v. San Antonio*, 33 Tex. Civ. App. 683, 77 S. W. 829, affirmed in 98 Tex. 627, no op. See the title MUNICIPAL CORPORATIONS.

3. Master and Servant.

See the title MASTER AND SERVANT.

"To make the master liable in any case, to exemplary damages for the fraud, malice, gross negligence or oppression of the servant, it should be alleged and proved, that the acts of the servant which constitute the fraud, malice, gross negligence or oppression, were committed by direction of the master, or that the master has ratified and adopted such acts as his own, or that the master has been guilty of negligence in the selection and employment of the servant whose acts

constitute the fraud, malice, gross negligence or oppression complained of." *International, etc., R. Co. v. Gracia*, 70 Tex. 207, 208, 7 S. W. 802.

"It is no longer an open question in this state that the master can not be held in exemplary damages for the negligent acts of its servants, unless authorized or ratified by it, and that the simple retention of the servant in its employ is not sufficient to sustain a verdict based upon such ratification. *Dillingham v. Russell*, 73 Tex. 47, 11 S. W. 139; *Gulf, etc., R. Co. v. Reed*, 80 Tex. 362, 15 S. W. 1105, and cases there cited." *Gulf, etc., R. Co. v. McFadden* (Civ. App.), 25 S. W. 451.

A railway corporation can only act through its officers, and is chargeable with the ratification of acts of oppression committed by its servants and which their superiors did not prevent or remedy. *San Antonio, etc., R. Co. v. Grier*, 20 Tex. Civ. App. 138, 49 S. W. 148.

Exemplary damages are not recoverable of a corporation where the negligence complained of is that of a servant, unless the servant acts by the direction of the employer, or the employer ratifies the act. (Civ. App.), *Western Union Telegraph Co. v. Landry*, 108 S. W. 461, judgment reversed *Landry v. Western Union Tel. Co.*, 102 Tex. 67, 113 S. W. 10, but reversal was on another point. See, also, *Western Union Tel. Co. v. Brown*, 58 Tex. 170; *Texas, etc., R. Co. v. Woodall*, 2 App. Civ. Cases, §§ 471, 476.

Refusal to Deliver Express Package.—Where the driver of an express company's wagon refused to deliver an express package, with malicious disregard of the rights of the consignee, and the express company ratified his act, the consignee was entitled to exemplary damages. *Gary v. Wells, etc., Co.'s Express* (Civ. App.), 40 S. W. 845.

Consignee of express package held

entitled to exemplary damages on malicious disregard of his rights by the express company. *Gary v. Wells, etc., Co.'s Express* (Civ. App.), 40 S. W. 845.

Breach of Contract the Act of Servant.—Exemplary damages are not allowable against a corporation for a breach of its contract, where the breach is an act of its servants, and not of the corporation itself or its controlling officers. *Arkansas Const. Co. v. Eugene*, 50 S. W. 736, 20 Tex. Civ. App. 601.

Injury at Crossing.—A railroad is not liable in exemplary damages for injuries at a crossing caused by the malicious acts of its employees in running a train, unless such acts were authorized by the company or subsequently ratified by it with full knowledge of the facts. *Gulf, C. & S. F. Ry. Co. v. Moore*, 69 Tex. 157, 6 S. W. 631; *International & G. N. Ry. Co. v. McDonald*, 75 Tex. 41, 12 S. W. 860.

Malicious Killing of Animal by Engineer.—A railroad company not authorizing or approving of the act of its engineer in maliciously killing an animal is not liable for exemplary damages. *Galveston, H. & S. A. R. Co. v. Davis*, 1 White & W. Civ. Cas. Ct. App. § 148.

Calling Name of Station Too Soon.—A railroad company is not liable for exemplary damages to a passenger who was caused, by its servants, to leave the train at night, about 1½ miles before reaching his destination, where the only negligence relied on is that such servants called the name of the station before it was time for the passengers to leave the car, and refused to stop the train after they discovered that such passenger had been left. *Gulf, C. & S. F. Ry. Co. v. McFadden* (Civ. App.), 25 S. W. 451.

Vicious Dog Tied in Station.—Where plaintiff was bitten by a vicious dog in defendant's station, through the negligence of its servant in improperly fastening him in a public place, puni-

tive damages can not be recovered. *Trinity & S. Ry. Co. v. O'Brien*, 46 S. W. 389, 18 Tex. Civ. App. 690.

4. Attorney and Client.

A client was not liable for exemplary damages, caused by acts of his attorney which he did not ratify or participate in. *Galveston, etc., R. Co. v. Ware*, 74 Tex. 47, 50, 11 S. W. 918. See ante, "Wrongful Attachment," III, B, 2, b, (1); post, "Principal and Agent," III, C, 5. See the titles ATTACHMENT, vol. 2, p. 296; ATTORNEY AND CLIENT, vol. 2, p. 567.

Where the attachment was sued out by an attorney, exemplary damages can not be recovered without proof that the attachment plaintiffs knew of the attorney's malice, and ratified his malicious acts. *Strauss v. Dundon* (Civ. App.), 27 S. W. 503.

In an action for a wrongful attachment made by an agent or attorney, the principal is not liable for exemplary damages on account of the malice of his agent, unless he participated in the malice or afterwards ratified, adopted, or approved the malicious act. *Willis v. McNeill*, 57 Tex. 465.

Wrongful Execution.—See the title EXECUTIONS, ante, p. 229.

A plaintiff in execution is not liable for exemplary damages for seizing exempt property, though his attorney directed the levy in willful disregard of defendant's right, where plaintiff did not sanction his attorney's acts. *Anderson v. Larremore*, 1 White & W. Civ. Cas. Ct. App. § 949.

5. Principal and Agent.

See ante, "Attorney and Client," III, C, 4. See the title PRINCIPAL AND AGENT.

"Notwithstanding the general rule that the principal is not liable in exemplary damages for the unauthorized malicious acts of the agent, still, if the principal should ratify or accept such acts of the agent it thereby becomes liable for the damages, as well ex-

emplary as actual, resulting from the act. As an illustration of this doctrine, if the prosecution instituted against appellee by the conductor was malicious and unfounded, and instituted without the authority of the corporation, still, if it afterwards took up and carried on that prosecution, this would constitute a ratification of the act of the agent. For upon sound, equitable considerations, the corporation would not be allowed to accept the benefits resulting from the malicious acts of its agent without being compelled to assume the burdens justly attaching to the acts." *Galveston, etc., R. Co. v. Donahoe*, 56 Tex. 162. See, also, *Blum v. Gaines*, 57 Tex. 135, 141; *Willis & Bro. v. McNeill*, 57 Tex. 465, 477; *Jacobs, etc., Co. v. Crum*, 62 Tex. 401; *Gulf, etc., R. Co. v. Moore*, 69 Tex. 159, 6 S. W. 631; *Western Union Tel. Co. v. Karr*, 5 Tex. Civ. App. 60, 62, 24 S. W. 302; *Thompson v. Bell* 11 Tex. Civ. App. 1, 32 S. W. 142.

To render a principal liable for exemplary damages for his agent's wrongful acts, misconduct of the principal in connection with the agent's wrong, such as previously authorizing the agent's wrong or a subsequent ratification thereof, must be shown. *Mutual Life Ins. Co. v. Hargus* (Civ. App.), 99 S. W. 580.

In the case of *Tynburg & Co. v. Cohen*, 67 Tex. 220, 225, 2 S. W. 734, Judge Stayton says that, if the act of the agent was the result of evil motive, it was necessary that the principal "had knowledge of such facts as showed the wrongful acts of their agent at the time they accepted and approved of his acts. *Willis & Bro. v. McNeill*, 57 Tex. 465, 466; *Wallace & Co. v. Finberg*, 46 Tex. 35, 37; *Brown v. Bridges*, 70 Tex. 661, 665, 8 S. W. 502; *Rankin v. Bell*, 85 Tex. 28, 35, 19 S. W. 874." *Strauss v. Dundon* (Civ. App.), 27 S. W. 503.

Vindictive damages can not be recovered against a master or principal

for the act of his servant or agent, unless authorized or ratified expressly or impliedly by the former. *Western Union Tel. Co. v. Brown*, 58 Tex. 170.

If agent would not be liable to punitive damages the principal can not be. *McAllen v. Western Union Tel. Co.*, 70 Tex. 245, 246, 7 S. W. 715.

Wrongful Attachment by Agent.—In an action for wrongful attachment, in the absence of evidence that defendant participated in the acts of his agent, in suing out the attachment, exemplary damages can not be awarded. *Thompson & Olmsted v. Bell*, 11 Tex. Civ. App. 1, 32 S. W. 142.

Negligence of Agent.—Exemplary damages can not be imposed upon a principal for the negligence of his agent. *Houston & T. C. Ry. Co. v. Cowser*, 57 Tex. 293.

Refusal to Sign Round Trip Ticket.—See the title CARRIERS OF PASSENGERS, vol. 3, p. 771.

The refusal of a ticket agent of defendant railroad company to sign and stamp a return ticket so as to make it good for the return trip, because he thought the signature was not genuine, but without malice or oppression, does not warrant the allowing of exemplary damages, where a friend at once advanced the money to plaintiff for a return ticket, which was accepted, and thereby avoided all inconvenience or suffering from the agent's acts. *New York, T. & M. R. Co. v. Leander* (Civ. App.), 46 S. W. 843.

No Distinction Whether Master Natural or Artificial Person.—No distinction can be made as to liability for damages inflicted by an agent, whether the master be a natural or an artificial person. *Hays v. Houston, etc., R. Co.*, 46 Tex. 272.

Corporations are not punishable in exemplary damages for malicious acts of their agents unless they ratify same. *International, etc., R. Co. v. Garcia*, 70 Tex. 207, 208, 7 S. W. 802. See the title CORPORATIONS, vol. 4, p. 682.

Exemplary damages can not be recovered from a railroad company for the malicious acts of its agents in failing or refusing to carry a passenger, where it is not shown that such malicious acts were ratified by the company. *Townsend v. Texas, etc., R. Co.*, 40 Tex. Civ. App. 71, 88 S. W. 302. See the title CARRIERS OF PASSENGERS, vol. 3, p. 771.

Any liability of a railroad company for exemplary damages for wrongful acts of its agents must be limited to cases where there has been negligence, on the part of the company, in selecting or instructing the agent, or where the wrongful act has been ratified. *Hays v. Houston G. N. R. Co.*, 46 Tex. 272.

Acts of State Agent.—Where an officer of a corporation acts as its state agent, with power to make contracts and control its agencies and business in the state, his acts and representations in the sphere of his business are those of the company, and make it liable for exemplary damages if maliciously and fraudulently made to deceive. (Civ. App.), *Western Cottage Piano & Organ Co. v. Anderson*, 76 S. W. 945, judgment reversed, 79 S. W. 516, 97 Tex. 432, reversed on different point.

Where the state agent of a foreign corporation had authority and discretion to do whatever was necessary to be done in transacting the business of the corporation in the state, without referring the matter to any other person for direction or advice, the corporation was liable not only for actual damages, but for exemplary damages, for the agent's fraudulent representations in transferring a mortgage held by the corporation. Judgment (Civ. App.), 76 S. W. 945, reversed. *Western Cottage Piano & Organ Co. v. Anderson*, 79 S. W. 516, 97 Tex. 432.

Fraudulent Representations of Insurance Agent.—See the title INSURANCE.

In an action by an insured for the cancellation of a life policy, based on the fraudulent representations of the soliciting agent of the insurer, there was no evidence that the insurer authorized the agent to make the fraudulent representations or that the insurer knew that such representations were made. Held, that the insurer was not liable for exemplary damages. *Mutual Life Ins. Co. v. Hargus* (Civ. App.), 99 S. W. 580.

An action by the general agent of an insurer on a note given by an insured for the first premium affords no ground for exemplary damages in an action by the insured for the cancellation of the policy and the note, based on the fraudulent representations of the agent of the insurer soliciting the insurance. *Mutual Life Ins. Co. v. Hargus* (Civ. App.), 99 S. W. 580.

D. EFFECT OF CRIMINAL PROSECUTION UPON AWARD.

Punitive damages may be recovered for a wrongful act, though it is also punishable as a crime. *Cole v. Tucker*, 6 Tex. 266.

Article 15, § 26, of the constitution provides for the recovery of exemplary damages, though the act on which the action is based may constitute a crime of high degree. *Houston, etc., R. Co. v. Harry & Bros.*, 63 Tex. 256, 257.

IV. Measure of Exemplary Damages.

A. IN GENERAL.

The rules by which damages should be measured are questions of law to be given in the charge by the court to the jury. *Galveston, etc., R. Co. v. Le Gierse*, 51 Tex. 189.

In actions for tort unless the wrongful act is wanton, grossly negligent, or attended with circumstances of aggravation, the measure of damages is actual compensation. *Hoskins v. Huling*, 2 Willson, Civ. Cas. Ct. App. § 157.

B. DISCRETION OF JURY.

There is a large class of cases where the common law in giving relief loses sight of the principle of compensation, and gives damages by way of punishment, for acts of malice, vexation, fraud and oppression. In those cases it has been found difficult to set any fixed or prescribed limits to the discretion of the jury; or, in fact, to prescribe any rule whatever. In other words, they are left to what Domat, speaking of the court, calls, as we have seen, *la prudence du juge*, reserving only to the bench the right of control over verdicts which bear the evident impress of prejudice, passion or corruption. *Smith v. Sherwood*, 2 Tex. 460, 463; *Lesk v. Pollard*, 1 App. Civ. Cases, § 117.

The awarding of exemplary damages is in the discretion of the jury in the first instance, but it is the duty of trial judge to see that such discretion is not abused. *Tynberg v. Cohen*, 76 Tex. 409, 416, 13 S. W. 315; *Texas, etc., R. Co. v. Woodall*, 2 App. Civ. Cases, §§ 471, 478.

In actions of fraud, the jury may give exemplary damages, and in doing so, of course they were not restricted to the amount of damage, which the proof shows to have been actually sustained by reason of the fraudulent acts of the defendant. *Oliver v. Chapman*, 15 Tex. 400, 409; *International, etc., R. Co. v. Telephone, etc., Co.*, 69 Tex. 277, 5 S. W. 517.

In *Walker v. Smith* (1 Wash. C. C. R. 152) Mr. Justice Washington said: "Where merely vindictive damages are sued for, the jury act without control on the subject of damages, because there is no legal rule by which they can be measured; and unless they are so extravagant as to induce a suspicion of improper conduct, the court will not interfere." *Graham v. Roder*, 5 Tex. 141, 149.

The rules by which damages should be measured are questions of law, to

be given in the charge by the court to the jury; the amount of damage to which a party may be entitled, is a question of fact to be determined by the jury, by the application of these rules of law to the evidence in the particular case. *Galveston, etc., R. Co. v. Le Gierse*, 51 Tex. 189, 204.

The law furnishes no other criterion by which to measure the damages, than the sound sense and discretion of the jury, acting upon the evidence they had before them. *Hughes v. Brooks*, 36 Tex. 379, 381.

Whenever there is a question of fraudulent intent, it is peculiarly the province of the jury to decide. *Oliver v. Chapman*, 15 Tex. 400, 409.

All Facts Should Be Submitted to Jury.—"To enable a jury to exercise their discretion wisely for the purposes for which such damages are allowable, all the facts and circumstances which belong to the principal transaction and tend to develop its character should be submitted to them." *Jacobs, etc., Co. v. Crum*, 62 Tex. 401, 415.

Should Jury Have Such Discretion.—"That in criminal cases, the legislature, both for the protection of society and of the individual offenders, should place a limit on the verdict of a jury, and yet exemplary damages, which are allowed only in those civil cases which are quasi criminal in their nature, and then as a fine or penalty, should rest in the discretion of a jury, whose verdict in a great majority of cases far exceeds the highest fines allowed by law in criminal cases, is an inconsistency which may well arrest the attention of the legislative and judicial minds. By analogy, in the absence of a more definite rule, we might look to the example of the legislature in those cases in which they have fixed a minimum and maximum amount proportioned to the actual injury received." *Willis & Bro. v. McNeill*, 57 Tex. 465, 479.

Inducements operating on minds of jury in fixing vindictive damages, will not be questioned where amount is not grossly excessive. *Landa v. Obert*, 45 Tex. 539.

Malicious Levy.—It is a question for the jury to ascertain from the facts whether a levy was malicious and willful, and, if so, to determine from the facts what amount they would allow as punitive damages for such levy. *Morris v. Williford* (Civ. App.), 70 S. W. 228. See the title EXECUTIONS, ante, p. 229.

Where trespass is committed in a wanton, rude, or aggravated manner indicating a desire to injure, a jury ought to be liberal in compensating the party injured, and in such cases there is no certain fixed standard, for a jury may properly take into view not only what is due in the party complaining, but to the public, by inflicting what are called in law speculative, exemplary, or vindictive damages. *Smith v. Sherwood*, 2 Tex. 460, 463; *Graham v. Roder*, 5 Tex. 141; *Cole v. Tucker*, 6 Tex. 266, 268.

The jury have discretion to award exemplary or vindictive damages in cases of trespass or tort accompanied by oppression, fraud, malice or negligence so gross as to raise presumption of malice. *Smith v. Sherwood*, 2 Tex. 460, 463.

Where physician at birth ties up penis instead of umbilical cord, question of exemplary damages is properly left to jury. *Brooke v. Clark*, 57 Tex. 105, 114. See the title PHYSICIANS AND SURGEONS.

Court Usurping Power of Jury.—See the title ATTACHMENT, vol. 2, p. 296.

In an action to recover damages for the wrongful suing out of an attachment, it is improper for the court to name the amount for which exemplary damages might be found by the jury. *Lister v. Campbell* (Civ. App.), 46 S. W. 876.

C. ATTORNEYS' FEES.

"There is, unquestionably, some conflict in the decisions, and we readily admit that some of the earlier decisions of this court tend in some degree to maintain the proposition that when fraud or malice are of the gist of plaintiff's action, he may recover his counsel fees in prosecuting the suit as part of his damages. But while we do not mean to intimate that there are no cases in which the plaintiff may be entitled to their recovery, he is only entitled to do so, as we think, where they are a part of the damages resulting as the natural and proximate consequence of the act complained of." *Landa v. Obert*, 45 Tex. 539, 545.

"The great weight of authority seems to be opposed to the allowance of counsel fees as an element of damages, even in cases proper for exemplary damages; at least, there is so much authority that way, that this court is at liberty to disregard these the other way, if necessary to follow the rule most in accordance with legal principles and sound reason." *Landa v. Obert*, 45 Tex. 539, 546.

"While damages assessed by way of example may indirectly compensate the plaintiff for money expended in counsel fees, these fees can not be taken as the measure of punishment, or as a necessary element in its infliction. As has been well remarked, 'if the plaintiff is to recover damages for his counsel fees when he succeeds, he ought to pay the defendant like fees when he fails in his suit. The law, however, entitles the defendant to no such redress.'" *Landa v. Obert*, 45 Tex. 539, 545.

When Considered as Element of Damage.—Counsel fees for the prosecution of plaintiff's demand in cases of tort for negligence are not a natural or proximate result of the injury, and are not to be regarded in such cases in estimating actual damages, but may be considered by the jury, in a proper

case, in fixing the amount of exemplary damages. *Houston, etc., R. Co. v. Oram*, 49 Tex. 341, 346.

Exception.—Attorney's fees, when made necessary by a wrongful act, may be recoverable as vindictive damages. *Anderson v. Larremore*, 1 App. Civ. Cases, §§ 947, 948. See, also, *Findley v. Mitchell*, 50 Tex. 143; *Landa v. Obert*, 45 Tex. 539.

D. EXCESSIVENESS.**1. In General.**

Should Be Proportionate to Actual Damages.—As ground for new trial, see the title NEW TRIALS.

Exemplary damages can be recovered only where actual damages are sustained, and must bear a reasonable proportion to such actual damages. *Flanary v. Wood*, 73 S. W. 1072, 32 Tex. Civ. App. 250.

The rule that exemplary damages should not be disproportioned to actual damages, does not mean that the one should be an exact or approximate ratio to the other but only that the imposition of heavy exemplary damages, where the actual damages recoverable were small, was a fact which should be looked to to determine whether passion rather than reason dictated the verdict. *Tynberg v. Cohen*, 76 Tex. 409, 13 S. W. 315.

It is difficult to lay down any rule by which to test the question of excess in a verdict for vindictive damage. They are very largely in the discretion of the jury. But it is said in the case of the *Railroad Company v. Nichols*, Austin Term, 1882, "exemplary damages when allowed should be in proportion to the actual damages sustained." *International, etc., R. Co. v. Telephone, etc., Co.*, 69 Tex. 277, 282, 5 S. W. 517.

There is and can be no fixed ratio between actual and exemplary damages. *Coles v. Thompson*, 7 Tex. Civ. App. 666, 669, 27 S. W. 46.

Verdict Will Stand if Not Plainly Excessive.—A verdict for vindictive

damages will not be set aside unless so excessive as to show improper motive. *Barnette v. Hicks*, 6 Tex. 352.

"In cases where there is no certain measure of damages, the court will not substitute its own sense of what would be the proper amount of the verdict, and will not set aside a verdict for excessive damages, unless there is reason to believe that the jury were actuated by passion, or by some undue influence, perverting the judgment." *Thomas v. Womack*, 13 Tex. 580, 584.

Supreme court can set aside verdict for excess in exemplary damages only when amount is so large as to show passion, prejudice or partiality. *Mayer v. Duke*, 72 Tex. 445, 454, 10 S. W. 565.

2. Cases Illustrative.

See opinion for example of excessive damages. *Southwestern Tel., etc., Co. v. Whiteman*, 37 Tex. Civ. App. 163, 81 S. W. 76.

Ratio of Four to One.—There is no fixed rule as to the proportion between actual and exemplary damages in cases where such damages are recoverable, and where \$2,000 exemplary damages and \$500 actual damages were awarded, the proportion can not be said to be so great as to lead to the conclusion that the jury were actuated by prejudice or other improper motive. (Civ. App.), *St. Louis Southwestern Ry. Co. of Texas v. Thompson*, 108 S. W. 453, judgment reversed *St. Louis & S. W. Ry. Co. of Texas v. Same* (Sup.), 113 S. W. 144.

Ratio of Twelve to One.—Exemplary damages bearing the ratio of twelve to one to actual damages are excessive. *Willis & Bro. v. McNeill*, 57 Tex. 465, 480.

Ratio of Three to One.—A verdict of \$500 actual damages and \$1,500 exemplary damages for an unlawful collection by a railroad company of a 50 cent fare, but without injuring plaintiff, is excessive. *Galveston, etc., R. Co. v. Patterson* (Civ. App.), 46 S. W. 848.

Ratio of Fifty to One.—A verdict for \$10,000, in a case allowing exemplary damages, the real damages in which were not over \$200, is clearly excessive, and should be set aside. *International & G. N. R. Co. v. Telephone Co.*, 69 Tex. 277, 5 S. W. 517.

Assault and Battery—Verdict Excessive.—See the title ASSAULT AND BATTERY, vol. 2, p. 73.

In an action to recover damages for an assault and battery on plaintiff's wife, and for the value of certain household goods carried away by defendants, a judgment for \$2,344 exemplary damages was excessive, where the actual damages were assessed at \$56, which the evidence showed to be the value of the furniture taken. *Flarary v. Wood*, 73 S. W. 1072, 32 Tex. Civ. App. 250.

Exemplary damages in the sum of \$100 are not excessive where a railroad company exhibits gross negligence and oppression in failing to provide an opening through its fenced right of way across an inclosure which cut off the owner's cattle from water and grass. *San Antonio, etc., R. Co. v. Grier*, 20 Tex. Civ. App. 138, 49 S. W. 148.

Plaintiff Excluded from House.—Where it appears that plaintiff was entitled to the occupancy of the house at the time the doors were closed upon him, that the act of defendant was done without warning, and without necessity, and letters written by him to plaintiff tend to show that he was moved by malice, a verdict of \$330 exemplary damages will not be disturbed. *Gross v. Hays*, 73 Tex. 515, 11 S. W. 523.

Wrongful Attachment.—In action for maliciously suing out wrongful attachment and breaking up plaintiff's business, verdict for four thousand dollars exemplary damages is not excessive. *Mayer v. Duke*, 72 Tex. 445, 453, 10 S. W. 565. See the title ATTACHMENT, vol. 2, p. 296.

A verdict for \$35 for the value of a bale of cotton wrongfully attached, and \$50 for exemplary damages, is not excessive. *Lister v. Campbell* (Civ. App.), 46 S. W. 876.

Injury to Passenger—Verdict Excessive.—See the title CARRIERS OF PASSENGERS, vol. 3, p. 771.

In a suit for injuries to a passenger it appeared that the railroad was in very bad condition. There were old iron and rotted ties in abundance in the track. The accident occurred during an unusual spell of weather, which contributed largely to the result. The company was putting the road in better condition at the time. Many new ties had been put in and new rails supplied. The time of trains had been reduced to 10 miles an hour. Held, that the facts did not justify the recovery of \$5,000 exemplary damages in addition to \$20,000 actual damages. *International & G. N. R. Co. v. Brazzil*, 78 Tex. 314, 14 S. W. 609.

In an action against a railroad company, the following special issues were submitted: "Was the wreck which occasioned the injury caused by a defective and unsafe roadbed? or was said wreck caused by a defective locomotive?" Each of these issues was answered, "Yes;" and the jury gave a verdict for \$25,000 actual damages, and \$16,927.40 exemplary damages, less \$1,927.40 paid to, or to the use of, plaintiff. Held, that the verdict was excessive, and the giving of exemplary damages the result of passion or prejudice. *Gulf, C. & S. F. Ry. Co. v. Gordon*, 70 Tex. 80, 7 S. W. 695.

Trespass to Try Title—Verdict Excessive.—See the title TRESPASS TO TRY TITLE AND EJECTMENT.

In trespass to try title, wherein plaintiffs sued out a writ of sequestration, a verdict for defendant for \$1,000 exemplary damages, nearly the value of the house and lot in controversy, was excessive. (Civ. App.), *Cobb v. Johnson*, 105 S. W. 847, reversed (Sup.), 108 S. W. 811.

7 Tex—59

Malpractice by Physician.—See the title PHYSICIANS AND SURGEONS.

Where a physician, attending a woman in childbirth, carelessly tied a ligature around the child's penis, which resulted in the loss of nearly all the glands of that member, in an action by the child, exemplary damages could be given, and a verdict for \$5,500 was not excessive. *Brooke v. Clark* 57 Tex. 105.

V. Pleading and Practice.

A. AVERMENTS OF PETITION.

1. In General.

Claims for compensatory, and for exemplary damages should be severed in the pleading, and in their submission to the jury. *Zeliff v. Jennings*, 61 Tex. 458.

The better practice is to separate the actual from the vindictive damages in the petition as well as in the verdict. But if this is not done, the petition will serve as a basis for a verdict and the informality of the verdict can not be taken advantage of for the first time on appeal. *Moehring v. Hall*, 66 Tex. 240, 1 S. W. 258.

"We think the true practice which should govern in all this class of cases, and which should be enforced by the presiding judges below, is that indicated by this court in *Wallace & Co. v. Finberg*, 46 Tex. 35, that when both actual and exemplary damages are sought, they should be claimed by proper allegations, in the nature of two distinct counts on different causes of action, or cross action, with averments respectively appropriate to each remedy, these being essentially different in the facts necessary to be alleged and proven." *Galveston, etc., R. Co. v. Le Gierse*, 51 Tex. 189, 203.

Where the petition states the grounds for actual damages separate from those for exemplary damages, whether in separate paragraphs or not,

and such statement is followed by a proper prayer, the actual and exemplary damages are pleaded specially. *Land v. Klein*, 50 S. W. 638, 21 Tex. Civ. App. 3.

Should State Whether Actual or Exemplary Damages Are Claimed.—

Petition in action for damages should state whether the damages claimed therein are actual or exemplary. *McAllen v. Western Union Tel. Co.*, 70 Tex. 245, 7 S. W. 715.

Mode of Compelling Severance.—It the defendant wished the amount of exemplary and compensatory damages separately stated, he should have proceeded by special demurrer. *Moehring v. Hall*, 66 Tex. 240, 242, 1 S. W. 258.

When Objection for Failure to Sever Is Made.—

The objection that the court did not direct the jury to separate the actual from the vindictive damages can not be taken for the first time in the supreme court. The court should have been asked to submit a charge directing the jury to separate the one of those classes of damages from the other. *I. & G. N. R. Co. v. Smith*, 62 Tex. 252, 256; *Belo & Co. v. Wren*, 63 Tex. 686, 727. See the title APPEAL AND ERROR, vol. 1, p. 313.

"Where the petition does not disclose such facts as would entitle the plaintiff to recover punitive damages, and to the extent awarded by the verdict, the judgment would be reversed upon a charge which authorized the jury to find such damages." *Anding v. Perkins*, 29 Tex. 348, 354.

Facts Alleged Must Bring Damages Claimed within Definition of Exemplary Damages.—

Where the facts alleged do not bring the damages claimed within the definition of exemplary damages, the fact that the pleader calls them such does not alter the legal effect of the allegations. *Harmon v. Callahan* (Civ. App.), 35 S. W. 705.

"An original petition makes no claim for exemplary damages, but a trial amendment makes such claim, based

upon a general allegation of gross negligence on the part of appellant's servants and employees. Appellant excepted to the sufficiency of the trial amendment, which exception the court overruled, and submitted to the jury the issue of exemplary damages. We are of opinion that exception to the claim of exemplary damages should have been sustained. No facts are alleged in the trial amendment which under the law would entitle appellee to recover exemplary damages. (*Western Union Tel. Co. v. Brown*, 58 Tex. 170; *Hays v. Houston, etc., R. Co.*, 46 Tex. 272; *Daniel v. Western Union Tel. Co.*, 61 Tex. 452, 456.)" *Western Union Tel. Co. v. Goodsey*, 4 App. Civ. Cases, § 123, 16 S. W. 789.

A petition against a railroad company by one injured through being run over by a locomotive held not to present a case for exemplary damages. *Gulf, etc., R. Co. v. Holzheuser* (Civ. App.), 45 S. W. 188.

Amendment Necessary.—The petition set up humiliation in the presence of others, and loss of reputation and credit occasioned thereby as ground for actual damages. The general demurrer as against the items of actual and exemplary damages should have been sustained, and on the failure of plaintiff to respond by amendment the cause should have been dismissed for want of jurisdiction. *Malin v. McCutcheon*, 33 Tex. Civ. App. 387, 76 S. W. 586.

Only Amount of Damages Alleged Are Recoverable.—

Where plaintiffs in an action to recover damages for seizure of goods in replevin allege that the replevin suit was brought maliciously and unlawfully, and admit payment for a part of the value of the property seized, and pay judgment for \$900 actual damages above what had been settled for, and \$1,050 exemplary damages, they are not entitled to recover a greater sum as exemplary damages than they ask for in their petition.

Gregory v. Coleman, 3 Tex. Civ. App. 166, 22 S. W. 181.

General and Special Allegation of Damages.—When a petition in a suit to recover damages alleges generally that the plaintiff was damaged in a designated sum, and it afterwards claims a different sum as punitive damages, and a designated sum as actual damages, the general claim for damages should be stricken out on exception. *McAllen v. Western Union Tel. Co.*, 70 Tex. 245, 7 S. W. 715.

Petition Must Show Malice, Fraud or Gross Negligence.—Judgment can not be rendered for exemplary damages, in an action against a railroad company for personal injuries, when the petition contains no allegation of any circumstance indicating fraud, malice, gross negligence, or oppression on the part of the company, or committed by its direction or ratified by it, or that the company has been guilty of malice, gross negligence, or oppression in employment of servants whose acts constitute fraud, malice, gross negligence, or oppression. *International & G. N. R. Co. v. Garcia*, 70 Tex. 207, 7 S. W. 802; *Harmon v. Callahan* (Civ. App.), 35 S. W. 705, 706.

Where, in an action for injuries caused by steam blown from a passing locomotive, the petition does not aver that the act was maliciously done, but that it was carelessly, willfully, and negligently done, plaintiff could not recover exemplary damages. *Texas & P. Ry. Co. v. Woodall*, 2 Willson, Civ. Cas. Ct. App. § 472.

Must Plead Actual Damages to Recover Exemplary Damages.—If there are no allegations in the petition showing actual damages, the averments as to exemplary damages must fall to the ground. *Carson v. Texas Installation Co.* (Civ. App.), 34 S. W. 762, 764.

Breach of Contract—Must Allege Exception.—Plaintiff seeking to overcome the rule that exemplary damages

are not recoverable for breach of contract must allege facts which make his case an exception to the rule. *Burnett v. Edling*, 19 Tex. Civ. App. 711, 713, 48 S. W. 775, affirmed in 93 Tex. 636, no op.

Attachment—Want of Probable Cause.—In an action for damages for the wrongful issuance of a writ of attachment, plaintiff's petition must allege a want of probable cause. *Faroux v. Cornwell*, 40 Tex. Civ. App. 529, 90 S. W. 537.

Petition Must Ask for Exemplary Damages.—Exemplary damages are not recoverable unless there is a prayer therefor in the petition. *Houston, etc., R. Co. v. Jackson*, 62 Tex. 209.

2. Averments Sufficient.

The averment in a petition that the defendant wrongfully and maliciously seized and converted a dray, the property of the plaintiff, who was the head of a family, and a licensed drayman and the owner of no other vehicle, to the special injury of his business (which was set forth) as a drayman, was sufficient to sustain an action for exemplary as well as actual damages. *Cone v. Lewis*, 64 Tex. 331, citing *Kolb v. Bankhead*, 18 Tex. 228, 229; *Champion v. Vincent*, 20 Tex. 811, 812; *Gordon v. Jones*, 27 Tex. 620, 622; *Graham v. Roder*, 5 Tex. 141, 146; *Cole v. Tucker*, 6 Tex. 266, 267; *Neill v. Newton*, 24 Tex. 202.

In action for injury to stock from opening division fence, allegation that defendant's act was willful and malicious supports exemplary damages, if proof shows circumstances of malice or oppression. *Claunch v. Osborn* (Civ. App.), 23 S. W. 937, 938.

Allegations in Tort Connected with Charge of Breach of Contract.—Allegations that plaintiff had a contract with defendant to construct its railroad; that defendant wrongfully and forcibly seized and converted his property while he was using it in such construction; and instigated an unlaw-

ful levy of attachment upon his property while he was so using it, for the purpose of making it impossible to perform his contract,—state a cause of action in tort authorizing exemplary damages, though such allegations are connected with others charging breach of the contract, for which actual damages are sought. *Shirley v. Waco Tap Ry. Co.*, 78 Tex. 131, 10 S. W. 543.

Forcible Entry on Another's Land.—Averment that defendant did wrongfully and maliciously, and with the purpose of injuring and oppressing plaintiff, forcibly enter on plaintiff's lands, and unlawfully exclude plaintiff therefrom, and deprive him of the use and profits of the same, for the purpose of forcing plaintiff to submit to unlawful and oppressive demands, authorize the recovery of vindictive damages. *Long Mfg. Co. v. Gray*, 13 Tex. Civ. App. 172, 35 S. W. 32.

Interference with Property Rights.—A complaint which alleged the right of plaintiff to occupy a building from which he was excluded by defendant, and that the act of defendant, in depriving him of the possession and retaining his property, was willful, illegal, and malicious, and done with intent to harass and oppress, was sufficient to support a verdict for exemplary damages. *Gross v. Hays*, 73 Tex. 515, 11 S. W. 523.

Conversion of Bill of Lading.—An allegation, in a petition claiming exemplary damages, that the act of conversion complained of was done unlawfully, wantonly, and maliciously, and with the fraudulent intent to deprive plaintiff of the value of certain coal, was sufficient, without stating the circumstances showing it to have been so done. *San Antonio & A. P. Ry. Co. v. Kniffen*, 4 Tex. Civ. App. 484, 23 S. W. 457.

A petition for the value of coal shipped to and used by defendant, alleging that the shipment was to plaintiff's order, plaintiff drawing his draft

on defendant for the value thereof, with bill of lading attached, on which was indorsed, "Delivered to" S. (defendant), that the draft was presented, and not paid, but that defendant appropriated it to its use, without plaintiff's consent,—states an action in tort for conversion, in which exemplary damages can lie, provided the conversion was attended with circumstances of fraud, malice, or wanton disregard of plaintiff's rights. *San Antonio & A. P. Ry. Co. v. Kniffen*, 4 Tex. Civ. App. 484, 23 S. W. 457.

Permitting Weeds to Grow on Right of Way.—Where the petition, in an action against a railroad company for damages for permitting weeds to grow and go to seed on its right of way, thereby injuring plaintiff's land, stated that the facts alleged were known to defendant and its officers, and the destruction and injury to plaintiff's fields was a malicious, aggressive, and wanton act of defendant, it was sufficient to authorize a recovery of exemplary damages. *Doeppenschmidt v. International & G. N. R. Co.*, 46 Tex. Civ. App. 577, 102 S. W. 950.

Breach of Contract for Permitting Drawing Water from Well.—In action for breach of contract to permit drawing water from well, allegations that defendant's acts were conceived and done maliciously, willfully and wantonly and that plaintiff ought to be awarded five hundred dollars as exemplary damages, were sufficient to admit proof thereof. *Westfall v. Perry* (Civ. App.), 23 S. W. 740, 742.

The prayer of a petition, in a suit brought for exemplary damages for a trespass on the person and for an unlawful and forcible invasion of the domicile in committing it, following the recital of acts constituting said trespass and asking "judgment against the defendants for ten thousand dollars damages for the injuries aforesaid," is a sufficient allegation of the

damage, though not elsewhere alleged in the petition, to sustain a verdict for the plaintiff. In a case where special damage only is recoverable, it might be otherwise. *Cook v. De La Garga*, 9 Tex. 358, 362; *Hoggland v. Cothren*, 25 Tex. 345.

3. Averments Insufficient.

Appropriation of Money.—The mere charge in a petition in a suit for money collected and retained, that the defendant "has fraudulently appropriated it to his own use, for though repeatedly called upon by your petitioner to pay over the same, he has failed to account," will not sustain a verdict for exemplary damages. *Neill v. Newton*, 24 Tex. 202.

Breach of Contract—Not Amounting to a Tort.—An allegation that a breach of contract was done "with malice, willfully and fraudulently" is insufficient to constitute an averment that the breach of contract amounted to a tort, in the absence of facts attending the breach so stated that it may be ascertained therefrom whether they constituted as alleged by the pleader malice and fraud and whether the circumstances connected with the breach amounted to a tort. *Hooks v. Fitzreiter*, 76 Tex. 277, 13 S. W. 230.

Wrongful Killing of Hogs.—In an action to recover the value of hogs killed by defendant, an allegation merely that plaintiff has been "retarded in his business of raising hogs, and has been sorely vexed, and has suffered great anxiety and distress of mind," will not support a recovery of exemplary damages. *Harmon v. Calahan* (Civ. App.), 35 S. W. 705.

B. EVIDENCE.

1. Admissibility.

Plaintiff's testimony that it would take \$100 to recompense him was incompetent, as he should have shown the circumstances, and left the jury to ascertain the amount, if any, of punitive damages. *Morris v. Williford* (Civ. App.), 70 S. W. 228.

Expulsion from Beneficial Association.—Where there was evidence raising an issue of exemplary damages, in an action for conspiracy, resulting in plaintiff's expulsion from a beneficial association, evidence that plaintiff at the time had a home of his own, a wife, and two children was admissible as bearing on the effect such expulsion might have on his mind and reputation. *St. Louis, etc., R. Co. v. Thompson*, 102 Tex. 89, 113 S. W. 144. See the title CONSPIRACY, vol. 4, p. 361.

Exemplary damages not having been allowed, exclusion of evidence tending to reduce same was harmless. *Cain v. Corley*, 44 Tex. Civ. App. 224, 99 S. W. 168.

Evidence Tending to Defeat Claim for Exemplary Damages.—In an action for conversion, evidence that defendant took possession of the goods under a contract with the owner's agent, and not by force, is admissible to defeat the claim for exemplary damages. *Slocum v. Putnam* (Civ. App.), 25 S. W. 52.

Insulting Message to Wife.—Where an action for battery seeks recovery of exemplary as well as actual damages, proof that the defendant had, just before the assault, been informed of an insulting message sent by plaintiff to his wife was admissible. *Shapiro v. Michelson*, 19 Tex. Civ. App. 615, 47 S. W. 746. See the title ASSAULT AND BATTERY, vol. 2, p. 73.

Assault by Conductor Provoked by Passenger.—The fact that the unlawful assault by the conductor was provoked by a previous one on him by the passenger, is, it seems, admissible in mitigation of damages, exemplary at least. *Galveston, etc., R. Co. v. Preele*, 27 Tex. Civ. App. 496, 65 S. W. 438, affirmed in 95 Tex. 678, no op.

Tenant's Loss of Time When Landlord Seized Crop.—Where exemplary damages are sought for an illegal distraint by the landlord, the tenant may, as bearing on that matter, give evi-

dence of loss of time by himself and family, as a result of the seizure of his crop. *Watson v. Boswell*, 25 Tex. Civ. App. 379, 61 S. W. 407. See the title LANDLORD AND TENANT.

Declarations of tenants as to intentions or plans for beating his landlord out of his rent are properly admitted on the issue whether the distress warrant was lawfully sued out, though not made to or in the presence of the landlord. *Edwards v. Anderson*, 36 Tex. Civ. App. 611, 82 S. W. 659.

Declarations of Employee of His Own Recklessness.—In suit by a corporation against another corporation for damages, where exemplary damages are sought, it is error to admit declarations of an employee of defendant of his own reckless disregard for consequences of his act. *International, etc., R. Co. v. Telephone, etc., Co.*, 69 Tex. 277, 281, 75 S. W. 517. See the title MASTER AND SERVANT.

Acts and Declarations to Show Malice.—This action of trespass is founded upon an alleged illegal entry upon the land of the appellees, under circumstances carrying insult and indignity to them, whether present at the time or not; and in order to show whether that entry was vexatiously, wantonly or maliciously made, it was proper to show the acts and declarations of the parties at the time which gave character to the entry and showed its purpose. *Cook v. De La Garza*, 9 Tex. 358, 362; *Weyer v. Wegner*, 58 Tex. 539, 542.

In case of a conviction upon a criminal charge, and the fine is paid or the punishment suffered, that may be shown in mitigation of exemplary damages. *Shook v. Peters*, 59 Tex. 393, 396.

Loss of credit is an element of exemplary, not actual damages, and evidence thereof is admissible under a general allegation of exemplary damages. *Curlee v. Rose*, 27 Tex. Civ. App. 259, 65 S. W. 197.

Evidence that a railroad company made openings in its fence for the passage of the cattle of the plaintiff's neighbors, but failed to do so for him, as required by statute, shows discrimination, and is admissible on the question of exemplary damages. *San Antonio, etc., R. Co. v. Grier*, 20 Tex. Civ. App. 138, 49 S. W. 148.

Knowledge of Intimately Connected Facts.—Evidence of knowledge by a railway company sued for negligently injuring a passenger, of facts intimately connected with those upon which the actual damage rests is admissible to show acts so willful and negligent as to make the company liable for exemplary damages. *Texas & P. Ry. Co. v. De Milley*, 60 Tex. 194.

2. Sufficiency.

Failure to Stop Car.—Where, in an action against a street railroad for damages for failure to stop a car and admit plaintiff as a passenger, plaintiff and one who accompanied him testified that they commenced signaling the car by waving their hands when it was a quarter of a mile distant, and continued it until it passed, and that when it passed the motorman motioned to them and the conductor signaled them and laughed. The motorman testified that they stood near the track talking, but gave no signal until he was even with them. Held, that an instruction on exemplary damages was warranted. *Northern Texas Tract. Co. v. Patterman* (Civ. App.), 80 S. W. 535. See the title CARRIERS OF PASSENGERS, vol. 3, p. 771.

Ejection from Street Car.—Where, in an action for malicious assault and ejecting of a passenger from a street car, it was shown that the conductor was prosecuted before a justice, and that the railroad defended him by its attorneys, and that its general manager was present at the trial, paid the conductor's fine, and that he was retained in the company's employ after the assault, it justified a finding that the

company ratified the conductor's acts. *Denison & S. Ry. Co. v. Randell*, 69 S. W. 1013, 29 Tex. Civ. App. 460.

A corporation's state agent induced plaintiff to pay the claim of its debtor, representing that such debtor was solvent, that a mortgage transferred to plaintiff was ample security, and that if the money was paid the debtor would be permitted to continue business and pay plaintiff. The debtor was wholly insolvent, the mortgage was worthless, and on receipt of the money the agent, contrary to assurances, assigned the mortgage to the debtor, and took possession of the stock and closed the business. Held, sufficient to sustain a finding that the representations were known to be false and were made to deceive, entitling plaintiff to exemplary damages. *Western Cottage Piano, etc., Co. v. Anderson* (Civ. App.), 76 S. W. 945, reversed in 97 Tex. 432.

Turning Live Stock into Plaintiff's Pasture.—In an action for turning defendant's live stock into plaintiff's pasture, where there is no evidence as to any damages sustained by plaintiff, except that he "was all tore up about it," and that he would not have consented to defendant's live stock being in his pasture for \$200, a verdict for both actual and exemplary damages can not be sustained. *Claunch v. Osborn* (Civ. App.), 23 S. W. 937.

Breaking Sewer Connection.—Evidence held sufficient to show that the action of a sewer company in breaking plaintiff's connection was wrongful, willful, and oppressive, and such as warranted exemplary damages. *Diamond, etc., Sewerage Co. v. Smith*, 27 Tex. Civ. App. 558, 66 S. W. 141, affirmed in 95 Tex. 677, no op.

Turning Horses Out of Pasture.—Evidence considered and held to warrant a verdict for exemplary damages for turning plaintiff's horses out of a pasture, the act constituting a deliberate invasion of a known right. *Wag-*

goner v. Snody, 36 Tex. Civ. App. 514, 82 S. W. 355, reversed in 98 Tex. 512.

Conversion of Coal.—See the title CARRIERS OF GOODS, vol. 3, p. 502.

In an action for conversion of certain coal, the evidence showed that the coal was allowed to go onto defendant's road on the promise of its auditor, in the presence of its general manager, that it would not be used by defendant till paid for; plaintiff refusing to allow it thus to get into defendant's hands, except on this promise. The coal was used by defendant without payment, on orders of the auditor from its main office, it claiming an offset against the coal by reason of a prior transaction, which claim was found baseless. Held, that the jury were warranted in concluding that there was a wanton disregard of plaintiff's rights, authorizing exemplary damages. *San Antonio & A. P. Ry. Co. v. Kniffen*, 4 Tex. Civ. App. 484, 23 S. W. 457.

If there is total want of evidence to sustain a verdict for actual damages, it can not sustain a verdict for exemplary damages. *Claunch v. Osborn* (Civ. App.), 23 S. W. 937, 938.

Exemplary damages can not be recovered, in the absence of a showing of actual damages. *Carson v. Texas Installment Co.* (Civ. App.), 34 S. W. 762.

Evidence Held Sufficient.—Evidence held sufficient to support the verdict of a jury upon an issue of exemplary damages. *Diamond, etc., Sewerage Co. v. Smith*, 27 Tex. Civ. App. 558, 66 S. W. 141, affirmed in 95 Tex. 677, no op.

Evidence held insufficient to warrant verdict for exemplary damages. *Willis & Bro. v. Chowning*, 18 Tex. Civ. App. 625, 46 S. W. 45, affirmed in 93 Tex. 677, no op.

3. Burden of Proof.

The burden is on plaintiff to show that an officer seized his property, while prompted by ill feeling or improper motives, in order to entitle

plaintiff to recover exemplary damages. *Fitzpatrick v. Small*, 1 White & W. Civ. Cas. Ct. App. § 1142.

C. REMITTITUR.

Cases in Which Remittitur Is Proper.—"Where the law recognizes some fixed rules and principles to regulate the measure of damages, by which it may be determined in how much the verdict is excessive, as in actions on contracts, and for torts done to property, the value of which may be ascertained by evidence, a remittitur of the excess may be received as an answer to a motion for a new trial, on the ground of excessive damages. (*Robson v. Watts*, 11 Tex. 764, 768; *Underwood v. Parrott*, 2 Tex. 168; *Robbins v. Walters*, 2 Tex. 130.)" *Thomas v. Womack*, 13 Tex. 580.

"Where the jury have given such excessive damages that the court feel bound to set aside the verdict, they will, instead of simply ordering a new trial, give the plaintiff the option of reducing the verdict to the sum which the court considers reasonable, and on his remitting the excess will deny the motion for a new trial, and this in actions of tort as well as on contract." *Thomas v. Womack*, 13 Tex. 580, 583.

Where improper damages are allowed, the error may be cured by remitting the amount claimed for them. *Houston, etc., R. Co. v. Pereira* (Civ. App.), 45 S. W. 767, affirmed in 93 Tex. 642, no op.

There is no error in allowing one who has recovered verdict for a certain amount, and interest thereon, as exemplary damages, to remit the interest. *San Antonio & A. P. Ry. Co. v. Kniffen*, 4 Tex. Civ. App. 484, 23 S. W. 457.

Cases in Which Remittitur Is Not Proper.—The provisions of the statute in relation to a remitter do not apply in an action to recover damages for a tort. It is only in cases where the measure of damage is matter of law, and the court can determine with cer-

tainty the amount which the party is entitled to recover, that a remitter will cure the error of an excessive verdict. *R. S. arts. 1351-1357*; *Thomas v. Womack*, 13 Tex. 580; *Hughes v. Brooks*, 36 Tex. 379; *Hardeman & Son v. Morgan*, 48 Tex. 103; *Hoskins v. Huling*, 2 App. Civ. Cases, §§ 155, 156.

"Where the law recognizes no fixed rules and principles by which to ascertain the excess, and it is uncertain and considerable, a new trial ought to be awarded." *Thomas v. Womack*, 13 Tex. 580, 585.

Where the court can not determine with certainty the amount of damage the appellee may be entitled to recover, it is not a proper case for directing a remittitur of the excess, and entering judgment for the true amount. *Hughes v. Brooks*, 36 Tex. 379, 381.

Effect on Exemplary Damages of Remission of Actual Damages before Entry of Judgment.—The remission of actual damages before entry of judgment by one who has recovered a verdict for actual and exemplary damages for the wrongful and malicious levy of an attachment deprives the court of power to render judgment for the exemplary damages, since there must be some finding of actual damages to support a judgment for exemplary damages. *Smith v. Dye* (Civ. App.), 51 S. W. 858.

D. INSTRUCTIONS.

Duty to Instruct as to Discrimination between Actual and Exemplary Damages.—In an action wherein exemplary damages are claimed, it is error to leave it to the jury to find such damages as they believe the plaintiff entitled to, without furnishing any rule of law to guide them in discriminating between actual and exemplary damages. *Galveston, H. & S. A. Ry. Co. v. Dunlavy*, 56 Tex. 256.

The proper practice is that the court should, in the charge, give to the jury the rules of law, as applied to the

facts in evidence, which should govern them in the measure of this damage. *Galveston, etc., R. Co. v. Le Gierse*, 51 Tex. 189, 203.

Distinction Need Not Be Made.—If exemplary damages are not claimed it is not the duty of the court to distinguish between exemplary and compensatory damages. *International, etc., R. Co. v. Smith*, 62 Tex. 252.

Refusal to Instruct on Punitive Damages When Claim Only for Actual Damages.—In a personal injury action it was proper to refuse to instruct that plaintiff could not recover punitive damages where he sued for compensatory damages only and the court instructed that on finding for plaintiff, they should allow him actual damages. *Houston & T. C. Ry. Co. v. Boehm*, 57 Tex. 152.

In an action for damages, it was proper to refuse to instruct that the jury should not find for exemplary damages where they were not claimed, and the question of actual damages alone was submitted. *San Antonio Traction Co. v. Davis* (Civ. App.), 101 S. W. 554.

It is not error to refuse a charge on the subject of exemplary damages where no claim of that kind was made by the pleadings and the court expressly confined the jury to a consideration of actual damages. *Gulf, C. & S. F. Ry. Co. v. Copeland*, 17 Tex. Civ. App. 55, 42 S. W. 239.

A charge on exemplary damages is properly refused where such damages are not sought in the action. *Western Union Tel. Co. v. Waller* (Civ. App.), 47 S. W. 396.

Proper to Refuse to Submit Question of Exemplary Damages to Jury.—Where, in an action for the recovery of a threshing machine, plaintiff made no objection to the court's submitting of the question to the jury, and a finding in favor of defendant's right to declare the contract under which plaintiff held the property forfeited, and to

repossess the property, and did not claim to have suffered any personal violence or injury by defendant's alleged forcible taking thereof, plaintiff was not entitled to recover actual damages, and hence a refusal to submit the question of exemplary damages to the jury was proper. *Mulliner v. Shumake* (Civ. App.), 55 S. W. 983.

Effect of Failure to Show Principal Not Liable for Individual Malice of Agent.—Where portions of the charge are calculated to mislead the jury, by the failure to clearly draw the distinction between the nonliability of plaintiffs for exemplary damages, by reason of the individual malice of their agent in suing out a writ of attachment, and their liability therefor, if they participated therein, or adopted or ratified the same with a knowledge of the facts, though it presents a correct proposition as it would be understood by the legal mind, it is error to refuse to give an instruction which clearly presents the doctrine of the liability of a principal for exemplary damages for the act of the agent. *Willis v. McNeill*, 57 Tex. 465.

When Error to Submit to Jury Question of Exemplary Damages.—Error to submit question of exemplary damages to jury where record fails to show approval by the company of agent's negligence. *Western Union Tel. Co. v. Brown*, 58 Tex. 170, 176.

"In a case in which a plaintiff claims damages actual and exemplary, the jury should be instructed to separate the one from the other in their verdict; but a failure of the court so to charge is not cause for reversing a judgment, if the charge be otherwise correct and no request is made to the court for a charge upon that matter." *Shook v. Peters*, 59 Tex. 393, 396.

Withdrawal of Claim for Exemplary Damages.—The withdrawal of a claim for exemplary damages from the consideration of the jury simply by verbal declaration by counsel of its abandon-

ment made after the evidence is closed and during argument is not sufficient, but it should be withdrawn from the jury in the charge of the court, distinctly calling their attention to the fact that it is abandoned and charging them as to the remaining issues. *I. & G. N. Ry. Co. v. Underwood*, 64 Tex. 463.

When Doubtful if Sufficient Facts Are Shown to Warrant Exemplary Damages.—Where, in an action for injuries, the petition claims exemplary damages, and a question exists as to whether the evidence shows sufficient facts to entitle plaintiff to recover the same, a charge should be given on that subject, unless the court withdraws the question of such damages from the jury. *International & G. N. Ry. Co. v. Underwood*, 64 Tex. 463.

When Evidence as to Exemplary Damages Introduced, but Question Excluded from Jury.—When, in a suit to recover damages, evidence proper to be considered under the prayer for exemplary damages was introduced, without objection, and afterwards the court charged the jury, excluding from their consideration the question of exemplary damages, the failure of the court of its own accord to instruct the jury not to consider the evidence thus admitted is not ground for reversal. *Brown v. Bacon*, 63 Tex. 595.

Failure to Instruct on Exemplary Damages When Same Not Claimed.—It is not error for the court to fail to instruct the jury upon the question of exemplary damages, nor was it the duty of the court to distinguish between exemplary and compensatory damages, when exemplary damages are not claimed in the complaint. *International, etc., R. Co. v. Smith*, 62 Tex. 252.

Instruction on Forceful Removal of Property.—In an action for damages for forcibly entering plaintiff's house, and removing therefrom certain property without his consent, it is proper to instruct that if the jury are satisfied

that defendants removed the property as alleged, and their manner on making such removal was insulting and overbearing, so as to naturally wound plaintiff's feelings, they shall find for plaintiff for such an amount as they may deem proper; "such damages being called vindictive damages, or smart money." *Loftus v. Maxey*, 73 Tex. 242, 11 S. W. 272.

Knowledge by Railroad of Defects in Track.—An instruction that a railroad company is liable to exemplary damages if it knew of the defects in its track, and operated the road indifferent to the passengers, is erroneous, in not limiting such damages to cases where acts of gross negligence contributed to the accident. *Missouri Pac. R. Co. v. Johnson*, 72 Tex. 95, 10 S. W. 325.

In an action against a railroad company for personal injuries to a passenger, it is error to charge that exemplary damages are "given as a kind of punishment," leaving the jury to infer that defendant would be liable to such damages if, with knowledge of the general bad condition of the road prior to the accident, it allowed it to remain so, regardless of whether plaintiff's injury resulted from that known general bad condition. *Missouri Pac. Ry. Co. v. Brazil*, 72 Tex. 233, 10 S. W. 403.

A charge that if the road had been out of repair for a long time, to the company's knowledge, or if the general bad condition was so notorious that the company, by exercise of ordinary care, should have known of it, but failed to repair it, the question of exemplary damages may be considered, is erroneous as authorizing exemplary damages, though the road, where the injuries occurred, was but slightly defective, and as authorizing them for the general bad condition of the road regardless of whether plaintiff's injuries resulted therefrom. *Missouri Pac. Ry. Co. v. Shuford*, 72 Tex. 165, 10 S. W. 408.

Charge Need Not State That Exemplary Damages Are Given by Way of Punishment.—Defendant against whom exemplary damages are given can not complain that charge did not state that exemplary damages are given by way of punishment. *Mayer v. Duke*, 72 Tex. 445, 453, 10 S. W. 565.

Proper Charge When Both Actual and Exemplary Damages Claimed.—Where in an action for the conversion of cotton, exemplary damages were also claimed, the charge should have required the jury either to find the facts alleged as the basis for that recovery, or else to find against plaintiff on that issue. *Lee v. McDonnell*, 31 Tex. Civ. App. 468, 72 S. W. 612.

Ratification by Railroad of Assault on Passenger by Conductor.—See the title ASSAULT AND BATTERY, vol. 2, p. 73.

Where, in an action for wrongful assault in ejecting a passenger from a street car for nonpayment of fare, it appeared the conductor was notified by plaintiff and his companion that he had paid his fare, but the conductor, notwithstanding this fact, made an unnecessary assault on plaintiff, striking him several times in the face, and causing blood to flow from his nose, and bruising and scratching his face, and that defendant ratified the acts of the conductor, the evidence justified the submission of plaintiff's right to recover exemplary damages to the jury. *Denison & S. Ry. Co. v. Randell*, 69 S. W. 1013, 29 Tex. Civ. App. 460.

Charge on Willful Negligence of Train Porter.—In an action for injuries to a passenger, an instruction that wanton and willful negligence is the failure to exercise such care as an ordinarily prudent person would exercise under the same or similar circumstances, and that if defendant, its agents or employees, were grossly negligent to plaintiff while she was alighting from defendant's car, the

jury should award plaintiff exemplary damages, was erroneous, as the carrier was not liable for punitive damages, unless the violent conduct of its train porter was authorized or subsequently ratified by the carrier. *Texas, etc., R. Co. v. Beezley*, 46 Tex. Civ. App. 108, 101 S. W. 1051. See the title CARRIERS OF PASSENGERS, vol. 3, p. 771.

Charge on Gross Negligence When Exemplary Damages Not Claimed.—A charge upon gross negligence is misleading and improper, in an action by a widow to recover for the death of her husband, alleged to have been caused by the negligence of a superior while the deceased, under his direction, was engaged in coupling cars, where exemplary damages are not sought. *Louisiana Extension R. Co. v. Carstens*, 19 Tex. Civ. App. 190, 47 S. W. 36.

If Issue of Exemplary Damages Is Raised the Court Should Charge on Same.—In an action for conversion of a car of coal, in which exemplary damages were claimed, it was error to refuse defendant's special charge that, if the coal was taken through error in marking the car, the jury should find for the defendant as to any claim for exemplary damages, the issue having been raised by the evidence. *Gulf, etc., R. Co. v. Cleburne* (Civ. App.), 79 S. W. 836.

Instruction on Measure of Damages for Mental Suffering Corrected by Subsequent Charge.—In an action to recover for personal injuries, error in an instruction that the measure of damages will be the physical pain and suffering and mental anguish and the peril and fright experienced by plaintiff is corrected by a further statement that in ascertaining such damages, "if any have been sustained," pain, suffering, and peril "to which plaintiff was subject, if to any she was subject," should be considered. *Texas & P. Ry. Co. v. Woodall*, 2 Willson, Civ. Cas. Ct. App. § 474.

It was not error for the court to refuse to charge at defendant's request that the jury could not allow exemplary damages, where the main charge given specified only actual damages, and the jury were also instructed not to consider the argument of plaintiff's counsel urging them to render such a verdict as would set a precedent and prevent such occurrences in the future, as their allowance of damages was to be confined to a fair compensation for actual damages. *Gulf, etc., R. Co. v. Conder*, 23 Tex. Civ. App. 448, 58 S. W. 58, affirmed in 93 Tex. 730, no op.

Words and Phrases—"Should" and "Might" or "May."—It was not error for the court to instruct the jury that if the attachment was both wrongful and malicious, they "should" give exemplary damages instead of merely instructing that they "might" award such damages. *Mayer v. Duke*, 72 Tex. 445, 10 S. W. 565.

In an action against one for having cut holes in the wall of plaintiff's house so as to make it a part of a shed which he was constructing on his own adjoining lot, an instruction that if defendant, in doing this, acted willfully or with gross negligence, or in utter disregard of plaintiff's rights, the jury "should" find exemplary damages for plaintiff, rather than that they "may" find them, is not erroneous. *Nolan v. Mendere*, 6 Tex. Civ. App. 203, 25 S. W. 28.

"In the case of *Mayer v. Duke*, 72 Tex. 445, 10 S. W. 565, Judge Gaines, commenting upon this exact question, on page 453, * * * says: 'We are aware that it is usual to instruct the jury, in cases calling for a charge upon the subject, that they 'may' give exemplary damages, provided they find a certain state of facts proved by the evidence. * * * Yet it seems to me, in many cases at least, it would not have been error for them to have gone further, and instructed the juries

that they should find exemplary damages if they found the facts proved which warranted such damages.'" *Nolan v. Mendere*, 6 Tex. Civ. App. 203, 25 S. W. 28.

Exemplary Damages Are "for the Purpose of Setting a Wholesome Example to Others."—An instruction that exemplary damages might be allowed as a punishment is not rendered erroneous by adding, "and for the purpose of setting a wholesome example to others," as such addition is merely explanatory, and does not allow two kinds of damages. *Knittel v. Schmidt* (Civ. App.), 40 S. W. 507, 16 Tex. Civ. App. 7.

"Gross Negligence" and "Ordinary Care."—In an action against a railroad company for injuries to a passenger, a charge on the question of exemplary damages that gross negligence is a total want of ordinary care, and ordinary care is that degree of care that a person would use under like circumstances, is erroneous, as authorizing the jury to believe that exemplary damages may be awarded where the degree of care exercised is but slightly below ordinary care. *Missouri Pac. Ry. Co. v. Shuford*, 72 Tex. 165, 10 S. W. 408.

A charge that, if the injuries received were due to the gross negligence of defendant, the jury should consider the question of exemplary damages; that gross negligence was a total want of ordinary care; and that ordinary care was that degree of care which an ordinary person would use under like circumstances,—is erroneous, as inducing the belief that the exercise of care but slightly less than ordinary care would render defendant liable in exemplary damages. *Missouri Pac. Ry. Co. v. Mitchell*, 72 Tex. 171, 10 S. W. 411.

Instruction Using Words "Wantonly and without Justification."—"It is urged that the court erred in instructing the jury 'that, if the striking was

done wantonly and without justification, the jury might find, in addition to the actual damages sustained, such sum as may be deemed adequate as exemplary or punitive damages;' and this upon the ground that the charge was misleading in that it gave the jury to understand that the terms 'wantonly' and 'without justification' were synonymous. Such could not have been the effect of the charge; but, on the contrary, its effect was that the act must have been not only wanton, but also without justification." *Shook v. Peters*, 59 Tex. 393, 396.

E. VERDICT AND JUDGMENT.

1. Verdict.

See ante, "In General," III, A.

When Separate Verdicts Required.—Where the testimony warrants a charge upon both actual and exemplary damages, the jury should be required to respond in separate verdicts, showing, if any, the amount of actual and that of exemplary damages they may find. *Galveston, etc., R. Co. v. Le Gierse*, 51 Tex. 189, 203.

Effect if Actual and Vindictive Damages Not Separated in Verdict.—The better practice is to separate the actual from the vindictive damages in the petition as well as in the verdict. But if this is not done, the petition will serve as a basis for a verdict and the informality of the verdict can not be taken advantage of for the first time

on appeal. *Moehring v. Hall*, 66 Tex. 240, 1 S. W. 258.

If Actual and Exemplary Damages Claimed, Verdict Can Not Be for Exemplary Damages Alone.—Where a petition states a claim for damages both actual and exemplary, a verdict for exemplary damages can not be sustained, unless there is also a verdict for actual damages. *Jones v. Matthews*, 75 Tex. 1, 12 S. W. 823.

"Impunitive" for "Punitivc."—There being no such word as "impunitive" in the English language, a verdict for a certain sum as impunitive damages is unintelligible. *Dillon v. Rogers*, 36 Tex. 152.

Verdict for "Actual Damage and Insult."—In an action for damages, the jury returned a verdict for the plaintiffs, for "actual damage \$150, and for insult \$237.50." Held, that such verdict excludes the idea that the jury meant to allow plaintiffs a larger sum for actual damages than \$150. *Galveston, H. & S. A. Ry. Co. v. Dunlavy*, 56 Tex. 256.

2. Judgment.

A judgment for exemplary damages with no actual damages found will not be permitted to stand. *Jones v. Matthews*, 75 Tex. 1, 12 S. W. 823; *Carson v. Texas Installment Co. (Civ. App.)*, 34 S. W. 762; *Smith v. Dye*, 21 Tex. Civ. App. 662, 52 S. W. 981; *Malin v. McCutcheon*, 33 Tex. Civ. App. 387, 76 S. W. 586.

Exemplifications.

See the titles DOCUMENTARY EVIDENCE, vol. 6, p. 531; FOREIGN LAWS; JUDGMENTS AND DECREES; RECORDS; STATUTES. See, also, the titles BEST AND SECONDARY EVIDENCE, vol. 2, p. 796; NOTARY PUBLIC.

Exempt.

See the title PRIVILEGE.

Exemption.

As to equal privileges and immunities, see the title CONSTITUTIONAL LAW, vol. 4, p. 472, et seq.

Exemptions.

See the titles EXEMPTIONS FROM EXECUTION AND ATTACHMENT, and references there made; HOMESTEAD EXEMPTIONS; LICENSES; REVENUE LAWS. As to exemptions from water rates, see the title WATER COMPANIES AND WATERWORKS. As to exemptions from taxation, see the titles IMPAIRMENT OF OBLIGATION OF CONTRACTS; SPECIAL ASSESSMENTS; TAXATION. As to exemption from jury service, see the title JURY.

EXEMPTIONS FROM EXECUTION AND ATTACHMENT.

BY W. F. SOUDER.

I. Nature and General Principles, 944.

- A. Nature of Right, 944.
- B. Constitutional Provisions, 944.
- C. Object and Intention of Legislature, 945.
- D. Exemptions Created by Law Subsequent to Contract, 945.
- E. Construction of Exemption Laws, 945.
- F. Law Applicable, 946.
- G. Liabilities Enforceable against Exemption Rights, 946.
- H. Liability to Set-Off, 946.
- I. Exemption of Personal Property Instead of Homestead, 947.
- J. Right of Owner to Transfer or Incumber Exempt Property, 947.
 - 1. Sale, 947.
 - 2. Exchange, 947.
 - 3. Gift, 948.
 - 4. Mortgage, 949.

II. Persons Entitled to Claim Exemptions. 949.

- A. Residents, 949.
- B. "Every Citizen or Head of Family," 949.
- C. Persons in Service of Texas, 949.
- D. Aliens, 950.
- E. Trustees, 950.
- F. Surviving Husband, Wife or Next of Kin, 950.

III. Continuation of Exemptions and Waiver of Right, 951.

- A. Continuation, 950.
- B. Waiver, 951.
 - 1. Power to Waive, 951.
 - 2. Consent to Levy, 951.
 - 3. Estoppel or Forfeiture, 951.

IV. Specific Exemptions, 952.

- A. In General, 952.
- B. Household and Kitchen Furniture, 952.
 - 1. In General, 952.
 - 2. Necessity for Actual or Constructive Use, 953.
 - 3. Rifle and Piano, 953.
 - 4. Furniture Used in Hotel, Boarding House or Restaurant, 953.
- C. Horses and Wagons, 954.
 - 1. Horses, 954.
 - 2. Wagons, 955.
- D. Provisions, Forage and Crops, 955.
 - 1. Provisions in General, 955.
 - 2. Forage for Stock, 956.
 - 3. Crops Growing on Homestead, 956.
- E. Current Wages for Personal Services, 956.
 - 1. Definition, 956.
 - 2. What Constitutes Current Wages, 957.
 - 3. Offset against Current Wages, 957.
- F. Pension Money, 957.
- G. Property Intended for Improvement of Homestead, 957.
- H. Insurance Money, 957.
 - 1. Proceeds of Exempt Property, 958.
- J. Tools, Apparatus and Books of Trade or Profession, 958.
 - 1. Definitions, 958.
 - 2. Nature of Term "Apparatus," 958.
 - 3. What Business the Term "Trade" Includes, 959.
 - 4. Number of Trades Limited to Debtor, 959.
 - 5. What the Words "Trade" or "Apparatus" as Used in Statute Includes, 959.
 - a. In General, 959.
 - b. Printing Press and Material, 960.
 - 6. Necessary Tools, 960.
 - 7. Law Library, 961.
 - 8. Farming Implements, 961.
- K. Partnership Property, 961.
- L. Trust Property, 962.

V. Protection and Enforcement of Right, 962.

- A. What Constitutes Infringement of Right and Persons Liable, 962.
- B. Claiming and Selecting Exemptions, 963.
 - 1. Claiming Exemptions, 963.
 - a. Necessity for, 963.
 - b. Time of, 963.
 - c. Motive in Making, 963.
 - d. Insufficient Affidavit, 963.
 - 2. Selecting Exemptions, 963.
 - a. Selection a Personal Privilege, 963.
 - b. Ownership, 963.
 - c. Time for Making, 964.
- C. Remedies for Infringement of Right, 964.
 - 1. Injunction, 964.

2. Necessity for Demand and Proof, 964.
3. Parties, 964.
4. Defenses, 964.
5. Questions for Jury, 965.
6. Pleading, 965.
7. Evidence, 965.
8. Damages, 966.
9. Verdict and Judgment, 966.

CROSS REFERENCES.

See the titles **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS**, vol. 2, p. 113; **ATTACHMENT**, vol. 2, p. 296; **CHATTEL MORTGAGES**, vol. 4, p. 88; **CROPS**, vol. 5, p. 537; **EXECUTIONS**, ante, p. 229; **EXECUTORS AND ADMINISTRATORS**, ante, p. 364; **GARNISHMENT**; **HOMESTEAD EXEMPTIONS**; **HUSBAND AND WIFE**; **INSURANCE**; **PUBLIC OFFICERS**.

As to holding exempt animals for impounding fees, see the title **ANIMALS**, vol. 1, p. 304. As to exemptions of bankrupt, see the title **BANKRUPTCY AND INSOLVENCY**, vol. 2, p. 645. As to personal wages being exempt from garnishment, see the title **GARNISHMENT**. As to homestead exemptions, see the title **HOMESTEAD EXEMPTIONS**. As to exemptions from taxation, see the title **TAXATION**. As to the amount recovered by the beneficiary in actions for injuries resulting in death being exempt from execution and attachment by the creditors of the deceased, see title **DEATH BY WRONGFUL ACT**, vol. 5, p. 1084. As to removal from state effecting right to recover for exempt property, see the title **TROVER AND CONVERSION**.

I. Nature and General Principles.

A. NATURE OF RIGHT.

A debtor has not a vested right under the statute allowing an exemption. *Mason v. Bumpass*, 1 White & W. Civ. Cas. Ct. App., § 1338.

The rules as to the rights of persons in homestead property after the death of the husband and wife apply with equal force to the personal property exempt from forced sale so far as the rights of the creditors are concerned, though they may not always be applicable when considered with reference to the rights of those who are not creditors. *Givens v. Hudson*, 64 Tex. 471. See, generally, the title **HOMESTEAD EXEMPTIONS**.

B. CONSTITUTIONAL PROVISIONS.

"The constitution of 1869, art. 12, § 15, declares: 'the legislature shall have power, and it shall be their duty to

protect by law from forced sale a certain portion of the property of heads of families.' This clause may be considered as having been adopted with reference to the well defined judicial definition of the term 'forced sale,' made in *Sampson & Keen v. Williamson*, 6 Tex. 110, as including 'every sale made under the process of the courts in the mode prescribed by law.'" *Mason v. Bumpass*, 1 App. Civ. Cases, §§ 1338, 1340.

"The constitution of 1870 on this subject (art. 16, § 49) is as follows: 'The legislature shall have power, and it shall be its duty, to protect by law from forced sale a certain portion of personal property of all heads of families, and also of unmarried adults, male and female.' In the Rev. Stat., art. 2335, the exemptions of the act of 1870 were continued, with some additional articles. The effect of the entire chapter on the subject is, however, qualified by art. 2342, Rev. Stat.,

as follows: 'The exemption of personal property provided for in this chapter shall not apply * * * to other debts which are secured by a lien upon such property.'" *Mason v. Bumpass*, 1 App. Civ. Cases, §§ 1338, 1340.

C. OBJECT AND INTENTION OF LEGISLATURE

The intention of the legislature in giving exemptions was to protect all heads of families in pursuit of their occupations. *Cone v. Lewis*, 64 Tex. 331. See, also, *Rodgers v. Ferguson*, 32 Tex. 533, 535; *Nichols v. Claiborne*, 39 Tex. 363, 366.

In *Cobbs v. Coleman*, 14 Tex. 594, 598, the court held, that by the act of 1839 (Hart. Dig., art. 1270), the legislature intended a real, substantial benefit.

"The object of the legislature in passing the exemption law was manifestly to secure to each family a sure means of comfort and support, in the enjoyment of which they might feel secure." *Allison v. Brookshire*, 38 Tex. 199, 201.

D. EXEMPTIONS CREATED BY LAW SUBSEQUENT TO CONTRACT.

Where, after the creation of a debt, a statute was passed exempting certain articles from levy and sale on execution, and the debtor purchased such articles, they were not subject to levy and sale. *Helm v. Pridgen*, 1 White & W. Civ. Cas. Ct. App. § 643, 644.

E. CONSTRUCTION OF EXEMPTION LAWS.

See post, "Specific Exemptions," IV.

Legislative Intention Governs.—In determining the extent of statutory exemptions from forced sale, the plain duty of the courts is to enforce the legislative intention, as manifested by the letter and spirit of the law, whether the exemptions extend too far being for the legislature. *Alsup & Thompson v. Jordan*, 69 Tex. 300, 6

S. W. 831; *Cone v. Lewis*, 64 Tex. 331.

Liberal Construction.—Laws exempting property from forced sale are given a liberal construction in order to effectuate the policy of the legislation. *Rodgers v. Ferguson*, 32 Tex. 533; *Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710; *Helm v. Pridgen*, 1 App. Civ. Cases, § 643; *Robinson v. Robertson*, 2 App. Civ. Cases, § 253; *Allison v. Brookshire*, 38 Tex. 199, 201; *Kingsland, etc., Co. v. McGowan Bros.*, 3 App. Civ. Cases, § 32.

In many instances the courts have been possibly more liberal than the wording of the statute would seem to justify. *Smith v. Horton*, 19 Tex. Civ. App. 28, 29, 46 S. W. 401, affirmed in 92 Tex. 21.

Exemption laws being remedial and humane are to be liberally construed. *Robinson v. Robertson*, 2 Willson, Civ. Cas. Ct. App. § 253.

In discussing this question in the case of *Green v. Raymond*, 58 Tex. 80, 83, the court said: "The settled policy in Texas has ever been to make liberal exemptions of property from forced sale in this state. That liberality has been extended from time to time, until today Texas, in this particular, surpasses all the other states of the American Union. The wonderful improvement and progress of the past few years attest the wisdom of that policy, which, if continued, will in after years be demonstrated by a commonwealth composed not only of prosperous, free and independent, but also of solvent citizens. It has not been the policy of the judicial department to restrict this liberalizing tendency of the law-making power by a strict construction of these laws; on the contrary, they have been 'liberally construed with a view to effect their objects and to promote justice.'"

Debtor Given Benefit of Doubt.—

Where it does not clearly appear whether certain property is embraced within the exemption statute, the

debtor will generally be allowed the benefit of the doubt and permitted to retain the property. *Robinson v. Robertson*, 2 Willson, Civ. Cas. Ct. App. § 253; *Watkins v. Davis*, 61 Tex. 414, 416.

Law Should Not Be Strained beyond Fair Meaning.—While exemption laws are to be construed beneficially to the debtor, the court should not strain the law beyond its fair meaning. *Tucker v. Napier*, 1 White & W. Civ. Cas. Ct. App. § 672.

Act March 20, 1848, § 45, can not be regarded a statute in *pari materia*, with the general laws exempting the homestead, and other property of the citizen, from forced sale; and can not properly be taken and construed together with them, as constituting one statute, upon the subject of which they treat, or as parts of one and the same system. *Hubbard v. Horne*, 24 Tex. 270. See, generally, the title HOME-STEAD EXEMPTIONS.

F. LAW APPLICABLE.

See the title CONFLICT OF LAWS, vol. 4, p. 262.

G. LIABILITIES ENFORCEABLE AGAINST EXEMPTION RIGHTS.

See post, "Protection and Enforcement of Right," V.

Rev. St. art. 2342, precluding a mortgagor of chattels from claiming them as exempt from sale to satisfy the mortgage, applies to mortgages executed prior to its enactment. *Mason v. Bumpass*, 1 White & W. Civ. Cas. Ct. App. §§ 1340, 1341.

Under **Rev. St. art. 2342**, providing that the exemption of personal property shall not apply to debts which are secured by a lien thereon, a mortgagee of exempt chattels may enforce his lien as against a claim of exemption. *Bigger v. Jones*, 3 Willson, Civ. Cas. Ct. App. § 227.

Property exempt from execution can not be sold on a judgment for debt, though the person owning the

judgment have a verbal lien on the property sought to be sold for purchase money. *McGaughey v. Meek*, 1 White & W. Civ. Cas. Ct. App. § 1196.

Property exempt from execution of debt can not be sold under execution on a judgment for a debt, though the person holding the judgment have a landlord's lien on the property sought to be sold. *McGaughey v. Meek*, 1 White & W. Civ. Cas. Ct. App. § 1196.

Where a chattel mortgage covering exempt and nonexempt property has been recorded, the mortgagor can require the mortgagee, in foreclosing, to first exhaust the nonexempt property; but where the mortgage has not been recorded, the mortgagor, when certain of his creditors have levied execution on the nonexempt property, can not require the mortgagee, or his assignees, to first exhaust such property before proceeding against the exempt property. *Baughn v. Allen* (Civ. App.), 68 S. W. 207.

H. LIABILITY TO SET-OFF.

See post, "Protection and Enforcement of Right," V. And see, generally, the title SET-OFF, RECOUPMENT, RECONVENTION AND COUNTERCLAIM.

Under the statutory provision that certain property, including current wages for personal services, "shall be exempt from attachment or execution, or every other species of forced sale for the payment of debts," an employer sued for such wages can not set off a debt due from the employee to a third person, and assigned to him. *Dempsey v. McKennell*, 2 Tex. Civ. App. 284, 23 S. W. 525.

In an action for conversion of exempt property, a judgment can not be set off against the claim. *Staggs' Heirs v. Piland*, 71 S. W. 762, 31 Tex. Civ. App. 245. See *Moore v. Graham*, 29 Tex. Civ. App. 235, 69 S. W. 200.

In an action to recover damages for the wrongful attachment of exempt

property, defendant can not set off the debt on which the attachment proceedings were based. *Wilson v. Manning* (Civ. App.), 35 S. W. 1079.

A debt for which exempt property was wrongfully attached can not be pleaded as a set-off in an action for wrongfully attaching the property. *Craddock v. Goodwin*, 54 Tex. 578.

Where creditors attach and sell community property for a debt of the husband, and the debtor's wife obtains judgment against them therefor, the creditors can not, as against an assignee of the wife, offset against such judgment their judgment against the husband, even after the wife's death, since the wife's judgment, being for the value of exempt property, is also exempt. *Cullers v. May*, 81 Tex. 110, 16 S. W. 813.

I. EXEMPTION OF PERSONAL PROPERTY INSTEAD OF HOMESTEAD.

See, generally, the title **HOMESTEAD EXEMPTIONS**.

The widow's homestead contemplated by statute may be in land, or money in lieu of it, but not partly in both. *Crocker v. Crocker*, 46 S. W. 870, 19 Tex. Civ. App. 296.

A widow can not be compelled to take an incomplete homestead, or one subject to the right of partition, without her consent, and may have an allowance made to her in lieu of homestead out of any property belonging to the estate of her husband, but she can not have both the homestead and the allowance. *Crocker v. Crocker*, 46 S. W. 870, 19 Tex. Civ. App. 296.

The statute does not confer authority upon the county court while sitting in a guardianship case to set aside to minor children, out of the estate of a deceased person, the homestead or other exempt property, or make allowances in lieu thereof. *Leslie v. Elliott*, 26 Tex. Civ. App. 578, 64 S. W. 1037, affirmed, no op.

J. RIGHT OF OWNER TO TRANSFER OR INCUMBER EXEMPT PROPERTY.

See the title **HOMESTEAD EXEMPTIONS**.

1. Sale.

The right of a debtor to dispose of his exempt property and give a good title, as against his creditors, is well established. *Conner v. Hawkins*, 66 Tex. 639, 2 S. W. 520; *Cox v. Shropshire*, 25 Tex. 113; *Baines v. Baker*, 60 Tex. 139; *Eaves v. Williams*, 10 Tex. Civ. App. 423, 31 S. W. 86.

A sale of exempt property can not constitute a fraud upon creditors. *Eaves v. Williams*, 10 Tex. Civ. App. 423, 31 S. W. 86. See, generally, the title **FRAUDULENT AND VOLUNTARY CONVEYANCES**.

As to sale of exempt property being within the statute of frauds, see the title **FRAUDS, STATUTE OF**.

2. Exchange.

As a general rule, where exempt property is voluntarily converted into nonexempt property, latter is not exempt from forced sale. *Watkins v. Davis*, 61 Tex. 414, 416.

Where exempt property has been taken from owner against his will, and its form changed by process of law, proceeds are protected until reasonable opportunity to reinvest in other exempt property. *Whittenberg v. Lloyd*, 49 Tex. 633, 642. See, also, *North v. Shearn*, 15 Tex. 175; *Paschal v. Cushman*, 26 Tex. 74.

"As was said in *Watkins v. Davis*, 61 Tex. 414: 'There is a distinction generally recognized with reference to the conversion of that class of property which is exempt into the class which is not exempt, between a voluntary and an involuntary change or conversion. And it is held, as a general rule, that where property of the first class is voluntarily converted into property of the other class, that the latter will not be exempt from forced

sale.' In that case, however, an exception to this general rule is made in case of a homestead, and it was held that if 'the homestead was sold with the then present and specific intent to reinvest the proceeds in another, the proceeds of the former homestead would not be subject to garnishment while in process of the change and reinvestment.'" *Kingsland, etc., Co. v. McGowan Bros.*, 3 App. Civ. Cases, § 32.

"In *Schneider & Bro. v. Bray*, 59 Tex. 668, it was held that 'if property acquired by voluntary exchange of exempt property be from its character or use likewise exempt by the terms of the constitution and laws, it must receive the same protection from forced sale which shielded the property given in exchange for it.' That case involved the homestead exemption, which, as we have seen, affords, it would seem, an exception to the general rule. This same exception appears in *Whittenberg v. Lloyd*, 49 Tex. 633, in which case Mr. Justice Gould says: 'Where exempt property has been taken from the owner against his will, and its form changed by process of law (as in case of a homestead exceeding in value the amount allowed by law), the proceeds are protected until there is reasonable opportunity to reinvest in other exempt property.'" *Kingsland, etc., Co. v. McGowan Bros.*, 3 App. Civ. Cases, § 32.

Reason for Rule.—The reason for the general rule which subjects to forced sale property not exempt by statute, which has been received in voluntary exchange for other property which was exempt, is that the statute and not the choice or caprice of the debtor, fixes the character of the exemption. *Schneider v. Bray*, 59 Tex. 668; *Thompson on Homesteads*, § 750; *Whittenberg v. Lloyd*, 49 Tex. 633, 642; *Schneiders & Bro. v. Bray*, 59 Tex. 668, 670; *Mann v. Kelsey*, 71 Tex. 609, 612, 12 S. W. 43.

"The reason thus given for the rule proves the rule itself to be, that if the property received in exchange is of the class or character not exempt by law, it is subject to execution. It also establishes the converse principle, that if the property received in exchange is of the species exempted by law, it will not be subject to execution for the debts of its new owner." *Schneider & Bro. v. Bray*, 59 Tex. 668, 671.

"Applying this rule to the articles exempt by our own constitution, should the horses, oxen, cows, furniture, farming utensils, tools of trade, etc., exempted, be exchanged for money, merchandise, or the like, the property thus acquired not being of the classes exempted by our laws, would be subject to execution for the new owner's debts. On the other hand, if horses, cows, furniture, etc., should be received in exchange, not beyond the limit prescribed by law, they would not be subject to such execution. A man may exchange his horse for another, or for five head of cattle, if he has none, or his tools of trade for others that suit him better, and no one would think of having such newly-acquired property levied on under execution against him." *Schneider & Bro. v. Bray*, 59 Tex. 668, 671.

Sale under deed of trust, although not a "forced sale," is not a voluntary sale, and such sale comes within protection extended to proceeds arising from involuntary changes of the form of exempt property. *Hunter v. Woolcut*, 55 Tex. 433, 436.

3. Gift.

See, generally, the title GIFTS.

If a donor purchased property with the intention of giving it away and carried his intention into immediate effect, the property was at no time exempt to him, and the party to whom it was given, took it subject to execution for his donor's previous indebtedness. *Connor v. Hawkins*, 66 Tex. 639, 2 S. W. 520.

If a party claims title to property by gift, and by reason of its being exempt to his donor who has never made such use of the property as entitled him to its exemption, he must show an intention of the donor to make such use of it, existing previous to the conveyance to himself. *Connor v. Hawkins*, 66 Tex. 639, 2 S. W. 520.

Intent in Transferring Immaterial.—

Where certain horses, levied on as the property of claimant's husband, were claimed to be exempt, and were also claimed by the wife under a gift from her husband, an instruction that a gift of exempt property from husband to wife on the ground of love and affection is good, if made in good faith and without intent to defraud the husband's creditors, was erroneous, since, if the property was exempt, the husband's intent in transferring it was immaterial. *McClelland v. Barnard*, 36 Tex. Civ. App. 118, 81 S. W. 591; *Cox v. Shropshire*, 25 Tex. 113; *Matrel v. Somers*, 26 Tex. 551; *Wood v. Chambers*, 20 Tex. 247, 254.

4. Mortgage.

See, generally, the title MORTGAGES AND DEEDS OF TRUST.

Under Rev. St. art. 2342, providing that exemption of personal property from forced sale for debt shall not apply to debts "secured by a lien on such property," a mortgage of property exempt from forced sale is valid. *Rose v. Martin* (Civ. App.), 33 S. W. 284.

A wife's consent is not necessary to a chattel mortgage made by the husband on exempt personal community property. *Mason v. Bumpass*, 1 White & W. Civ. Cas. Ct. App. § 1339

II. Persons Entitled to Claim Exemptions.

A. RESIDENTS.

Nonresidents of the state of Texas are entitled to the benefit of const.

Tex., art. 16, § 28, and Rev. Stat., Tex., art. 218, providing that no current wages for personal services shall ever be subject to garnishment. *Bell v. Indian Live-Stock Co.* (Sup.), 11 S. W. 344. See, generally, the title GARNISHMENT.

B. "EVERY CITIZEN OR HEAD OF FAMILY."

The exemption of property from execution by act of 1839; in favor of "every citizen or head of family" extends to all inhabitants of the state, married or single and is still in force. *Cobb v. Coleman*, 14 Tex. 594.

At the passage of the act of 1839, the laws of Spain were in force and by these there were many exemptions, but nothing is said about a "single man," or "heads of families." *Cobbs v. Coleman*, 14 Tex. 594.

Separation between Husband and Wife.—

The horse and wagon of a person having a wife and five children are exempt from execution, although for one year prior to the levy of the writ he has not lived with his wife nor contributed to her support. *Rogers v. Fox*, 4 Willson, Civ. Cas. Ct. App. § 85, 16 S. W. 781.

Property acquired by a married man, who is the head of a family, which he continues to occupy and use, with his servants, after dissolution of the marriage, is exempt from execution. *Withee v. Brown*, 1 White & W. Civ. Cas. Ct. App. § 545.

C. PERSONS IN SERVICE OF TEXAS.

In 1847, the United States government issued a requisition to the governor of Texas to raise a military force for the protection of the Texas frontier. Such a force was raised and mustered into the service of the United States, its officers receiving commissions from the governor, and was employed on that frontier. Held, that officers of this force were not in the service of Texas within the meaning

of the act of 1843 (Hart. Dig. art. 1349), which exempts from liability to forced sales the land of persons in the service of Texas. *Highsmith v. Usery*, 25 Tex. Supp. 96.

D. ALIENS.

See, generally, the title ALIENS, vol. 1, p. 174.

Aliens are entitled to the benefit of state exemption laws. *Cobbs v. Coleman*, 14 Tex. 594.

E. TRUSTEES.

See, generally, the title TRUSTS AND TRUSTEES.

Where a defendant in execution is in possession of slaves as trustee for others, and such slaves are levied on, he has a right and it is legally incumbent on him to assert the claim on behalf of the beneficiaries in the trust, and to maintain the exemption of the property from execution. *Parker v. Portis*, 14 Tex. 166.

F. SURVIVING HUSBAND, WIFE OR NEXT OF KIN.

The statute, *Pasch. Dig. art. 5487*, providing that exempt property "does not form any part of the estate of a deceased person when a constituent of the family survives," was not designed to allow any mere mortgage lien to be so enforced as to deprive the widow and children of the exempt property, or an allowance in lieu thereof. *Abney v. Pope*, 52 Tex. 288.

Under the provision making it the duty of the court to allow to the widow and children a certain sum in lieu of exempt property not existing in kind, the value of existing exempt property turned over in kind can not be deducted from the sum allowed. *Cooper v. Pierce*, 74 Tex. 526, 12 S. W. 211.

The right of a surviving wife to exempt personal property is paramount to all ordinary claims against the estate. *Williams v. Hall*, 33 Tex. 212.

The surviving widow of one who dies leaving no homestead is entitled to an allowance in lieu of such per-

sonal property exempt from forced sale as her husband did not leave her at the time of his death. *Terry v. Terry*, 39 Tex. 310.

Under Prob. Act 1870, the surviving widow is entitled to an allowance in lieu of such personal property exempt by law from sale as her husband did not leave her at the time of his death. *Mayman v. Reviere*, 47 Tex. 357.

The minor children of a widower on his death are entitled to property exempt from execution. *Moore v. Owsley*, 37 Tex. 603.

Where the estate has not the property in kind, the minor children of a widower at his death are entitled to an allowance in lieu of the specific property exempt from execution. *Moore v. Owsley*, 37 Tex. 603.

The minor children of a son of a decedent are not entitled to an allowance in lieu of exempt property, where such son's family were not constituents of deceased's family at the time of his death. *Glasscock v. Stringer* (Civ. App.), 33 S. W. 677.

Heirs of a deceased survivor of a community can not claim the exemption existing in her favor in her lifetime. *Peters v. Hood*, 2 Willson, Civ. Cas. Ct. App. § 377.

On the death of the husband exempt personalty passes to the surviving wife free from the debts of the community, and at her decease descends to her collateral heirs free from liability for such debts. *Cameron v. Morris*, 83 Tex. 14, 18 S. W. 422.

Stepmother and Children.—Under Batt's Civ. St. art. 2049, § 4, providing that if there be children of the deceased, of whom the widow is not the mother, the share of such children in such exempted property, except the homestead, shall be delivered to them, children of a deceased person are entitled to recover from the widow of their father, their stepmother, their share of exempt personal property sold by her, where she appropriated all of

the proceeds thereof. *Burns v. Falls*, 56 S. W. 576, 23 Tex. Civ. App. 386.

Minor Children of First Wife.—

Under Rev. St. 1895, arts. 2037-2041, 2046-2051, where an allowance is made in lieu of exemptions in the matter of the estate of a decedent leaving a second wife and minor children by the first wife, such minors share therein. *Wilson v. Brinker* (Civ. App.), 76 S. W. 213.

III. Continuation of Exemptions and Waiver of Right.

A. CONTINUATION.

An exemption of a trade apparatus from execution, under Rev. St. arts. 2395, 2397, terminates on the owner's abandoning his trade. *McCord-Collins Co. v. Lazarus* (Civ. App.), 50 S. W. 1048.

When a mechanic abandons his trade his tools are no longer exempt from execution. *Willis & Bro. v. Morris*, 66 Tex. 628, 1 S. W. 799.

Certain mechanics, M., R., and S., erected a house for the manufacture of cotton gins, etc. At one time all worked in the factory. Afterwards they started a mercantile establishment, of which S took charge, and gave it his principal attention. M. superintended and worked in the factory, and R. traveled in the interest of the firm, and, when not so engaged, also worked in the factory. Held, that M. and R. had not abandoned their trade as mechanics, and were entitled to the exemption from levy of the tools of their trade, but that S. had permanently abandoned his trade, and his tools were no longer exempt. *Willis v. Morris*, 66 Tex. 628, 1 S. W. 799.

An exemption of personal property from forced sale, while the debtor has a family, does not continue in his favor, after the other members of the family are dead. *Allen v. Ashburn*, 65 S. W. 45, 27 Tex. Civ. App. 239.

Exemption from execution of lands

granted to soldier under act 1837, ceases at death. *Hubbard v. Horne*, 24 Tex. 270, 272.

B. WAIVER.

1. Power to Waive.

Property exempt from execution is not subject to be levied on, even if pointed out to the sheriff by the head of the family. *Ross v. Lister*, 14 Tex. 469.

2. Consent to Levy.

Where the husband consents to the issuance and levy of a writ of attachment upon community property which is exempt, and there is no complaint by the wife that it was fraudulently done to deprive her of the privilege, the exemption will be deemed to have been waived. *Dodge v. Knight* (Sup.), 16 S. W. 626.

3. Estoppel or Forfeiture.

A daughter, who claims as her property a chattel levied on as her father's, can not plead that, as part of his household furniture, it was exempt from levy. *Connor v. Hawkins*, 64 Tex. 544.

A daughter claimed a piano levied on as the property of her father to satisfy an execution against him, and filed her bond and affidavit for trial of right of property, the piano being held by a railroad company as the property of her father. An issue was made up, the claimant asserting that the property was her own. Six months later she filed a plea setting up that the piano, if the property of her father, was exempt as part of the household furniture. Held, that not having been in possession of the property at the time it was seized, claimant by claiming that the title was in her father, put herself in the position of a third party, setting up an exemption which defendant in execution did not assert, and that the plea should have been disallowed. *Conner v. Hawkins*, 64 Tex. 544.

A fraudulent conveyance of property does not constitute a forfeiture

of a right of exemption therein. *King v. Harter*, 70 Tex. 579, 8 S. W. 308.

Wages Remaining with Treasurer.

—Where money exempt to a physician as current wages for personal services due him from a city is left in the city treasury after demand has been made for the same by the physician and payment of the entire amount refused, the fact that it remains in the treasury does not operate as a forfeiture of the right to claim it as exempt. *Sydnor v. City of Galveston*, 4 Willson, Civ. Cas. Ct. App. § 59, 15 S. W. 202.

IV. Specific Exemptions.

A. IN GENERAL.

"It may be well to observe that at the passage of the act of 1839 the laws of Spain were in force, and by these there were many exemptions. There is no reference here but the Institutes of Aso & Manuel, as found in White, and from these it appears that among the reservations were implements and beasts of husbandry, bread of bakers, tools of artificers, books of advocates and students, beds, wearing apparel, and other things necessary for daily use." *Cobbs v. Coleman*, 14 Tex. 594, 598.

"In making the exemptions our constitution and statutes selected articles most certainly contributing to the ease, comfort and independence of the family. They allow the family a home and its furniture, horses and cattle to labor for them and contribute to their sustenance, and the tools of trade for the head of the family to use in making a support." *Schneider & Bro. v. Bray*, 59 Tex. 668, 671.

"Should any of these articles become useless, decayed, or not of so much service as would others of the same species, the law does not compel the owner to keep them, but he may exchange them for others of more service to him. Otherwise the beneficial effects of the law would be in a

great measure defeated." *Schneider & Bro. v. Bray*, 59 Tex. 668, 671. See ante, "Exchange," I, J, 2.

B. HOUSEHOLD AND KITCHEN FURNITURE.

1. In General.

"The statute provides as follows: 'The following property shall be reserved to every family, exempt from attachment or execution, and every other species of forced sale for the payment of debts.' * * * 'All household and kitchen furniture.' (Rev. Stat., art 2335.)" *Alsup v. Jordan*, 69 Tex. 300, 304, 6 S. W. 831; *Hammer v. Woods*, 6 Tex. Civ. App. 179, 24 S. W. 942.

The existing statute places no limit on the value of the household and kitchen furniture which it declares shall be exempt from forced sale; former statutes did. *Alsup & Thompson v. Jordan*, 69 Tex. 300, 6 S. W. 831; *Mueller v. Richardson*, 82 Tex. 361, 18 S. W. 693; *Hammer v. Woods*, 6 Tex. Civ. App. 179, 24 S. W. 942.

Under Rev. St. art. 2335, exempting household and kitchen furniture, all such property is exempt, no matter when acquired, and without reference to the quantity or value thereof, or whether it all be at the same place. *Neeper v. Irons*, 3 Willson, Civ. Cas. Ct. App. § 183.

"The general definition of 'household,' when used as a qualifying word, is pertaining or belonging to the house or family, and it is so evidently used in the statute under consideration, the purpose of which is to exempt articles belonging to a family. And in such a connection the word 'furniture' is one of very broad signification, and, according to lexicographers, embraces a supply of necessary, convenient or ornamental articles with which a residence is equipped. The statute declares that 'the ordinary signification shall be applied to words, except words of art or words connected with a particular trade or subject matter, when

they have the signification attached to them by experts in such art or trade, or with reference to such subject matter.' (Rev. Stat., art. 3138.)" *Alsup v. Jordan*, 69 Tex. 300, 304, 6 S. W. 831.

"Looking to the entire article giving the exemption, it is evident that the legislature did not intend to limit the exemptions to such things as are necessities to the family. It exempts 'the family library and all family portraits and pictures.' This will embrace the entire collection of books belonging to the family, without reference as to whether they are such as convey information necessary in the ordinary affairs of life, or such as merely minister to the pleasure or amusement of the family or some of its members. It also exempts 'one carriage or buggy;' vehicles convenient but not necessities in every family." *Alsup v. Jordan*, 69 Tex. 300, 305, 6 S. W. 831. See, also, *Mueller v. Richardson*, 82 Tex. 361, 18 S. W. 693.

2. Necessity for Actual or Constructive Use.

An article of furniture is not exempt from execution unless it is in the actual or constructive use of the owner as a part of his household furniture, or is destined to be so used. *Conner v. Hawkins*, 66 Tex. 639, 2 S. W. 520.

3. Rifle and Piano.

A rifle is not exempt, under St. 1839, as an article of household and kitchen furniture, though it might be as the furniture of a frontiersman's tent or cabin. *Choate v. Redding*, 18 Tex. 579.

Piano.—The statute exempting from forced sale "all household and kitchen furniture" embraces all necessary convenient or ornamental articles with which a household is equipped, and may include a piano used for the instruction of children in music, as the legislature did not intend to limit the

exemption to such articles as are mere necessities to a family. *Alsup & Thompson v. Jordan*, 69 Tex. 300, 6 S. W. 831; *Betz v. Maier*, 12 Tex. Civ. App. 219, 221, 33 S. W. 710.

A pianoforte is not exempt from attachment and execution as an article of household furniture. *Alsup v. Jordan*, 69 Tex. 300, 6 S. W. 831.

4. Furniture Used in Hotel, Boarding House or Restaurant.

Under Pasch. Dig. art. 6634, exempting from forced sale the household and kitchen furniture of a family, used by them as such, the furniture of a hotel, used for the accommodation of guests, is not exempt. *Bond v. Ellison*, 2 Posey Unrep. Cas. 387.

The exemption of "all household and kitchen furniture" from forced sale does not include such furniture when used in hotels and restaurants, beyond that which is used by the family. *Heidenheimer v. Blumenkron*, 56 Tex. 308; *Frank v. Bean*, 3 App. Civ. Cases, § 210; *Dodge v. Knight* (Sup.), 16 S. W. 626.

Chief Justice Stayton, in *Mueller v. Richardson*, 82 Tex. 361, 18 S. W. 693, passing upon these facts, says: "The statute now in force exempts from forced sale 'all household and kitchen furniture.' Rev. Stat., art. 335. There is no limitation on the exemption, based either on value or necessity of the family for the use of the property to which the exemption applies; and the only inquiry in this case is, was the property levied on, within the meaning of the statute, household and kitchen furniture?" *Hammer v. Woods*, 6 Tex. Civ. App. 179, 184, 24 S. W. 942.

"He then says: 'It seems to us that personal property held only for purposes of business, such as that of hotel or restaurant keeping, ought not to be held "household furniture" within the meaning of statutes giving exemptions, although that used by a family in the same building for the use and comfort

of the family might be; for in the one case the property is held and used for purpose of business and profit, to secure which this particular exemption is not given; while in the other the exemption is given to secure the necessities, comforts, and conveniences of the family in a home. The primary purpose in the one case is profit, while in the other it is protection, comfort, and convenience to the family, which ought not to be denied because incidentally support for the family may be secured by the temporary use of the exempt property in the home." *Hammer v. Woods*, 6 Tex. Civ. App. 179, 184, 24 S. W. 942.

Widow Taking Boarders for Support.—Rev. Stat., art. 2335, exempts from sale under execution "all household and kitchen furniture" of the debtor. Held, where a widow with one child occupied a house of seven or eight rooms, and took boarders incidentally for the purpose of support, that she was entitled to hold exempt from sale the furniture in the rooms occupied by the boarders. *Mueller v. Richardson*, 82 Tex. 361, 18 S. W. 693.

C. HORSES AND WAGONS.

1. Horses.

Horse Not an Implement or Apparatus of Trade.—A horse used by one in cutting hay can not be claimed as exempt from attachment under a statute reserving to the debtor the tools and apparatus of his trade. *Tucker v. Napier*, 1 White & W. Civ. Cas. Ct. App. § 670. See post, "Tools, Apparatus and Books of Trade or Profession," IV, J.

What the Word "Horses" as Used in Statute Includes—Mules.—The word "horses" in the statute exempting two horses includes mules. *Allison v. Brookshire*, 38 Tex. 199; *Betz v. Maier*, 12 Tex. Civ. App. 219, 221, 33 S. W. 710.

"In the exemption of two horses the legislature evidently intended to protect to a family animals to cultivate

the soil, as well as to ride or drive; and we think it would be a very illiberal construction of the legislative intent to say, that the use of the word horses, in that connection, excluded geldings, mares or mules, since all are used for the same purposes." *Allison v. Brookshire*, 38 Tex. 199, 201.

"The usefulness and services of a mule are identical with that of a horse, at least so far as the exemption is concerned; and as in common parlance the mule is hardly distinguishable from the horse, we are of the opinion that the word horses, as used in that statute, includes mules also." *Allison v. Brookshire*, 38 Tex. 199, 202.

Shoes, Saddle, etc.—The exemption of a horse from execution includes not only the subject itself, but everything absolutely essential to its beneficial enjoyment; as shoes, saddle, etc. *Cobbs v. Coleman*, 14 Tex. 594; *Betz v. Maier*, 12 Tex. Civ. App. 219, 221, 33 S. W. 710.

An only horse and rope are exempt from execution. *Dearborn v. Phillips*, 21 Tex. 449; *Betz v. Maier*, 12 Tex. Civ. App. 219, 221, 33 S. W. 710.

"As to martingales, the maxim of *de minimis non curat lex* may very well apply. They are not so generally essential as a bridle and saddle, but they may frequently, and to save executive officers from difficulties who can have no certain tests, martingales may be regarded as included within the reservation of the horse." *Cobbs v. Coleman*, 14 Tex. 594, 599.

"The reason for these exemptions is because they are necessary for the beneficial enjoyment of the horse." *Anderson v. McKay*, 30 Tex. 186, 190.

Bridles and Saddles Must Be of a Reasonable Value.—"All the implements of husbandry are not allowed to exceed fifty dollars in value, and the whole policy of the act is to subtract no more from the creditor than is essential to the moderate support of

the debtor; and while the law would not permit the horse to be so stripped as to be almost valueless, nor suffer the spirit of the freeman who owns him to be exposed to unnecessary humiliation, yet extravagance would not be justified and bridles and saddles beyond a reasonable value might be exposed to seizure." *Cobbs v. Coleman*, 14 Tex. 594, 599.

Two colts, which have never been used as a team for the family, and only one of which has been broken to use, the other being too young, may be claimed as exempt, under Rev. Stat. 1895, art. 2395, exempting two head of horses to each family. *Hall v. Miller*, 51 S. W. 36, 21 Tex. Civ. App. 336.

A jackass is exempt under Rev. Stat., art. 2335, exempting horses. *Robinson v. Robertson*, 2 Willson, Civ. Cas. Ct. App. § 254; *Betz v. Maier*, 12 Tex. Civ. App. 219, 221, 33 S. W. 710.

Bicycle.—Courts will not engraft upon a statute exempting a horse from execution, a bicycle useful for the same purpose. *Smith v. Horton*, 19 Tex. Civ. App. 28, 46 S. W. 401. See post, "In General," IV, J, 5, a.

2. Wagons.

What the Word "Wagon" as Used in Statute Includes.—Laws 1866, p. 160, exempting certain articles of property of citizens from forced sale, includes by the word "wagon" all four-wheeled vehicles, whether covered or placed upon springs, and for whatever use they may be employed, whether for the transportation of property or persons. *Rodgers v. Ferguson*, 32 Tex. 533.

Under the statute of 1866 relating to exemptions, a carriage, the only vehicle owned by defendant in execution, was exempt. *Nichols v. Claiborne*, 39 Tex. 363.

Dray.—Under the statute exempting from forced sale one wagon and one carriage or buggy, a dray of a

drayman is exempt. *Cone v. Lewis*, 64 Tex. 331.

The statute does not give the exemption of a vehicle which may be classed as a "wagon" to those pursuing any given occupation, alone, but "to every family." In the case of a drayman the exemption would seem peculiarly appropriate and in harmony with the spirit of the statute, which exempts "all implements of husbandry," and "all tools, apparatus and books belonging to any trade or profession." *Cone v. Lewis*, 64 Tex. 331. See post, "Tools, Apparatus and Books of Trade or Profession," IV, J.

The statute exempts from forced sale one wagon and one carriage or buggy; in determining whether a dray is included within the meaning of the term "wagon," the intention of the legislature in giving the exemption must be considered and followed. The intention was to protect all heads of families in the pursuit of their occupations, and a correct construction of the law would seem to protect draymen and cartmen in the possession of their vehicles. *Cone v. Lewis*, 64 Tex. 331.

"In *Rodgers v. Ferguson*, 32 Tex. 533, drays and cars are held to be included within the term wagon when used in the exemption statutes." *Betz v. Maier*, 12 Tex. Civ. App. 219, 221, 33 S. W. 710.

D. PROVISIONS, FORAGE AND CROPS.

1. Provisions in General.

Under Rev. St. art. 2335, exempting all provision and forage on hand for home consumption, a debtor may retain all grain necessary for the support of his family and stock until in the ordinary routine of farm operation a new supply will be furnished by another crop. *Anderson v. Larremore*, 1 White & W. Civ. Cas. Ct. App. § 951.

The allowance of provisions should

be such as a provident man would ordinarily keep on hand. *Ward v. Gibbs*, 10 Tex. Civ. App. 287, 30 S. W. 1125.

On an issue as to whether wheat levied on under an attachment was exempt or not, a charge that the jury were to determine whether the grain levied on was necessary for home consumption, and that the provisions and forage provided for extends for the year only in which it has been reserved, was erroneous, and, instead of giving the same, the court should have followed the language of the statute, exempting provisions and forage on hand for home consumption. *Bell v. Fox*, 84 S. W. 384, 37 Tex. Civ. App. 522.

Cotton Neither Provision Nor Forage.—Under Rev. St. 2335, exempting from sale under execution all the provisions and forage on hand for home consumption, cotton is not included as either provisions or forage. *Seligson v. Staples*, 1 White & Civ. Cas. Ct. App. § 1072.

Property in Lieu of "Provisions" or "Forage."—The debtor is not entitled to claim other property in lieu of the "provisions" and "forage." Exempted under Rev. St. § 2335, *Seligson v. Staples*, 1 White & Civ. Cas. Ct. App. § 1072.

Question for Jury.—It is for the jury to determine whether or not provisions seized under execution were held by the judgment debtor for home consumption, and exempt. *Ward v. Gibbs*, 10 Tex. Civ. App. 287, 30 S. W. 1125.

2. Forage for Stock.

Under Rev. St. 1895, art. 2395, subd. 15, exempting from forced sale "all provisions and forage on hand for home consumption," cotton seed suitable for feeding stock is exempt, if the supply reserved be not unreasonably excessive, though it may not, in view of other forage on hand, be in-

dispensable, and therefore an instruction that the forage must be "necessary" for home consumption, to render it exempt, is erroneous. *Stephens v. Hobbs*, 14 Tex. Civ. App. 148, 36 S. W. 287.

Corn for More Hogs than Are Exempt.—Where an execution defendant claims corn levied on to be necessary to him, as the head of a family, for home consumption, and hence exempt, it is not made subject to the execution by the bare fact that he owns 100 hogs, instead of 20, the number exempt from execution. *Burris v. Booth* (Civ. App.) 40 S. W. 186.

3. Crops Growing on Homestead.

See, generally, the titles CROPS, vol. 5, p. 537; HOMESTEAD EXEMPTIONS.

Unpicked cotton grown upon the homestead is exempt from execution. *Coates v. Caldwell*, 71 Tex. 19, 8 S. W. 922; *Eaves v. Williams*, 10 Tex. Civ. App. 423, 31 S. W. 86; *Allen v. Ashburn*, 27 Tex. Civ. App. 239, 65 S. W. 45.

Crops growing upon the homestead do not lose their exempt character by virtue of being severed from the soil and gathered under a writ of garnishment wrongfully levied thereon. *Stagg v. Piland*, 31 Tex. Civ. App. 245, 71 S. W. 762. See, generally, the title GARNISHMENT.

E. CURRENT WAGES FOR PERSONAL SERVICES.

See, generally, the title GARNISHMENT.

1. Definition.

"Current means running, now passing or present in its progress. Wages means a compensation given to a hired person for his services. Current wages are such compensation for personal services as are to be paid periodically, or from time to time, as the services are rendered; as when the services are to be paid for by the hour, day, week, month or year. The services rendered

must be such as that the compensation therefor is measured by the time of the continuance of the service." *Dempsey v. McKennell*, 2 Tex. Civ. App. 284, 285, 23 S. W. 525.

2. What Constitutes Current Wages.

Appellant employed appellee to nurse him through a spell of sickness, and promised to pay him well for his services, but there was no agreement fixing the compensation to be paid, either for the entire service, or by the hour, day, week or month. The mere circumstance that the rate of compensation is not agreed on in advance, ought not to take the case out of the exemption. In nursing, appellee was actually occupied by the day, and his right to compensation accrued as he served, being measured by customary or reasonable rates, and was certainly "compensation to a hired person for services," and current because accruing during the continuance of service, and the amount measured by the time of his employment. *Dempsey v. McKennell*, 2 Tex. Civ. App. 284, 23 S. W. 525.

3. Offset against Current Wages.

See ante, "Liability to Set-Off," I, H.

F. PENSION MONEY.

See generally, the title PENSIONS.

Prob. Act 1870, making property reserved by law from forced sale form no part of the estate of a deceased person where a constituent of the family survives, does not apply to a pension warrant issued to a veteran soldier under Acts 1874, p. 114. *Heard v. Northington*, 49 Tex. 439. See *Hubbard v. Horne*, 24 Tex. 270.

G. PROPERTY INTENDED FOR IMPROVEMENT OF HOMESTEAD.

See, generally, the title HOMESTEAD EXEMPTIONS.

"Lumber to Build Residence Is Exempt from Forced Sale."—"Appellant had purchased a tract of unimproved

land, which he designed to make his homestead. He owned no other land. He purchased lumber with which to erect upon said land a house to reside in. A portion of this lumber he had hauled to a place of safety near the land, and there left it until he could get the balance of his lumber from the mill. Appellee had an execution against appellant, which he caused to be levied upon the lumber which had been hauled and left near appellant's land. Appellant brought this suit to enjoin the sale of the lumber, upon the ground that it was a part of his homestead, and was therefore exempt property. Upon a hearing of the case, the temporary injunction which had previously been granted was dissolved, and it was adjudged that appellant take nothing by his suit, and pay the costs. Held, the lumber bought and intended for erecting a dwelling house, on the site selected by appellant for a homestead, was exempt from forced sale. The petition and evidence showed the time when the land was destined for the future residence of appellant and his family, and the steps taken towards building upon the land, and the reason why he had been prevented from improving and occupying it. The intention to use the lumber and in building a dwelling house upon the land to be occupied by him as his residence is evidenced by unmistakable acts. The fact that, at the time the lumber was levied upon, the lumber was not on his land, would not affect the question. (*Cobbs v. Coleman*, 14 Tex. 594; *Anderson v. McKay*, 30 Tex. 186; *Stone v. Darnell*, 20 Tex. 11; *Franklin v. Coffee*, 18 Tex. 413.)" *McArnis v. McIntyre*, 1 App. Civ. Cases, § 513.

H. INSURANCE MONEY.

See, generally, the title INSURANCE.

Where a will directs payment of testator's debts, and bequeaths a life insurance policy, payable to testator, "his executors, administrators, or as-

signs," to his widow and child, and the estate becomes insolvent during administration, the creditors may resort to the insurance fund for the payment of their claims. *Dulaney v. Walsh* (Civ. App.), 37 S. W. 615, affirmed 38 S. W. 748, 90 Tex. 329.

I. PROCEEDS OF EXEMPT PROPERTY.

A judgment for the sale of property exempt is itself exempt, and can not be subjected to an execution against the judgment creditor. *Howard v. Tandy*, 79 Tex. 450, 15 S. W. 578.

Where the owner of exempt property seized under execution, is not able to give bond and avail himself of the more expeditious remedy of replevin, has act in suing for damages and obtaining a judgment does not deprive him of his right to exemption, but such right of exemption attaches to his recovery of damages. *Howard v. Tandy*, 79 Tex. 450.

A final judgment for conversion is subject to garnishment in a suit in a different court, where it appears that, although some of the property converted was exempt from forced sale, all of it was not, there being nothing to show how much of the judgment proceeded from exempt property. *Burke v. Hance*, 76 Tex. 76, 13 S. W. 163.

Insurance Money.—Money due from a policy of fire insurance, taken by a debtor for his own protection, for loss of personal property which is exempt from execution, is not subject to garnishment, even where the creditor has a lien on the property destroyed. *Ward v. Goggan*, 4 Tex. Civ. App. 274, 23 S. W. 479.

J. TOOLS, APPARATUS AND BOOKS OF TRADE OR PROFESSION.

1. Definitions.

"Mr. Webster gives the following definition of 'apparatus': 'Things provided as a means to some end, as the

tools of an artisan, the furniture of a house, instruments of war. In more technical language, a complete set of instruments or utensils for performing any operation or experiment.'" *Tucker v. Napier*, 1 App. Civ. Cases, §§ 670, 672.

"The word profession, in its larger and broader meaning, is defined by Webster to be the 'occupation, if not mechanical or agricultural, or the like, to whatever one devotes one's self; the business which one professes to understand and follow for subsistence; calling, vocation, employment.' Black's Law Dic., 951, defines it as a calling, vocation known employment. In a restricted sense it only applies to the learned professions." *Betz v. Maier*, 12 Tex. Civ. App. 219, 220, 33 S. W. 710; *Geise v. Pennsylvania Fire Ins. Co.* (Civ. App.), 107 S. W. 555.

"Trade."—The word "trade" embraces within its meaning commercial traffic, and it also has a restricted significance which applies to mechanical pursuits, but in its broad and general sense it covers and embraces all occupations and businesses, with the possible exception of the learned professions and those that pertain to liberal arts and the pursuit of agriculture. Black's Law Dic., *Queen Ins. Co. v. State*, 86 Tex. 250, 24 S. W. 397, reversing 22 S. W. 1048; *Geise v. Pennsylvania Fire Ins. Co.* (Civ. App.), 107 S. W. 555; *Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710.

2. Nature of Term "Apparatus."

"The word 'apparatus,' is strikingly apt, a generic term of the most comprehensive signification." *Green v. Raymond*, 58 Tex. 80, 83.

"In the case of *Willis & Bro. v. Morris*, 66 Tex. 628, 634, 1 S. W. 799, the present chief justice of the supreme court says, 'Expensive and complicated machinery propelled by steam power is not exempt' as a tool of trade, but that the word apparatus may take a wider range and may em-

brace such minor machinery as may be operated by hand." *Betz v. Maier*, 12 Tex. Civ. App. 219, 221, 33 S. W. 710.

3. What Business the Term "Trade" Includes.

Insurance Agent.—The words "trade or profession" (Sayles' Civ. St. art. 2337) include the business of an insurance agent, so as to entitle him to the exemption therein provided for. *Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710.

The business of saddle and harness making is one trade, within the meaning of the statute exempting all tools belonging to any trade from sale on execution. *Nichols v. Porter*, 7 Tex. Civ. App. 302, 26 S. W. 859.

4. Number of Trades Limited to Debtor.

The statute exempting the tools of one engaged in trade does not strictly limit the exemption to what is commonly pursued as a single trade, and it would seem that one who actually engages in several trades to earn support for himself and family may hold as exempt the necessary tools and apparatus for carrying on all of them. *A. C. Nichols & Co. v. Porter*, 7 Tex. Civ. App. 302, 26 S. W. 859. See, also, *Green v. Raymond*, 58 Tex. 80; *Cone v. Lewis*, 64 Tex. 331; *Alsup v. Jordan*, 69 Tex. 300, 6 S. W. 831.

"Mr. Thompson, in his work on **Homesteads and Exemptions**, § 759, says: 'Under a statute exempting simply the tools of a mechanic's trade, it has been held that there may be kindred employments which may be pursued by the same person, as the miscellaneous work of a general machinist, bell hanger, screw cutter, and the like, in which case all his tools necessary to carry on these trades will be protected. Thus the fact that a debtor carried on two trades at the same time, as that of a bookbinder and that of a printer, does not deprive him of the exemption

of his tools in either trade, if they were necessary and the latter occupation requisite for the procurement of subsistence.'" *Nichols v. Porter*, 7 Tex. Civ. App. 302, 26 S. W. 859, affirmed in 93 Tex. 669, no op.

5. What the Word "Trade" or "Apparatus" as Used in Statute Includes.

a. In General.

The expression "tools of trade" does not include minor machinery, although operated by hand. *Willis v. Morris*, 66 Tex. 628, 1 S. W. 799.

"**Apparatus**," as used in a statute of exemptions, may be applied to minor machinery operated by hand. *Willis v. Morris*, 66 Tex. 628, 1 S. W. 799.

A soda-water fountain used in a confectionery store is not included in Rev. St. arts. 2395, 2397, exempting a tool or apparatus belonging to a trade or profession from execution. *McCord-Collins Co. v. Lazarus* (Civ. App.), 50 S. W. 1048. See, also, *Smith v. Horton*, 19 Tex. Civ. App. 28, 46 S. W. 402, affirmed in 92 Tex. 21; *Henry v. McLean*, 1 App. Civ. Cases, § 1079.

An iron safe used by an insurance agent to store his policies, etc., is exempt from execution as a "tool" or "apparatus." Sayles' Civ. St. art. 2337. *Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710.

Mill and gin machinery are not exempt as tools of trade. *Cullers & Henry v. James*, 66 Tex. 494, 1 S. W. 314.

Bicycle.—Rev. St. 1895, art. 2397, provides that there shall be exempt from execution, to a person not a constituent of a family, among other things, "all tools, apparatus, and books belonging to any trade or profession." Held, that a bicycle was not a "tool or apparatus" belonging to the profession of an architect, and was not exempt. *Smith v. Horton*, 46 S. W. 401, 19 Tex. Civ. App. 28. See ante, "Horses," IV, C, 1.

Typewriter.—A typewriter is not exempt as a tool or apparatus belonging to the profession of a physician, though he uses it in correspondence and advertising his business. *Massie v. Atchley*, 66 S. W. 582, 28 Tex. Civ. App. 114.

Furniture.—The statute exempting the "tools, implements and fixtures" necessary to carry on a trade or profession includes furniture reasonable in amount and useful under the circumstances of the particular case. *Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710.

Articles Used in Restaurant.—Household and kitchen furniture used in hotels and restaurants is not exempt as tools and apparatus. *Frank v. Bean*, 3 Willson, Civ. Cas. Ct. App. § 211.

Even if keeping a restaurant is a trade, shelving, safes, furniture, tableware, and kitchen utensils used in a restaurant are not "apparatus," within Rev. St. 1895, art. 2395, subd. 5, exempting to every family apparatus belonging to any trade. Judgment, *Geise v. Pennsylvania Fire Ins. Co.* (Civ. App.), 107 S. W. 555, reversed. *Sim-mang v. Pennsylvania Fire Ins. Co.*, 102 Tex. 39, 112 S. W. 1044. See ante, "Household and Kitchen Furniture," IV, B.

Buggy and Horses.—A single man, who is a land, loan, and insurance agent, can not claim a buggy and harness, which he uses in such business, as exempt from execution, as tools and apparatus belonging to his trade and profession. *Cates v. McClure*, 66 S. W. 224, 27 Tex. Civ. App. 459. See ante, "Horses and Wagons," IV, C.

b. Printing Press and Material.

Under 2 Pasch. Dig. art. 5487, exempting from forced sale "all tools and apparatus belonging to any trade or profession," the printing press, type, and cases used in a printing office by the editor and publisher of a newspaper are exempt. *Green v. Raymond*, 58 Tex. 80.

Two printing presses and a paper cutter of a job printer, a married man and head of a family, which were necessary tools in his business, were exempt from forced sale. *St. Louis Type Foundry v. Taylor* (Civ. App.), 35 S. W. 691, 692.

In *Green v. Raymond*, 58 Tex. 80, 83, the court says: "The settled policy has been to make liberal exemptions of property from forced sale in this state. * * * It has not been the policy of the judicial department to restrict this liberalizing tendency of the law-making power by a strict construction of these laws; on the contrary, they have been liberally construed, with a view to effect these objects and to promote justice. The term trade and especially the word apparatus is strikingly apt—a generic term of the most comprehensive signification. The trade or profession of Raymond was that of editor and publisher of a weekly newspaper. What tools and apparatus belonged to this trade or profession? It is the printing press, type, cases, etc., not alone the pair of scissors, bottle of ink, goose quill pen of the editorial department. The apparatus belonging to the trade of a publisher must of necessity include the press, type, cases, etc., which are essential to the conducting of that business. The blacksmith could as well dispense with his anvil and hammer and the shoemaker with his awl and last, the farmer with his plow, as could the publisher dispense with his press, etc.; and yet all these are exempt as belonging to these respective trades." *Betz v. Maier*, 12 Tex. Civ. App. 219, 220, 33 S. W. 710.

6. Necessary Tools.

Merchant's books, iron chests, and office furniture, are exempt, as being the necessary apparatus of his trade. *Choate v. Redding*, 18 Tex. 579, 581.

Two barber chairs, a mirror in front of and a table accompanying each, used constantly for five years in carrying on his trade by a barber, a citizen of the state and head of a family, are

exempt from execution, where he is dependent on his trade for support, and has kept another barber employed to assist him. *Fore v. Cooper* (Civ. App.), 34 S. W. 341. See, also, *Nichols v. Porter*, 7 Tex. Civ. App. 302, 26 S. W. 859, affirmed in 93 Tex. 669, no op.; *St. Louis Type Foundry v. International Live Stock Printing, etc., Co.*, 74 Tex. 651, 653, 12 S. W. 842; *Green v. Raymond*, 58 Tex. 80, 83; *Mueller v. Richardson*, 82 Tex. 361, 18 S. W. 693.

7. Law Library.

The 1st section of the act of the 26th January, 1839, to exempt certain property from execution, exempts, among other things, the "books belonging to the trade or profession of any citizen." Pas. Dig., art. 3798, note 885. And the 45th section of the act about the estates of deceased persons makes it the duty of the county court to set apart, for the use and benefit of the widow and children of the deceased, all such property as may be exempted from execution or forced sale by the constitution and laws of the state, etc. Pas. Dig., Art. 1305, note 481; *Fowler v. Gilmore*, 30 Tex. 432.

Under the act of 1839 (Pasch. Dig. art. 3798), exempting the books, etc., belonging to the trade or profession of any citizen from execution, the law library of a deceased practicing attorney at law is not liable for the debts of the deceased. *Fowler v. Gilmore*, 30 Tex. 432.

Table, Desk, Chairs, etc.—"A lawyer's books are exempt, but the statute does not in terms exempt to him a table, desk and chair or cases in which to place his books; but who will doubt that in this state the exemption does extend to these things? His books would be of little service, and the purpose of the law in making the exemption of them to him would be defeated, if the exemption did not include these incidents, in order to make useful the thing exempted."

7 Tex—61

Betz v. Maier, 12 Tex. Civ. App. 219, 221, 33 S. W. 710.

If decedent permanently abandoned the law profession, the exemption of his law office and law library thereby ceased and they can not be included as exempt property of his estate. *Cooper v. Pierce*, 74 Tex. 526, 12 S. W. 211.

8. Farming Implements.

A reaper and mower is exempt from forced sale as an implement of husbandry. *Henry v. McLean*, 1 White & W. Civ. Cas. Ct. App. § 1079.

It seems to be recognized that a hay press and reaper are exempt from execution as implements of husbandry owned by a farmer who had ceased to use them, save by his tenants, to whom his farm was leased, *quære*. *Koyer v. White*, 6 Tex. Civ. App. 381, 25 S. W. 46.

"An ordinary scythe blade or grass blade, used by a person whose occupation is that of a grass mower, would be exempt from forced sale for his debts." *Tucker v. Napier*, 1 App. Civ. Cases, §§ 670, 672.

But a mowing machine used by one whose only business is that of a mower of hay is not exempt from execution under Pasch. Dig. art. 6834, providing that all implements of husbandry, and all tools and apparatus belonging to any trade or profession, shall be exempt from execution. *Tucker v. Napier*, 1 White & W. Civ. Cas. Ct. App. §§ 670, 672.

Question for Jury.—The question whether a given apparatus is an implement of husbandry, within the meaning of the exemption law, is one for the jury on all the facts and under proper instructions of the court. *Henry v. McLean*, 1 White & W. Civ. Cas. Ct. App. 1079.

K. PARTNERSHIP PROPERTY.

See, generally, the title PARTNERSHIP.

Under Rev. St. art. 2337, reserving to persons not constituents of a family

exempt from attachment, etc., "all tools, apparatus, and books belonging to any trade or profession," protects such property when held and owned by partners. *St. Louis Type Foundry v. International Live Stock, Printing & Pub. Co.*, 74 Tex. 651, 12 S. W. 842.

The press, type and material of a printing office is exempt from forced sale, although the property of a partnership. *St. Louis Type Foundry v. International Livestock Printing, etc., Co.*, 74 Tex. 651, 653, 12 S. W. 842; *Betz v. Maier*, 12 Tex. Civ. App. 219, 33 S. W. 710.

"It often happens, says Mr. Freeman, 'that property designated as exempt by statute belongs to two or more persons, either as cotenants or partners. The question then arises whether this property must be treated as exempt to the same extent as if held in severalty. The answers are irreconcilable, and the opposing opinions are both supported by respectable authorities. On the one hand it is insisted that the terms of the exemption statutes indicate that estates in severalty were meant. On the other hand, cotenants and partners in a majority of the states have been placed on the same footing, and both have been given the full benefit of the exemption laws. This latter position, even where the words of the statute do not clearly indicate an intent to deal with undivided interests, is made tenable by the general rule that these statutes must be liberally construed, so as to promote the policy on which they are based, and to accomplish the purpose to which they are directed. Prominent among these purposes is the protection of the poor by allowing them the implements of their trade, and the other means essential to enable them to gain a livelihood.' 1 *Freem. on Ex.*, § 221." *St. Louis Type Foundry v. International Livestock Printing, etc., Co.*, 74 Tex. 651, 652, 12 S. W. 842.

Where a partnership had no surplus of assets above liabilities, a member could not, as against creditors, withdraw, and appropriate a portion of the assets, consisting of household goods, and claim them as exempt from execution. *B. C. Evans Co. v. Kingsbury* (Civ. App.), 25 S. W. 729.

L. TRUST PROPERTY.

See the titles EXECUTORS AND ADMINISTRATORS, ante, p. 364; TRUSTS AND TRUSTEES.

Slaves purchased by an administrator with the funds of his intestate are the property of the estate held by him in trust for the distributees and heirs of the estate, and this too whether he be rightfully administrator or not and such property is not subject to execution. *Parker v. Portis*, 14 Tex. 166.

V. Protection and Enforcement of Right.

See ante, "Liabilities Enforceable against Exemption Right," I, G; "Liability to Set-Off," I, H.

A. WHAT CONSTITUTES INFRINGEMENT OF RIGHT AND PERSONS LIABLE.

See post, "Remedies for Infringement of Right," V, C.

Where damage results in wrongful seizure under judicial process of property exempt under the law, not only the officer making the seizure but those in whose favor the seizure is made, as well as those who direct it are liable, and where the levy and seizure are oppressive and the conduct malicious toward the owner of the exempt property, exemplary damages may be recovered against not only the officer, but also against any other person who knowingly encouraged or directed the malicious act. *Brown v. Bridges*, 70 Tex. 661, 8 S. W. 502.

Where a writ of attachment is levied on exempt property by order of the attachment plaintiff, plaintiff is liable.

Faroux v. Cornwell, 90 S. W. 537, 40 Tex. Civ. App. 529.

B. CLAIMING AND SELECTING EXEMPTIONS.

1. Claiming Exemptions.

a. Necessity for.

The provisions of Rev. St. 1895, art. 3251, giving a landlord a preference lien on the tenant's property that such statute shall not affect his right to statutory exemptions from forced sale, does not invalidate a judgment foreclosing such a lien on exempt property purchased by one pendente lite, where both he and the tenant omitted to claim such exemptions. *York v. Carlisle*, 46 S. W. 257, 19 Tex. Civ. App. 269.

b. Time of.

If an estate is solvent, it is too late for the widow to make application for an allowance, in lieu of the property not subject to forced sale, after the estate is ready for partition and distribution among the heirs. *Little v. Birdwell*, 27 Tex. 688.

This is not by reason of any supposed forfeiture incurred by neglect or delay but because the time has elapsed during which the statute designs to secure such property to the widow and children, and an allowance of it subsequent to that time would be in contravention of the provision which directs that such property shall be included in the partition and distribution of the estate. *Little v. Birdwell*, 27 Tex. 688, 689.

c. Motive in Making.

A debtor's motives in making a claim for exemption are immaterial; the claim being merely as to whether the property is within the exemption. *Anderson v. Galbreath*, 1 White & W. Civ. Cas. Ct. App. § 951.

d. Insufficient Affidavit.

A horse, together with other property, was attached, and the debtor, in his affidavit of exemptions, claimed the horse as exempt, but did not state that

the debtor did not own other horses than the one seized. Held, that the affidavit was not sufficient to show that the horse was exempt under the statute allowing two horses to each family. *Tucker v. Napier*, 1 White & W. Civ. Cas. Ct. App. § 670.

2. Selecting Exemptions.

a. Selection a Personal Privilege.

An execution debtor can select what of his property he wishes to be exempted under the law, provided it be done in good faith and without attempting thereby to cover up other property from the officer seeking a levy. *Fuller v. Sparks*, 39 Tex. 136.

A debtor owning a farm on which he raises grain may select as exempt from execution a reasonable amount in quantity of the grass or kinds of grains that he desires, and a creditor is not entitled to make selection for him. *Anderson v. Galbreath*, 1 White & W. Civ. Cas. Ct. App. § 951.

Owner of horses seized under execution has right, in action brought by him for damages for seizure and conversion of such horses, to designate which two of four horses levied upon are claimed as exempt property. *Yancy v. Felker*, 3 App. Civ. Cases, § 249.

b. Ownership.

Under Rev. St. 1895, art. 2395, subd. 9, exempting two horses to every family, such horses need not be the property of the head of the family, but may be the separate property of either spouse, or community property. *McClelland v. Barnard*, 81 S. W. 591, 36 Tex. Civ. App. 118.

Where more than two horses owned by either husband or wife, or which were their community property, were in the possession of the husband, he was entitled to select, and by appropriate use claim, such two of the horses as he might desire as exempt under Rev. St. 1895, art. 2395, subd. 9, exempting two horses from execution to

each family. *McClelland v. Barnard*, 81 S. W. 591, 36 Tex. Civ. App. 118.

Where a husband had four horses in his possession, two of which were the separate property of his wife, and the other two their community property, or his separate property, he was entitled to select, for the purpose of exemption, under Rev. St. 1895, art. 2395, subd. 9, exempting two horses to every family, the two which were not the separate property of the wife. *McClelland v. Barnard*, 81 S. W. 591, 36 Tex. Civ. App. 118.

c. Time for Making.

Where an officer levying an attachment on property a portion of which may be exempt does not request defendant to select his exemptions, defendant may make the selection at the trial, under Rev. St. art. 2427, authorizing it to be made within a reasonable time after request so to do by the officer making the levy. *Hall v. Miller*, 51 S. W. 36, 21 Tex. Civ. App. 336.

C. REMEDIES FOR INFRINGEMENT OF RIGHT.

1. Injunction.

See, generally, the title INJUNCTIONS.

An injunction is properly issued to prohibit the sale under execution of a carriage, it being exempt under the statute. *Nichols v. Claiborne*, 39 Tex. 363.

An injunction is properly issued to prevent the sale under an execution issued on the judgment of a justice of the peace of property exempt by law from a forced sale; and jurisdiction, once having attached, should be exercised to finally determine the rights involved under the issues made. *Stein v. Frieberg*, 64 Tex. 271.

2. Necessity for Demand and Proof.

Demand.—A party whose exempt property has been seized under execution may recover in conversion without making a demand and receiving a

refusal. *Ross v. McGuffin*, 2 Willson, Civ. Cas. Ct. App. § 460.

Proof.—A party claiming an exemption from execution must prove it. *Tucker v. Napier*, 1 White & W., Civ. Cas. Ct. App. § 670.

3. Parties.

See, generally, the title PARTIES.

Husband and wife may sue jointly for damages for seizure of exempt property. *Cunningham v. Coyle*, 2 Willson, Civ. Cas. Ct. App. § 422; *Neeper v. Irons*, 3 Willson, Civ. Cas. Ct. App. § 185.

4. Defenses.

Under Rev. St. art. 2335, exempting all provisions and forage on hand for home consumption, a debtor owning a farm and raising grain thereon may select such grain as he will use in reasonable amount, so that it is no defense to a charge of seizing all his wheat that there was left a growing crop of corn or oats in stack. *Anderson v. Larremore*, 1 White & W. Civ. Cas. Ct. App. § 951.

Removal from State.—A right of action for seizure of exempt property is not lost by the owner's removing from the state. *Neeper v. Irons*, 3 Willson, Civ. Cas. Ct. App. § 182.

Where buildings are erected by a manufacturing firm, on land of no material value for any other purpose, and suitable machinery attached thereto is placed in the buildings, with a view to carrying on a permanent business, the machinery becomes part of the freehold; and in an action by the owner to recover the land, and damages for wrongful seizure, against his creditor, who, with the knowledge that the property was claimed to be exempt, levied execution on it, bought it in at the sale, and entered into possession, there can be no recovery for the value of such property, buildings, and machinery, where, after such entry, it was destroyed by fire, without any fault on the part of the creditor, since the wrongful seizure is not the proxi-

mate cause of the loss. *Willis v. Morris*, 1 S. W. 799, 66 Tex. 628.

5. Questions for Jury.

As to whether a given apparatus is an implement of husbandry being a question for jury, see ante, "Farming Implements," IV, J, 8.

As to whether provisions were held for home consumption being a question for jury, see ante, "Provisions in General," IV, D, 1.

6. Pleading.

See, generally, the title PLEADING.

Necessary Allegations.—Where the property received by the surviving wife from her husband's estate is exempt, in an action against her on a community debt such matter, being purely defensive, must be alleged and proven. *Cockrum v. McCracken*, 1 White & W. Civ. Cas. Ct. App. § 66. See *Ross v. O'Neil*, 45 Tex. 599. See, also, the title HUSBAND AND WIFE.

In an action for the seizure and sale under execution of corn claimed by plaintiff to be exempt, the allegations of the complaint that he was the head of a family consisting of a wife and six children, and that such corn was all he owned, and was necessary for home consumption and the maintenance of himself and family, were sufficient to justify the admission of evidence that he was a farmer, and owned 2 horses, 1 mule, 100 hogs, 3 cows, and 3 calves, to be fed on such corn from the date of the levy until the next corn-gathering time. *Burris v. Booth* (Civ. App.), 40 S. W. 186.

A petition for an injunction to restrain the sheriff from proceeding under a judgment and execution obtained against the petitioner, alleging that all his property consists of 300 bushels of corn, which is insufficient to furnish his family with bread, meat, and such other articles of food as will be necessary, will be denied, because the petition does not state the number, ages, etc., of the members of the family. *Swisher v. Hancock*, 31 Tex. 262.

A petition to enjoin the sale of property levied on, which alleges that it is exempt as implements of husbandry, is insufficient in failing to allege that plaintiff was either the head of a family or member of a family entitled to exemptions under Acts 12th Leg., p. 427. *Attoway v. Still*, 2 Posey, Unrep. Cas. 697.

Plea in Abatement.—A daughter claimed a piano levied on as the property of her father to satisfy an execution against him and filed her bond and affidavit for trial of right of property, the piano being held by a railroad company as the property of the father. An issue was made up, the claimant asserting that the property was her own. Held, that a plea filed six months later, setting up that the piano, if the property of her father, was exempt as part of his household furniture, was not a plea in abatement, since it went to the merits of the action. *Connor v. Hawkins*, 64 Tex. 544. See, generally, the title ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 1.

7. Evidence.

See, generally, the title EVIDENCE, vol. 6, p. 1098.

Where Issue Is to an Illegal Levy.—Evidence to justify the suing out of the attachment is inadmissible where the issue is as to an illegal levy on exempt property. *Brown v. Bridges*, 70 Tex. 661, 8 S. W. 502.

In an action for damages for levying execution on and selling property, plaintiff's testimony that it would take \$100 to recompense him was incompetent, as he should have shown the circumstances, and left the jury to ascertain the amount, if any, of the punitive damages. *Morris v. Williford* (Civ. App.), 70 S. W. 228.

In an action for damages on account of execution sale of exempt property, the exclusion of evidence of consent by plaintiff's attorney to the sale is not error where defendants had been informed before the sale

that plaintiff was unwilling that the property should be sold. *Alsop v. Jordan*, 69 Tex. 300, 6 S. W. 831.

Evidence explaining why defendant failed to draw a balance in the hands of his employer was material on the issue as to whether defendant knowingly and voluntarily allowed his wages to remain undrawn after they were payable. *Childress v. Franks* (Civ. App.), 44 S. W. 868.

8. Damages.

See, generally, the title DAMAGES, vol. 5, p. 824.

Measure in General.—Where a wrongful levy was made on exempt horses, the measure of the owner's damages was the value of the use or hire of the horses during the time the owner was deprived of them provided the period of such detention was not long. *Steel v. Metcalf*, 4 Tex. Civ. App. 313, 23 S. W. 474.

One whose exempt property has been seized under execution may recover value thereof from officer as measure of damages. *Cole v. Crawford*, 69 Tex. 124, 127, 5 S. W. 646.

Where, in an action for damages for levying execution on and selling exempt property, there are no special damages alleged, the measure of damages is the value of the property, with interest thereon from the date of the levy. *Morris v. Williford* (Civ. App.), 70 S. W. 228.

In an action for levying on exempt property, the value of the property, with interest, is the limit of damages. *Low v. Tandy*, 70 Tex. 745, 8 S. W. 620.

Mental distress is not an element of actual damage for seizure and sale of property exempt from execution. *Morris v. Williford* (Civ. App.), 70 S. W. 228. See, also, *Crawford v. Doggett*, 82 Tex. 139, 17 S. W. 929; *Trawick v. Martin-Brown Co.*, 79 Tex. 460, 14 S. W. 564; *Evans Co. v. Kingsberry* (Civ. App.), 25 S. W. 729.

9. Verdict and Judgment.

See, generally, the titles JUDGMENTS AND DECREES; VERDICT.

It was error to direct verdict for plaintiff on the ground that the two horses seized by defendant were exempt, it appearing that four horses belonged to plaintiff's family, and the evidence being conflicting as to the truth of his claim that the other two belonged to his children. *Pardue v. Recer* (Civ. App.), 46 S. W. 112.

Allowing Recoupment.—It was error, in rendering judgment against defendant for the value of an exempt article sold by him under execution, to deduct from its actual value the sum realized at the sale and applied to the payment of the debt for which the execution issued. *Cone v. Lewis*, 64 Tex. 331. See, generally, the title SET-OFF, RECOUPMENT, RECONVENTION AND COUNTERCLAIM.

A judgment foreclosing a landlord's lien on certain chattels is conclusive as to a claim that such chattels are exempt in a subsequent suit by the debtor to restrain a sale of them on execution under such judgment. *Hammer v. Woods*, 6 Tex. Civ. App. 179, 24 S. W. 942.

Exercise.

Of jurisdiction by courts, see the title COURTS, vol. 5, p. 161. Of power of eminent domain, see the title EMINENT DOMAIN, vol. 6, p. 849. Of power of sale, see the titles MORTGAGES AND DEEDS OF TRUST; POWERS. Of power conferred on cities, see the title MUNICIPAL CORPORATIONS. Of police power, see the title CONSTITUTIONAL LAW, vol. 4, p. 424.

Exhaustion.

Of personalty before levy on realty, see the title EXECUTIONS, ante, p. 229. .

Exhibitor.

Liability of state fair corporation for negligence of, see the title AGRICULTURE, vol. 1, p. 173.

EXHIBITS.

CROSS REFERENCES.

See the title PLEADING, and references there given.

Use and Purpose of Exhibits.—The use and purpose of an exhibit is to set forth, in detail, that which is alleged in more general terms, or to embody in the record such facts as will, in legal effect, amount to the facts as alleged in the petition, or to aid the allegations in fixing more accurately and definitely their import; but not to supply the omission or allegations necessary to present a good cause of action. *Burks v. Watson*, 48 Tex. 107; *Macdonell v. I. & G. N. R. Co.*, 60 Tex. 590; *Pool v. Sanford*, 52 Tex. 621.

What May Be Exhibited—Copy of Deed.—A copy of a deed may be attached to the statement of facts as an exhibit in order to make the contents thereof a part of the record on appeal. *Leon & H. Blum Land Co. v. Dunlap*, 4 Tex. Civ. App. 315, 23 S. W. 473.

Custody of Exhibits.—A clerk and not a judge has legal custody of county records of deeds used as exhibits on trial of land case. *Collins v. Box*, 40 Tex. 190, 198.

Necessity for Attaching.—To make exhibit to pleading, instrument or copy thereof must be attached to it or filed with it. *Blum v. Moore*, 91 Tex. 273, 277, 42 S. W. 856, affirming 40 S. W. 511.

A written instrument not declared upon as the foundation of the action or defense, which is sought to be in-

troduced as evidence, must be filed with the papers of the case three days before the trial. This requirement is complied with if the instrument in question was made an exhibit to the original petition. *Watson v. Blymer Mfg. Co.*, 66 Tex. 558, 2 S. W. 353.

Annexing Unnecessary Exhibits.—Improperly annexing documents as exhibits to a petition in violation of district court rule 19, does not of itself operate to reverse a judgment, particularly where the petition is complete without reference to such documents, and does not depend upon them. *Whitley v. General Elect. Co.*, 18 Tex. Civ. App. 674, 45 S. W. 959, affirmed in 93 Tex. 723, no op.

Useless Exhibit.—The setting out at length in the pleadings of either party of written instruments or documents about the construction of which no question is raised is a useless encumbrance of the record and should be discouraged. *Holloway v. McIlhenney Co.*, 77 Tex. 657, 14 S. W. 240.

Right to Waive Filing Exhibits.—Filing exhibits in a cause may be waived by agreement of council. *Jenkins v. Adams*, 71 Tex. 1, 8 S. W. 603. See *Williams v. Huling*, 43 Tex. 113, 120.

Effect of Annexing or Attaching Exhibits—Need Not Be Described by Right Name.—Copy of instrument at-

tached to pleading and made part of it, need not be described by its right name. *English v. Helms*, 4 Tex. 228, 229.

Mere misnomer of instrument sued on is immaterial if made part of petition or correctly described. *Salinas v. Wright*, 11 Tex. 572, 577.

Where the note sued on was attached to the original petition, and in an amended petition, on which the case was tried, was referred to as "attached thereto," though not in fact attached, the mistake in describing the note as above stated could not be a ground of surprise to the defendant. *Gunter v. Lillard*, 1 Tex. Civ. App. 325, 21 S. W. 118. See *Wiebusch v. Taylor*, 64 Tex. 53, 55.

Description of County Warrants.

In an action on a long list of county warrants, it is proper instead of re-describing warrants fully in petition, to describe them in an exhibit in which are set forth the date of each claim, name of each payee and amount of each claim. *Sherwood v. La Salle County (Civ. App.)*, 26 S. W. 650, 651.

Exhibits May Be Read to Jury before Answer of Defendant.—Where the instrument sued on is attached to and made a part of the petition, it may be read to the jury as a part of the petition before the answer of the defendant has been read. *Peters v. Crittenden*, 8 Tex. 131.

Reference Which Petition Should Make in Regard to Exhibits.—A petition should refer to the exhibits only to aid, elucidate and explain the specific allegations made in the pleadings. *Miles v. Mays*, 4 App. Civ. Cases, § 110, 16 S. W. 540; *Macdonell v. I. & G. N. R. Co.*, 60 Tex. 590; *Wynne v. State Nat. Bank*, 82 Tex. 378, 382, 17 S. W. 918; *Milliken v. Callahan Co.*, 69 Tex. 205, 6 S. W. 681; *Burks v. Watson*, 48 Tex. 107, 114.

When Verity Alleged.—When a paper is made an exhibit in a plea, and its verity is alleged, it must be taken

in aid and explanation of the averments in the pleading which refer to it. *Milliken v. Callahan Co.*, 69 Tex. 205, 6 S. W. 681.

Contents of Petition Independent of Exhibits.—A petition should contain independent of exhibits all averments and allegations necessary to present a good cause of action. *Macdonell v. I. & G. N. R. Co.*, 60 Tex. 590; *Burks v. Watson*, 48 Tex. 107; *Miles v. Mays*, 4 App. Civ. Cases, § 110, 16 S. W. 540; *Guadalupe County v. Johnston*, 1 Tex. Civ. App. 713, 20 S. W. 833; *Wynne v. State Nat. Bank*, 82 Tex. 378, 382, 17 S. W. 918; *Pool v. Sanford*, 52 Tex. 621, 635.

The legal import of the transactions must be stated, and the undertakings imposed, as well as the failure by defendant to perform them. An exhibit showing the terms of a contract can not supply the absence of allegations in the petition of the legal effect of such contract. *Guadalupe County v. Johnston*, 1 Tex. Civ. App. 713, 20 S. W. 833.

An account between merchant and merchant attached to a petition, and referred to as an exhibit by appropriate allegations, regarding the sale and delivery of goods, which contained the following item, "1873, August 30. To merchandise, \$114.50," is sufficiently certain and in compliance with arts. 4611, 4612, Pasch. Dig. *Hays v. Samuels*, 55 Tex. 560.

In a suit for damages for goods, etc., destroyed, the petition showed "that plaintiff owned and had in his possession the goods, wares, and merchandise, and the household goods described in exhibit A, attached to, and made a part of the petition." It was further alleged that the water destroyed "all the goods, wares, and merchandise, and household effects in said exhibit." The exhibit contained an item, "\$269, money of Mrs. Fannie Emanuel." Held, the court did not err in admitting testimony to said item.

Austin v. Emanuel, 74 Tex. 621, 12 S. W. 318.

Where an exhibit is used as an adjunct to a pleading, the pleader, by virtue of district court rule No. 19, is not thereby relieved from making the necessary allegations of what the exhibit may be the evidence in whole or in part. *Borden v. Houston*, 26 Tex. Civ. App. 29, 62 S. W. 426.

In a suit to enjoin as a threatened nuisance the location of a public cemetery adjacent to plaintiffs' lands, the attaching of a map to the petition as an exhibit does not relieve the pleader from the necessity of alleging the facts to which the exhibit relates, even if a map is an exhibit authorized by rule 19 (67 S. W. XXI) for the government of the district courts. *Elliott v. Ferguson*, 37 Tex. Civ. App. 40, 83 S. W. 56.

An exhibit attached to a petition claiming a mechanic's lien, which exhibit upon its face shows that it was recorded, and that a copy thereof was served upon defendant as required to fix the lien, will not relieve the pleader from the necessity of averring those facts. *Pool v. Sanford*, 52 Tex. 621.

Variance.—See the title VARIANCE.

Where the instrument sued on is made an exhibit and filed as a part of the petition, it can not be excluded on the ground of variance. *Greenwood v. Anderson*, 8 Tex. 225; *Peters v. Crittenden*, 8 Tex. 131; *Longley v. Caruthers*, 64 Tex. 287.

Exhibit Will Control.—"This is upon the ground that the instrument thus made a part of the petition, and filed with it for the inspection of the defendant, must control and cure any misdescription of it in the body of the petition." *Longley v. Caruthers*, 64 Tex. 287, 288. See, also, *Pryon v. Grinder*, 25 Tex. 159; *Spencer v. McCarty*, 46 Tex. 213.

When an exhibit is referred to in pleading and its inspection shows facts

contradictory of the allegations in the plea, the exhibit in considering the plea on demurrer, and not the allegations found in the plea, must control. *Freiberg, Kline & Co. v. Magale*, 70 Tex. 116, 7 S. W. 684.

When a chattel mortgage is referred to in a plea and attached as an exhibit to verify the allegations as to its contents, the fact that the exhibit does not show by indorsement that it was filed for registration with the clerk, is immaterial on demurrer, which raises the question of its proper filing with the clerk, if the petition by distinct averment alleges such filing. *Freiberg v. Magale*, 70 Tex. 116, 7 S. W. 684.

If an exhibit is contradictory of, or not correspondent in legal effect to, the allegations concerning it, then the allegations stand unsupported and unaided by it, and the issues must be formed and tried on the allegations as made in the petition. *Burks v. Watson*, 48 Tex. 107, 115.

Where the instrument set out in the original petition is evidently a promissory note, in framing the petition the pleader seems to have misconceived its import, but he exhibits the instrument to the court and makes it a part of his petition. Being thus made a party of the petition, the court will give the instrument the legal effect to which it is entitled, notwithstanding it may have been misconceived by the pleader, if the pleading be intelligible and consistent and enough be stated to show a cause of action. *Beal v. Alexander*, 6 Tex. 531, 537.

A contract being made a part of a petition as an exhibit, will be looked to and will control contradictory allegations in the petition. *Lester v. New York Life Ins. Co.*, 84 Tex. 87, 19 S. W. 356.

Suit was brought on appellant's bond, made by reference a part of the amended original petition, marked "Ex. A. herewith filed." The file mark of the amended petition was November

7, 1878. In the transcript the copy of a bond is found in all respects answering the description of the one sued on except the file mark, which was September 14, 1878, the date stated by appellant in his brief as the date when the original petition was filed, the same having been omitted from the transcript. The tenor and effect of the bond was not set forth in the petition in terms. Held, that the bond appearing in the record must be treated as the exhibit referred to in the amended petition, and that though the petition was defective in failing to allege the tenor and effect of the bond, it was sufficient to allow of its admission in evidence, there being no special exception raising the question of its sufficiency relied on at the trial. *Peveler v. Peveler*, 54 Tex. 53. See the title EXCEPTIONS AND OBJECTIONS, ante, p. 2.

In action on an account which is attached to and made a part of petition and which shows the date on which money was due, demurrer to petition for not alleging when demand became due, nor when defendants became liable and promised to pay it, is properly overruled. *Petrie v. Neimeyer* (Civ. App.), 26 S. W. 266.

Curing Defect in Petition.—A petition on an account for labor at a stipulated price per month, is insufficient in

the absence of an allegation that the labor was performed. An exhibit showing the months and price "for services rendered," and referred to for the amount due, will not cure the defect; such petition is bad on general demurrer. *Shuttuck v. Griffin*, 44 Tex. 566.

In a suit for work and labor, an exception that the petition does not state the time and place of its performance, and the person by whose direction it was performed, is not well taken, where a bill of particulars attached to the petition, and made a part thereof, supplies by its entries the defect. *Texas, etc., R. Co. v. Ross*, 62 Tex. 447. See, also, *Burks v. Watson*, 48 Tex. 107, 114.

How Made Exhibits—Necessity for Express Words.—Deeds filed with petition are not a part thereof, unless specially made so by express words in petition to that effect. *Dunlap v. Yoakum*, 18 Tex. 582, 584.

Statement by a pleader that papers, referred to, as evidence are part of petition does not make them such. *Thompson v. Eanes*, 32 Tex. 190, 193.

Exhibits do not become part of petition and can not be so treated in determining demurrer, notwithstanding they be referred to in it as part thereof. *Schultz v. Herndon*, 32 Tex. 390, 391; *Stolte v. Herndon*, 32 Tex. 393.

Exidos.

See the title PUBLIC LANDS.

Existence.

As to corporate existence, see the title CORPORATIONS, vol. 4, p. 720, et seq.

Ex Officio.

See the title PUBLIC OFFICERS. See, also, the title JUSTICES OF THE PEACE.

Exoneration.

See the title CONTRIBUTION AND EXONERATION, vol. 4, p. 675, et seq. See, also, the titles EXECUTORS AND ADMINISTRATORS, ante, p. 364; GUARANTY; INDEMNITY; PRINCIPAL AND SURETY; TAXATION.

Ex Parte Proceedings.

See the titles ATTACHMENT, vol. 2, p. 296; BANKRUPTCY AND INSOLVENCY, vol. 2, p. 631; DISMISSAL, DISCONTINUANCE AND NONSUIT, vol. 6, p. 433; DIVORCE AND ALIMONY, vol. 6, p. 490; GARNISHMENT; MOTIONS; RECEIVERS; SPECIFIC PERFORMANCE; SUMMONS AND PROCESS; WILLS. See, also, the title DEPOSITIONS AND INTERROGATORIES, vol. 6, p. 326.

Expatriation.

See the title CITIZENSHIP, vol. 4, p. 168. See, also, the titles ALIENS, vol. 1, p. 174; NATURALIZATION.

Expectancy.

See the titles ADVANCEMENTS, vol. 1, p. 159; CATCHING BARGAINS, vol. 4, p. 2; DESCENT AND DISTRIBUTION, vol. 6, p. 392; PARENT AND CHILD; REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS. As to transfer, see the titles ASSIGNMENTS, vol. 2, p. 94; CHATTEL MORTGAGES, vol. 4, pp. 98, 131, et seq.; MORTGAGES AND DEEDS OF TRUST. See, also, the title ESTATES, vol. 6, p. 982. As to what are vested, as distinguished from expectant rights, see the title CONSTITUTIONAL LAW, vol. 4, p. 445, et seq. As to evidence of, see the title MORTALITY TABLES.

Expediente.

See the titles DOCUMENTARY EVIDENCE, vol. 6, p. 531; PUBLIC LANDS.

Expenditure and Expense.

See the title COSTS, vol. 4, p. 971. See, also, the titles ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 2, p. 166; COUNTIES, vol. 5, p. 95, et seq.; DIVORCE AND ALIMONY, vol. 6, p. 490; EXECUTORS AND ADMINISTRATORS, ante, p. 364; GUARDIAN AND WARD; PARTNERSHIP; TRUSTS AND TRUSTEES. Of surveyor of public lands, see the title PUBLIC LANDS. As to expenses as element of damages, see the titles DAMAGES, vol. 5, pp. 911, et seq., 926; DEATH BY WRONGFUL ACT, vol. 5, p. 1209. As to liability of cotenant for expenses, see the title JOINT TENANTS AND TENANTS IN COMMON. As to attorney's lien, see the title

ATTORNEY AND CLIENT, vol. 2, p. 603. As to expenditures on property fraudulently conveyed, see the title FRAUDULENT AND VOLUNTARY CONVEYANCES.

Experience.

As qualification of expert witness, see the title EXPERT AND OPINION EVIDENCE.

Experiments in Evidence.

As to experiments and demonstrations, admissibility of the evidence of non-expert assistants, etc., the title EXPERT AND OPINION EVIDENCE. As to exhibiting persons or inanimate objects to jury, see the title INSPECTION AND PHYSICAL EXAMINATIONS. As to witness testifying as to experimental results, see the title EVIDENCE, vol. 6, p. 1140. As to comparison with other persons to determine age, see the title EVIDENCE, vol. 6, p. 1241. As to right of witness to illustrate his testimony, by mechanical device, etc., see the title WITNESSES. As to misconduct of jury in experimenting with a plank lid as ground for new trial, see the title NEW TRIALS.

EXPERT AND OPINION EVIDENCE.

BY HOMER RICHEY.

I. General Principles as to Admissibility of Opinion Evidence, 980.

- A. General Rule and Exceptions, 980.
- B. Rules of Admission Strictly Construed, 981.
- C. Matters of Common Experience, Knowledge, or Understanding, 981.
- D. Where Jury Capable of Drawing Proper Inference or Conclusion from Facts, 981.
- E. Mixed Questions of Law and Fact, 982.
 - 1. Generally, 982.
 - 2. Motive or Intent—Fraud, 983.
 - 3. Negligence and Contributory Negligence; Ordinary Care, 983.
- F. Opinions Must Be Based upon Facts in Evidence, 985.
- G. Opinions Assuming Existence of Facts, 985.
- H. Opinions as to Merits of Cause, Weight of Evidence, Question at Issue, etc., 986.

II. Kinds of Experts, 987

III. Qualification of Experts, 987.

- A. General Principles, 987.
- B. Experts upon Particular Subjects, 987.
 - 1. Law or Custom, 987.
 - 2. Translators; Interpreters, 988.
 - 3. Commissioner of Land Office, 988.
 - 4. Contractors and Builders, 989.
 - 5. Civil Engineers; Construction of Railroads, Dams, Culverts, Bridges, etc., 989.

6. Machinery; Equipment, 990.
7. Operation of Trains, 991.
8. Competency of Employees, Fellow Servants, etc., 992.
9. Medical Experts, 993.
10. Life Expectancy, 993.
11. Physicians' and Nurses' Charges, 994.
12. Value, 994.
 - a. Personalty, 994.
 - b. Real Estate, 996.
13. Weight, 996.
14. Diseases of Animals, 997.
15. Damages, 997.
 - a. Generally, 997.
 - b. Damage to Live Stock, 997.
16. Transportation of Live Stock, 999.
17. Nautical and Marine Subjects, 999.
- C. Hearing, Determination and Review, 999.
- D. Disqualification by Reason of Interest, 1000.

IV. Examination of Experts, 1000.

- A. Placing under the Rule, 1000.
- B. Preliminary Examination, 1000.
- C. Duty to Give Facts upon Which Opinions Based, 1001.
- D. Sufficiency of Knowledge upon Which Opinion Based, 1001.
- E. Experiments and Demonstrations; Nonexpert Assistants, 1002.
- F. Questions Assuming Issuable Facts, 1003.
- G. Questions Calling for Mere Conclusion, 1003.
- H. Leading Questions, 1003.
- I. Hypothetical Questions, 1004.
 1. Necessity, Use and Admissibility, 1004.
 2. Hypothesis Must Be Based upon the Evidence, 1004.
 - a. In General, 1004.
 - b. Questions Testing Witness' Knowledge or Qualification, 1004.
 - c. Upon Assurance That Evidence Will Be Developed Later, 1004.
 - d. Illustrations, 1004.
 3. Form and Requisites, 1006.
 - a. In General, 1006.
 - b. Latitude as to Assumption of Facts, 1006.
 - c. Embodying Evidence or Facts in Question, 1006.
 - d. Questions Calling for Conclusions and Deductions Which Encroach upon the Province of the Jury, 1006.
 - e. Questions Calling for Categorical Answers, 1008.
 - f. Mentioning Names of Parties, 1008.
 4. Answer Must Assume Truth of Hypothesis; Not to Be Based on Witness' Understanding of Evidence, 1008.
 5. Exceptions and Objections, 1008.
- J. Cross-Examination, 1008.
 1. Generally, 1008.
 2. Principles Laid Down by Standard Authorities, 1009.
 - a. Generally, 1009.
 - b. Quoting Extracts; Naming Author, 1009.
- K. Unresponsive Answers, 1010.

- L. Impeaching Witness, 1010.
- M. Exceptions and Objections, 1010.
- N. Harmless Error, 1011.

V. Credibility and Weight of Expert Evidence, 1011.

- A. Province of Jury, 1011.
- B. Sufficiency to Raise Issue, 1012.
- C. Sufficiency to Sustain Verdict, 1012.

VI. Particular Subjects of Expert Evidence and the Evidence Admissible upon the Same, 1012.

- A. General Rule as to What May Be the Subject of Expert Testimony, 1012.
- B. Architecture and Building, 1012.
- C. Bookkeeping and Accounting, 1012.
- D. Boundaries and Surveys, 1013.
- E. Damages, 1014.
- F. Electricity, 1014.
- G. Exchange, Rate of, 1015.
- H. Explosions and Fires, 1015.
- I. Fences, 1016.
- J. Genuineness of Instrument, 1016.
- K. Goods, 1016.
 - 1. Storage and Handling, 1016.
 - 2. Damage to Goods, 1016.
 - 3. Quality, Identity and Similarity, 1017.
 - 4. Value, 1017.
- L. Insurance, 1017.
 - 1. Fire Insurance, 1017.
 - 2. Life Insurance, 1017.
- M. Interpretation and Construction, 1018.
 - 1. Written Instruments Generally, 1018.
 - 2. Words Peculiar to Business, Art, Trade or Profession, 1018
- N. Law, 1019.
 - 1. Foreign Law or Custom, 1019.
 - 2. Parliamentary Law, 1020.
- O. Life Expectancy, 1020.
- P. Live Stock, 1020.
 - 1. Quality of Animal, 1020.
 - 2. Number of Animals, 1021.
 - 3. Nature and Habits, 1021.
 - 4. Brands and Marks, 1021.
 - 5. Transportation of Live Stock, 1021.
 - 6. Damage to Live Stock, 1023.
 - 7. Value of Live Stock, 1023.
- Q. Lumber, Logs and Logging, 1023.
- R. Machinery, 1024.
- S. Medical Experts, 1024.
 - 1. General Rule as to Admissibility, 1024.
 - 2. Opinions Based in Part on Declarations and Statements of Patient, 1025.
 - 3. Opinions Based upon Statements of Other Physicians and Third Persons, 1026.

4. Statements of Physician to or About Patient, 1026.
5. Value of Professional Services, 1027.
6. Ability of Laymen to Measure or Compound Medicines, 1027.
7. As to Life Expectancy, 1027.
8. Insanity; Mental Capacity, 1027.
9. Obstetrics, 1028.
10. Personal Injuries, 1028.
 - a. Confining Evidence to Questions at Issue, 1028.
 - b. As to Simulation of Injuries, Symptoms, etc., 1029.
 - c. Right of Opposition to Make Physical Examination, 1029.
 - d. Temperate Habits of Injured Person, 1029.
 - e. Cause of Injury; Whether Trouble Actually Due to Injury Complained of, 1029.
 - f. Nature and Extent of Injuries, 1031.
 - g. Present and Future Effects, 1031.
11. Cause of Death, 1032.
- T-U. Nautical and Marine Subjects, 1032.
- V. Railroading, 1033.
 1. In General, 1033.
 2. Condition of Track and Bed, 1033.
 3. Construction, Inspection and Repair, 1033.
 4. Machinery and Equipment, 1033.
 5. Operation of Trains, 1034.
 - a. Rules; Requirement; Construction, 1034.
 - b. Loading and Unloading Cars, 1034.
 - c. Assisting Passengers, 1034.
 - d. Making Up Trains, 1034.
 - e. Starting and Stopping, 1034.
 - f. Duty to Keep Lookout; Ability to See Ahead, 1035.
 - g. Interpretation of Orders, 1035.
 - h. Observance of Signals, 1035.
 - i. Same; Distance at Which Seen or Heard, 1036.
 - j. Flagging Trains, 1036.
 - k. Switch Lights, 1036.
 - l. Precaution for Safety of Car Inspectors, 1036.
 - m. Having Train under Control, 1036.
 - n. Running Train over Submerged Track, 1036.
 - o. Effect of Striking Person on Track, 1037.
 - p. Operation of Hand Car, 1037.
 - q. Cause of Accident, 1037.
- W. Care and Competency of Employees, 1037.
- X. Trademarks, Labels, etc., 1038.
- Y. Value, 1038.
- Z. Watercourses, Dams, and Overflows, 1038.

VII. Nonexpert Opinion, 1039.

- A. Admissibility, 1039.
 1. General Rule and Exceptions, 1039.
 2. Must Give Facts upon Which Opinion Is Based, 1040.
 3. Sufficiency of Facts or Knowledge upon Which Opinion Based; Qualification of Witness, 1041.
 - a. In General, 1041.

- b. In Particular Cases, 1041.
 - (1) Opinion of Impeaching Witness, 1041.
 - (2) Freight Rates, 1041.
 - c. Review of Discretion of Trial Court, 1042.
- 4. Opinions upon Mixed Questions of Law and Fact, 1042.
- 5. Opinions Encroaching upon the Province of the Jury, 1042.
- 6. Irrelevant Opinion, 1043.
- 7. Appeal and Error, 1043.
- B. Evidence Held to Be or Not to Be Opinion Evidence, 1043.
- C. Particular Subjects of Opinion Evidence and the Evidence Admissible Thereon, 1043.
 - 1. Matters of Common Appearance and Observation, 1043.
 - a. In General, 1043.
 - b. Time and Distance, 1043.
 - c. Location, Relative Position of Persons and Objects, 1044.
 - d. Speed, 1044.
 - 2. Age, 1044.
 - 3. Appearance, Conduct and Demeanor, 1044.
 - 4. Boundaries and Surveys, 1045.
 - 5. Business, Occupation, etc., 1045.
 - a. Business in Which Certain Person Engaged, 1045.
 - b. Profit and Loss of Business, 1045.
 - c. Solvency and Insolvency, 1046.
 - d. Particular Business or Occupation, 1046.
 - 6. Character, Reputation and Influence; Habits, 1046.
 - 7. Contracting and Building, 1046.
 - a. Quality of Work and Labor; Compensation, 1046.
 - b. Bridges, 1047.
 - 8. Construction and Interpretation of Language, 1047.
 - 9. Damages, 1048.
 - a. General Rule as to Admissibility of Opinion, 1048.
 - b. As to Whether Claim Filed, 1048.
 - c. Injuries to the Person or Reputation, 1048.
 - d. Injury to Business, Credit, Good Will, etc., 1048.
 - e. Through Injury or Destruction of Personal Property, 1049.
 - (1) In General, 1049.
 - (2) Goods in Transit, 1049.
 - f. Injuries to Live Stock in Transportation, 1050.
 - (1) Sufficiency of Stock Pens, 1050.
 - (2) Delay in Furnishing Cars, 1050.
 - (3) Time Consumed in Transportation, 1050.
 - (4) Care and Attention, 1051.
 - (5) Cause of Injury, 1051.
 - (6) Nature and Extent of Injuries; Amount of Damages, 1051.
 - g. As to Damages for Breach of Contract, 1053.
 - h. Damages to Real Property, 1054.
 - (1) By Reason of Nuisance, 1054.
 - (2) Same; Maintenance and Operation of Railroad, 1054.
 - (3) In Condemnation Proceedings; Construction of Public Roads and Railroads Across Land, 1055.
 - (4) Injury to Access, 1057.
 - (5) Flooding Land, 1057.

- (6) Destruction of Trees, Grass, Crops, etc., 1057.
- (7) Deterioration or Destruction of Improvements, 1057.
- 10. Electricity, 1057.
- 11. Fires, 1058.
- 12. Identity, 1058.
- 13. Insurance, 1059.
 - a. Fire Insurance, 1059.
 - b. Life Insurance, 1059.
- 14. Intent, Motive, Purpose, Deduction, etc., 1059.
 - a. Generally as to Intent or Motive, 1059.
 - b. As Being Fraudulent or in Good Faith, 1060.
 - c. As Being Malicious or Otherwise, 1061.
 - d. Subjunctive Statements and Declarations, 1062.
 - e. As to Conclusions or Deductions, 1062.
- 15. Intoxication and Intoxicants, 1062.
- 16. Matters Legal, 1062.
 - a. Contracts, 1062.
 - b. Divorce, 1063.
 - c. Expectation of Child or Heir, 1063.
 - d. Probate Matters, 1063.
 - e. Title and Ownership of Property, 1063.
 - (1) Real Property, 1063.
 - (a) In General, 1063.
 - (b) Muniments of Title, 1063.
 - aa. Execution and Delivery of Deed, 1063.
 - bb. Legal Operation and Effect; Validity, 1064.
 - (c) Public Land Rights; Location, 1064.
 - (d) Loss of Records, 1064.
 - (e) Bona Fide Purchaser; Knowledge of Equities, 1065.
 - (f) Conveyances from Husband to Wife; Wife's Separate Estate, 1065.
 - (g) Partition of Real Estate, 1065.
 - (h) Adverse Possession, 1065.
 - (i) Homestead, 1066.
 - (2) Personal Property, 1066.
 - (a) In General, 1066.
 - (b) Sale of Property, 1066.
- 17. Live Stock, 1066.
 - a. Nature and Habits, 1066.
 - b. Number, 1066.
 - c. Appearance and Condition, 1066.
 - d. Injuries; Damages, 1067.
 - e. Value, 1067.
- 18. Health and Bodily Condition, 1067.
 - a. In General, 1067.
 - b. Cause of Sickness, 1067.
 - c. Nature and Character of Ailment, 1067.
 - d. Warranty of Soundness of Slave; Subsequent Sickness, 1068.
- 19. Insanity and Mental Capacity, 1068.
 - a. General Rule as to Admissibility of Nonexpert Opinion, 1068.
 - b. Must Give Facts upon Which Opinion Based, 1068.

- (1) In General, 1068.
- (2) Must Be Facts in Evidence or within Witness' Own Knowledge, 1069.
- c. Comparison with Persons Known to Be Insane, 1069.
- d. Opinions Not Pertinent to the Issue, 1069.
- e. Qualification of Witness, Sufficiency of Facts, Knowledge, etc., 1069.
- f. Invading the Province of the Jury, 1071.
 - (1) As to Business Capacity, Competency to Enter into Contracts, etc., 1071.
 - (2) Testamentary Capacity, 1071.
 - (3) Mental Capacity of Children, 1073.
20. Personal Injuries, 1073.
 - a. Cause and Manner of Injury, 1073.
 - b. Contributory Negligence, 1075.
 - c. Location; Description of Injury, 1076.
 - d. Effects of Injuries, 1077.
 - e. As to Money Loss or Damage, 1080.
21. Death and Dead Bodies, 1080.
22. Master and Servant—Principal and Agent, 1081.
 - a. Existence of the Relation, 1081.
 - b. Authority of Agent or Servant, 1081.
 - c. Duties, Character of Employment, etc., 1081.
 - d. As to Whether Employees Careful, Competent, etc., 1082.
23. Negligence, 1083.
 - a. Ordinary Care and Prudence, 1083.
 - b. Fires, 1083.
24. Railroading, 1084.
 - a. Track and Right of Way, 1084.
 - (1) Construction, as Dangerous, Proper, etc., 1084.
 - (2) Condition, as Being Defective in Need of Repair, etc., 1084.
 - (3) Maintenance and Repair, 1085.
 - b. Machinery and Equipment, 1085.
 - (1) Construction; Suitableness for Purpose, etc., 1085.
 - (2) Condition, as Defective or Otherwise, 1085.
 - (3) Inspection and Repair, 1085.
 - c. Operation of Trains and Cars, 1086.
 - (1) Rules, Custom, Usage, 1086.
 - (2) Schedules, Time Cards, etc., 1086.
 - (3) Making Up Trains; Switching, Coupling, etc., 1086.
 - (4) Starting and Stopping, 1086.
 - (a) Negligence in Starting, 1086.
 - (b) Power to Stop, Negligence in Stopping, 1087.
 - (c) Distance Required for Stop, 1087.
 - (d) Length of Stop; Sufficiency for Discharging and Receiving Passengers, 1087.
 - (5) Speed of Train or Car, 1088.
 - (6) Signals, 1089.
 - (7) Noise Made by Train, 1089.
25. Recollection, Understanding, and Belief, 1090.
 - a. Where Memory Grown Dim and Witness Thinks, Believes, or Has General Impression, etc., 1090.

- b. Conclusions Based Not upon Positive Recollection, but upon Habit, Custom, etc., 1090.
- c. Recollection or Belief as to Contents of Documents, 1090.
- d. Opinion as to Purport, Legal Operation and Effect of Documents, 1091.
- e. Recollection and Understanding of Language, Conversation, Contract, etc., 1091.
- 26. Sanitation, 1092.
- 27. Solvency and Insolvency, 1092.
- 28. Streets and Highways, 1092.
- 29. Value, 1092.
 - a. General Rules as to Admission of Opinion Evidence, 1092.
 - (1) Opinion Evidence Admissible, 1092.
 - (2) Market Value, 1093.
 - (3) Qualification of Witness, 1093.
 - (a) Generally, 1093.
 - (b) Opinion Based upon Market Reports, 1093.
 - (c) Opinion Based upon Hearsay, 1093.
 - (4) Criterion of Value, 1093.
 - (5) Invading Province of Jury, 1094.
 - (6) Harmless and Prejudicial Error, 1094.
 - b. As to the Value of Personalty, 1094.
 - (1) Market Value, 1094.
 - (2) Rental Value, 1094.
 - (3) As Affected by Place, Locality, 1094.
 - (4) Particular Kinds of Personalty, 1094.
 - (a) Book Accounts, 1094.
 - (b) Business, Credit, Good Will, etc., 1094.
 - (c) Stocks and Bonds, 1094.
 - (d) Goods, 1094.
 - aa. Generally, 1094.
 - bb. Mercantile Stocks, 1095.
 - (e) Crops, Hay, Grain and Food Stuffs, 1095.
 - aa. Crops, Generally, 1095.
 - bb. Grass and Hay, 1096.
 - cc. Barn and Contents, 1097.
 - (f) Live Stock, Poultry, etc., 1097.
 - aa. Admissibility in General, 1097.
 - bb. Qualification of Witness; Sufficiency of Information on Which Opinion Based, 1097.
 - aaa. Generally, 1097.
 - bbb. Experienced Cattlemen, 1098.
 - ccc. Plaintiff's Vendor, 1098.
 - ddd. Witness Who Has Not Seen Stock, 1098.
 - eee. Information Obtained from Others; Hearsay, etc., 1098.
 - fff. Limited Inquiries and Offers, 1099.
 - ggg. Market Reports, 1099.
 - hhh. Opinion Based on General Knowledge of Market Fluctuations, 1099.
 - iii. Value at Different Place or under Different Conditions, 1100.

- ### CROSS REFERENCES.

"The general rule is, that the opinion of a witness is not evidence; but, like all general rules, it has exceptions. The exception embraces certain subjects and certain classes of

witnesses. Great embarrassment has been felt in defining the subjects and the class of witnesses who may be permitted to give their opinions to the jury to the exclusion of others who are required to state the facts only within their own knowledge." *Thomas v. State* 40 Tex. 60, 64; *Cooper v. State*, 23 Tex. 331, 336.

Exception as to Expert Opinion.—In matters of science, art, or special occupations, where persons inexperienced therein would be unable to reach a proper conclusion from a mere statement of the facts, the opinions and conclusions of an expert may be given. *Bryan Press Co. v. Houston & T. C. Ry. Co.* (Civ. App.), 110 S. W. 99; *Cooper v. State*, 23 Tex. 331, 336; *Rogers v. Crain*, 30 Tex. 284, 288; *Thomas v. State*, 40 Tex. 60, 64; *I. & G. N. R. Co. v. Klaus*, 64 Tex. 293, 294; *Angle v. Young* (Civ. App.), 25 S. W. 798, 800; *Bryan Press Co. v. Houston, etc., R. Co.* (Civ. App.), 110 S. W. 99.

Ordinarily, where the facts in issue are not themselves accessible by evidence, and the knowledge, by which the existence of an unknown fact is inferred from other facts proved, does not fall within the range of ordinary information, the fact may be proved by professional or experienced witnesses, having peculiar knowledge or skill in the science, art or trade relating to the subject. *Metropolitan Life Ins. Co. v. Wagner*, 50 Tex. Civ. App. 233, 109 S. W. 1120.

Nonexpert Opinion.—There are many cases in which unskilled witnesses may give their opinions; and there is still another class of cases in which they may do so when they give, along with the opinions, the facts on which they are founded. *I. & G. N. R. Co. v. Klaus*, 64 Tex. 293, 294. See, also, post, "Nonexpert Opinion," VII, et seq.

B. RULES OF ADMISSION STRICTLY CONSTRUED.

The evidence of experts should be

confined with much strictness within the rules regulating its admission, since from its very nature, a relaxation of these rules may lead to great abuses. *Armendaiz v. Stillman*, 67 Tex. 458, 3 S. W. 678.

The rule is confined to cases in which, from the very nature of the subject, facts disconnected from such opinions, can not be so presented to a jury, as to enable them to pass upon the question with the requisite knowledge and judgment. *Cooper v. State*, 23 Tex. 331, 336.

C. MATTERS OF COMMON EXPERIENCE, KNOWLEDGE OR UNDERSTANDING.

Expert testimony is resorted to for the purpose of informing the court or jury upon subjects not commonly understood, but where the nature of the inquiry appeals to the common understanding and ordinary intelligence of mankind it would be improper to admit opinions of experts or other persons. *Radam v. Capital Microbe Destroyer Co.*, 81 Tex. 122, 16 S. W. 990.

When an injury relates to a matter that may be understood by one man of sense as well as another and where no special course of training is required to understand it, expert opinions should not be received. *Shelley v. City of Austin*, 74 Tex. 608, 12 S. W. 753; *Kennedy v. Upshaw*, 66 Tex. 442, 453, 1 S. W. 308; *Galveston, etc., R. Co. v. Sweeney*, 6 Tex. Civ. App. 173, 176, 24 S. W. 947; *Shelley v. Austin*, 74 Tex. 608, 12 S. W. 753.

Where matters are of such a nature that jurors are competent to form opinions with reference to them, such matters can not form the basis for expert testimony. *Galveston, H. & S. A. Ry. Co. v. Sweeney*, 6 Tex. Civ. App. 173, 24 S. W. 947.

D. WHERE JURY CAPABLE OF DRAWING PROPER INFERENCE OR CONCLUSION FROM FACTS.

Where the jury are as competent

as any other persons to deduce the proper conclusions from a given state of facts, the opinions even of scientific witnesses are not admissible in evidence as to the conclusion or inference to be drawn from them. *Cooper v. State*, 23 Tex. 331.

In the investigation of a subject where special knowledge or skill is required to deduce from the facts a reliable opinion, and where the ordinary juror would not be presumed to understand the subject or be competent to form a correct conclusion from a given state of facts, then of necessity the jury must be instructed by persons possessing the requisite special information; but when the inquiry is about a matter that may be understood by one man of sense as well as another—where no special course of study or training is required to understand it—opinions of experts are rejected. In such cases the facts must be stated and the jury allowed to draw their own conclusions. *Shelley v. Austin*, 74 Tex. 608, 612, 12 S. W. 753.

"The general distinction is, that the jury must judge of the facts for themselves, but that wherever the question depends on the exercise of peculiar skill and knowledge that may be made available, it is not a decision by the witness on a fact, to the exclusion of the jury, but the establishment of a new fact, relation or connection, which would otherwise remain unproved." *Cooper v. State*, 23 Tex. 331, 336.

Illustrations.—Where section hands set their hand car beside the track so as to block a public crossing, and plaintiff was injured in attempting to drive over the track at one side of the crossing, the opinion of an experienced driver as to whether one could cross with safety under such circumstances was properly excluded. *Locke v. International & G. N. R. Co.*, 60 S. W. 314, 25 Tex. Civ. App. 145.

In an action against a city for personal injuries caused by the alleged

defective construction of two bridges,—one a wagon way, and the other a foot bridge,—whereby an open space over a gutter was left between them, about ten feet long, four feet wide, and two feet deep, expert evidence is not admissible on the question as to whether the opening was dangerous. *Shelley v. City of Austin*, 74 Tex. 608, 12 S. W. 753.

Where the evidence showed the width of the approach to a railroad crossing, and that there was a precipice on either side, it is for the jury to determine whether a wagon could with safety turn around on the approach, and opinion evidence on that question is inadmissible. *International & G. N. R. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. 58.

In a suit for damages resulting from the levy of an attachment on cattle, a witness can not state that the cattle were injured and the owners damaged by the cattle being allowed to run at large and being neglected, and owing to the fact that the owners were not allowed to attend to them, these being conclusions for the jury. *Donald v. Carpenter*, 8 Tex. Civ. App. 321, 27 S. W. 1053.

The jury should determine the effect upon plaintiff's business of a report by a mercantile agency; the witness could only give his opinion, on which the jury would be as competent to judge as the witness. Such testimony is inadmissible. *Bradstreet Co. v. Gill*, 72 Tex. 115, 9 S. W. 753.

E. MIXED QUESTIONS OF LAW AND FACT.

1. Generally.

"In some cases a witness may be permitted to give an opinion or conclusion, but this can not be done, even by an expert, when the character of an act is in question and can be determined only by the application of rules of law to a given state of facts." *Half v. Curtis*, 68 Tex. 640, 642, 5 S. W. 451; *Miller v. Jannett*, 63 Tex. 82, 86;

Gabel v. Weisensee, 49 Tex. 131, 142.

The fact that a witness may possess greater knowledge as to the existence of facts entering into an inquiry than the jury would be supposed to have does not render his conclusion admissible where such conclusion is based upon a mixed question of law and fact. *Houston, etc., R. Co. v. Roberts*, 101 Tex. 418, 108 S. W. 808; *Boyer v. St. Louis, etc., R. Co. (Civ. App.)*, 72 S. W. 1038, reversed in 97 S. W. 1070.

In an action for delay in transportation of live stock, testimony as to what a witness from his experience as a cattleman considered a reasonable time within which to transport the live stock in question, if done with ordinary care and diligence, was inadmissible as the opinion of the witness on a mixed question of law and fact, as the witness must have first determined for himself what would constitute ordinary care, and then have deduced, from a consideration of all the elements that would in his opinion enter into the question of reasonable time, a conclusion as to what that time should be. *Houston, etc., R. Co. v. Roberts*, 101 Tex. 418, 108 S. W. 808.

In an action for damages to property occasioned by the construction of a railroad, the testimony of a witness as to the amount of the difference in value of the property before and after the building of the road, excluding benefits and injuries common to the whole community, was properly excluded, as calling for a conclusion of a mixed question of law and fact. *Boyer v. St. Louis, etc., R. Co. (Civ. App.)*, 72 S. W. 1038, reversed in 97 S. W. 1070.

2. Motive or Intent—Fraud.

In an action for damages for a malicious attachment under an affidavit that plaintiff was about to dispose of his property with intent to defraud his creditors, plaintiff's counsel was permitted to ask witnesses, "Did [plaintiff], about the time of the at-

tachment, do any act or thing to defraud his creditors?" and negative answers were admitted. Held, that as the character of the act was in dispute, and the question called for the opinion of the witnesses upon a question of mixed law and fact, the admission of the evidence was erroneous. *Half v. Curtis*, 68 Tex. 640, 5 S. W. 451.

"This question left it with the witness to determine what acts in law would be fraudulent, and upon his decision as to this to base his answer. It called for his conclusions as to law and fact, instead of requiring a statement simply of facts, from which, with other evidence given in the case, the jury—under the instructions of the court as to what, within the meaning of the law, would constitute fraud—could determine whether ground for suing out and levying the attachment existed." *Half v. Curtis*, 68 Tex. 640, 642, 5 S. W. 451.

3. Negligence and Contributory Negligence; Ordinary Care.

In the case of *Houston, etc., R. Co. v. Roberts*, 101 Tex. 418, 108 S. W. 808, 809, counsel urged that it was not permissible for the witness to testify what in his opinion is or is not ordinary care and diligence, and contended that what is ordinary care and diligence is a mixed question of law and fact, to be determined by the court or jury from all the facts of the particular case, and that to permit a witness to give his opinion thereon would be to submit the determination of the very issue of the case to the witness, instead of to the court or jury. Upon a certification of the point to the supreme court, it was pointed out that cases of *Texas, etc., R. Co. v. Ellerd*, 38 Tex. Civ. App. 596, 87 S. W. 362; *Texas, etc., R. Co. v. Walker*, 43 Tex. Civ. App. 278, 95 S. W. 743; *Chicago, etc., R. Co. v. Carroll*, 36 Tex. Civ. App. 359, 81 S. W. 1020, affirmed in 98 Tex. 611, no op. and *Chicago, etc., R. Co. v. Kapp*, 37 Tex. Civ. App. 203,

83 S. W. 233, hold that such testimony is admissible, and that the following cases hold to the contrary, to wit: *Pecos, etc., R. Co. v. Evans-Snider-Buell Co.*, 42 Tex. Civ. App. 60, 93 S. W. 1024; *Houston, etc., R. Co. v. Schutte* (Civ. App.), 91 S. W. 806; *San Antonio, etc., R. Co. v. Jackson*, 38 Tex. Civ. App. 201, 85 S. W. 445, 446; *Texas, etc., R. Co. v. Lee*, 21 Tex. Civ. App. 174, 51 S. W. 351, affirmed in 93 Tex. 722, no op., as well as the following on the same subject: *San Antonio, etc., R. Co. v. Griffith* (Civ. App.), 70 S. W. 438; *International, etc., R. Co. v. McGhee* (Civ. App.), 81 S. W. 804; and *Gulf, etc., R. Co. v. Irvine* (Civ. App.), 73 S. W. 540. Held, in answer to the question of the court of civil appeals, which cited the above conflict in the authorities, that the court erred in admitting the question and answer stated in the certificate, for the reason that the question called for and the answer gave the opinion of the witness on a mixed question of law and fact. *Gainesville, etc., R. Co. v. Hall*, 78 Tex. 169, 170, 14 S. W. 529; *Houston, etc., R. Co. v. Roberts*, 101 Tex. 418, 108 S. W. 808, 809.

Illustrations.—In an action against a railroad company by an employee for injuries due to a defect in the track, a question whether defendant was ordinarily careful in keeping its track in good condition calls for the opinion of the witness as to the exercise of ordinary care, and is properly excluded. *Ft. Worth & D. C. Ry. Co. v. Thompson*, 2 Tex. Civ. App. 170, 21 S. W. 137.

Opinions of expert railroad men, in an action against a railroad company by an employee for injuries caused by the backing up of an engine against cars between which plaintiff was standing while assisting in making up a train, as to plaintiff's negligence in going between the cars under the particular circumstances, are inadmissible;

the question being for the jury on all the circumstances. *St. Louis & S. F. R. Co. v. Nelson*, 49 S. W. 710, 20 Tex. Civ. App. 536.

In an action by a brakeman to recover for an injury received while coupling cars, because of an alleged defect in the track, evidence that it is a well-settled rule among railroad men that a brakeman who does not look where he goes in performing such duty is negligent, is not admissible. *Gulf, etc., R. Co. v. Hockaday*, 14 Tex. Civ. App. 613, 615, 37 S. W. 475, affirmed in 93 Tex. 684, no op.

In an action for the death of a servant of a railroad company, caused by a door of a box car falling on him while sitting near the track, evidence of expert railroad operatives that the position occupied by decedent at the time of the injury was dangerous was not a proper subject for expert testimony, it being an invasion of the province of the jury. *Houston, E. & W. T. Ry. Co. v. McHale*, 47 Tex. Civ. App. 360, 105 S. W. 1149.

In an action against a railroad for damages resulting from negligent transportation and handling of plaintiff's cattle, it was error to permit a witness to testify that the bad condition of the cattle on arrival at their destination was due to improper transportation and handling on the cars, and from being delayed too long thereon, and being jerked and switched about improperly, such testimony being in effect an opinion that the carrier was negligent. *Texas & P. Ry. Co. v. Felker*, 90 S. W. 530, 40 Tex. Civ. App. 604.

But in an issue involving the question of negligence of a railway company in the management of a switch from which it is claimed that damage results, it is competent for the defendant to introduce evidence of the mode adopted generally by prudent railroad men in switching their cars under like circumstances. *Houston, etc., R. Co. v. Cowser*, 57 Tex. 293.

Witnesses who have testified as to the manner in which certain switching was done may also testify, as experts (being qualified), as to whether it was done in the manner and with the caution usual in such cases. *Houston & T. C. Ry. Co. v. Cowser*, 57 Tex. 293.

In an action for injuries to a servant alleged to have resulted from the negligence of an incompetent fellow servant in operating a machine, a witness who showed that she was qualified to speak as an expert and who had explained the manner in which the work should be done should have been permitted to testify that the machine was not handled properly and skillfully by the operative at the time plaintiff was injured. *Galveston Rope & Twine Co. v. Burkett*, 2 Tex. Civ. App. 308.

Contributory Negligence of Child.—

In an action against a street railroad for injuries to a child 10 years of age, it is competent to prove plaintiff's age and all other facts necessary to enable the jury to decide the question of her contributory negligence, and persons, who are acquainted with her, may testify that she is intelligent or the reverse; but, after such facts have been narrated, the inferences and conclusions to be drawn therefrom are for the jury, and it is not competent for witnesses, whether experts or non-experts, to testify to their opinion that plaintiff is not of sufficient intelligence to appreciate the danger of going on a street car track without looking and listening for a car and has not the circumspection to avoid danger which an adult person would have. *Citizens' Ry. Co. v. Robertson*, 91 S. W. 609, 41 Tex. Civ. App. 324.

F. OPINIONS MUST BE BASED UPON FACTS IN EVIDENCE.

Opinions must be deduced from facts in evidence before the jury, but they need not be within the personal knowledge of the witness whose opinion is

given. The opinion may be founded on the statement of facts proved by others. *Rogers v. Crain*, 30 Tex. 284, 288; *Williams v. State*, 37 Tex. Cr. App. 348, 39 S. W. 687; *Texas & P. Ry. Co. v. De Milley*, 60 Tex. 194.

"The bill of exceptions shows that the appellants, for the purpose or rebutting testimony offered by the appellee, to the effect that the rail from which the injury resulted had been broken for ten or fifteen days, sought the opinion of those witnesses as to what would have been the effect upon passing trains if the rail in question had not only been broken, but had in part been removed from the track. The testimony was objected to, as the judge who tried the cause states in the bill of exceptions, because there was no proof sustaining the hypothesis upon which these opinions were sought. Such being the case, and we must take the statement of the judge to be true, there was no error in excluding the evidence; for if the opinion of a witness is sought, such opinion, to be of any value, must be based upon facts in the case." *Texas, etc., R. Co. v. De Milley*, 60 Tex. 194, 199.

G. OPINIONS ASSUMING EXISTENCE OF FACTS.

If a witness offered as an expert states or assumes facts, it is for court or jury to determine whether his assumption of fact is true, and, if found untrue, his opinion is of no value. The existence of the facts upon which the opinion is based must be determined by the jury and not by the expert. *Bryan Press Co. v. Houston, R. Co.* (Civ. App.), 110 S. W. 99; *Armendaiz v. Stillman*, 67 Tex. 458, 463, 3 S. W. 678.

Where an expert witness bases his opinion upon a state of facts which he has heard other witnesses testify to, and not upon actual knowledge of his own, the value of his opinion depends upon the existence of those facts, and their existence must be determined

by the court or jury, and not by the expert. *Armendaiz v. Stillman*, 67 Tex. 458, 3 S. W. 678.

If evidence is conflicting as to facts on which opinion of expert is founded he can not be permitted to determine what the facts actually were, and to give an opinion upon his own conclusion from such evidence. *Armendaiz v. Stillman*, 67 Tex. 458, 463, 3 S. W. 678; *Ft. Worth, etc., R. Co. v. Thompson*, 75 Tex. 501, 504, 12 S. W. 742.

Where Facts Are Undisputed.—It is not error to permit an expert to state his conclusions from facts which are undisputed. *Ft. Worth & D. C. R. Co. v. Thompson*, 75 Tex. 501, 12 S. W. 742.

Facts Pertaining to His Art or Science.—An expert could give his opinion on a state of facts pertaining to his art or science which he might assume to be true, and the court and jury must then decide whether his assumption of facts was correct. *Armendaiz v. Stillman*, 67 Tex. 458, 3 S. W. 678.

Where a medical witness in an action against a railroad for personal injuries received by a passenger in alighting from the train has testified to facts which he has himself ascertained in treating the injured person, it is proper for him to give his opinion as to the cause of the injury, assuming as true the facts to which he had previously testified. *Missouri, etc., R. Co. v. Criswell*, 34 Tex. Civ. App. 278, 78 S. W. 388.

H. OPINIONS AS TO MERITS OF CAUSE, WEIGHT OF EVIDENCE, QUESTION AT ISSUE, ETC.

"Where scientific men are called as witnesses, they can not give their opinions as to the general merits of the cause, but only their opinions upon the facts proved." *Cooper v. State*, 23 Tex. 331, 337.

Medical experts can not give their

opinions on the merits of the cause; but their opinions must be predicated upon the facts proved, or, if facts are not proved, upon a case hypothetically stated. *Cooper v. State*, 23 Tex. 331.

An expert may be asked his opinion regarding facts affecting a matter peculiar to his art or employment when the facts are undisputed, but he can not be asked his opinion as to the evidence in the case as rendered. Such a practice would usurp the province of the jury, who must weigh credibility. *Ft. Worth, etc., Ry. Co. v. Thompson*, 75 Tex. 501, 12 S. W. 742.

In an action for injuries sustained by plaintiff while a passenger on defendant's train, it was not error to refuse to allow a physician to review the testimony of plaintiff in the case, and then give his opinion as to the "reasonableness, correctness, or otherwise, of the statements" therein. *Gulf, C. & S. F. Ry. Co. v. Bell*, 58 S. W. 614, 24 Tex. Civ. App. 579.

In an action for personal injuries, it was error to exclude a question asked a doctor as to whether he concurred in a "supposed" opinion of another doctor as to the extent of the injury, since that was a question for the jury. *Galveston, H. & H. R. Co. v. Alberti*, 47 Tex. Civ. App. 32, 103 S. W. 699.

Where a physician, who had examined plaintiff, on being asked for his opinion as to what produced the condition he found, answered that he believed the preponderance of testimony required the conclusion that the condition was the result of physical injury, and stated that by the preponderance of testimony he meant facts which came to his own knowledge outside of anything said to him by any other person, his answer was admissible. *Galveston, H. & S. A. Ry. Co. v. Baumgarten*, 72 S. W. 78, 31 Tex. Civ. App. 253.

An expert who sat and listened to conflicting evidence regarding the construction of a jetty, and its effect in

changing the current of a river whereby the plaintiff claimed that his land had been cut away to his damage, qualified himself as an expert, and testified to some (though limited) personal knowledge of the facts. He was asked whether it was his opinion that the jetty produced, or brought about, or had any part in producing any part of the damage described as having been sustained by the plaintiff. Held: the answer should have been excluded, for it required the expert to usurp the province of the jury and pass on disputed facts. *Armendaiz v. Stillman*, 67 Tex. 458, 3 S. W. 678.

Where a medical expert sufficiently qualified himself to testify as a witness, it was error to exclude his testimony bearing on the vital issue in the case. *Elliott v. Ferguson*, 37 Tex. Civ. App., 40, 83 S. W. 56.

The mere fact that the answer of an expert may decide the question at issue before the jury, if the jury should believe it, is no ground of objection to the question and answer. *Galveston, H. & S. A. Ry. Co. v. Henefy* (Civ. App.), 99 S. W. 884.

A witness testifying as an expert may give his opinion upon the very issue on trial. *Galveston, H. & H. R. Co. v. Bohan* (Civ. App.), 47 S. W. 1050.

The question at issue in a suit for damages resulting from the derailment of a railway car being negligence *vel non*, a witness who helped to construct the road, and who was engaged as brakeman when the accident happened, may state facts within his knowledge showing the defective construction of the road when the derailment occurred, though the pleadings may not have charged specifically that the road was wanting in permanence of construction when built. *Ft. Worth, etc., R. Co. v. Thompson*, 75 Tex. 501, 12 S. W. 742.

A witness having testified on direct examination that, if an engineer is in

a position where he can not know positively that all the trains have passed that he went on the siding to wait for, his duty would be to ascertain positively whether they had all passed, and to stay on the siding, and not obey the order of the conductor to pull out, unless he was satisfied the trains had all passed, a question on cross-examination asking the witness whether he would swear positively that the engineer, under such circumstances, should refuse to obey the order of the conductor, though he could not know that it was wrong, and the conductor told him it was right, is not objectionable, as calling for the opinion of the witness as to the proper construction of a rule of the company. (Civ. App.) *Galveston, H. & S. A. Ry. Co. v. Brown*, 59 S. W. 930, judgment reversed 63 S. W. 305, 95 Tex. 2.

II. Kinds of Experts.

See post, "Experts upon Particular Subjects," III, B, et seq.; "Particular Subjects of Expert Evidence and the Evidence Admissible upon the Same," VI, et seq.

III. Qualification of Experts.

A. GENERAL PRINCIPLES.

In order to qualify a witness to testify as an expert, his competency as such must first be affirmatively proved. *Half v. Curtis*, 68 Tex. 640, 5 S. W. 451.

Testimony of nonexperts is not admissible upon questions of science and skill, since such matters should be elucidated by witnesses who by their education and experience are shown to be competent to judge thereof. *International & G. N. R. Co. v. Malone*, 1 White & W. Civ. Cas. Ct. App. § 233.

B. EXPERTS UPON PARTICULAR SUBJECTS.

1. Law or Custom.

One whose life work has been teach-

ing, and who has taught in the state for 15 years, may testify unqualifiedly that it is the custom to employ teachers in May or June, over the objection that he has not qualified as an expert. *Peacock v. Coltrane*, 44 Tex. Civ. App. 530, 99 S. W. 107.

Parol evidence by one who acted in an official capacity under a former government, and in that capacity administered its laws, may sometimes be admitted to show that certain paper evidence of title to land from such former government by grant conforms to the laws which he had been in the habit of administering. *State v. De Leon*, 64 Tex. 553.

A witness who states that he has been in the real estate business in a city in Texas, and one in Colorado, and knows that it was customary to collect earnest money in those places on negotiating sales of realty, and who has corresponded with many sections of the United States about the matter, but admits that he does not know what the general custom is throughout the United States, is not competent to testify to a general custom on the subject throughout the United States. *Edwards v. Davidson* (Civ. App.), 79 S. W. 48.

Foreign Laws.—Evidence of intelligent residents in Tamaulipas may be valuable as to contemporary construction of laws by executive officers. *State v. De Leon*, 64 Tex. 553, 558.

Evidence of intelligent Mexicans, not lawyers, may be received to show previous construction given to land laws of Spain and Mexico, by officers who executed them. *State v. Cuellar*, 47 Tex. 295, 305.

Though the practice has prevailed of permitting intelligent Mexicans, who are not lawyers, to testify in relation to the laws of Spain and Mexico in suits involving title to lands, such evidence is only valuable as showing the contemporaneous construction given to such laws, and beyond this is value-

less, when introduced to show what constitutes title. *State v. Cuellar*, 47 Tex. 295.

Where a contract was made in the state of Chihuahua, Mexico, between plaintiff and a party claiming to act as defendant's agent, the testimony of a practicing attorney of that state and country is admissible to prove the laws of such state, and their application to such contract, for the purpose of determining its validity. *Sierra Madre Const. Co. v. Brick* (Civ. App.), 55 S. W. 521.

2. Translators; Interpreters.

It is no objection to the deposition of a witness who translates in his evidence a Spanish document, that it had not at first been shown that the witness "was a Spanish scholar and competent to correctly translate the Spanish language into English," when his deposition disclosed the fact that he had once filled the post of Spanish translator in the general land office, and wrote and spoke the Spanish language. *Blythe v. Houston*, 46 Tex. 65, 67.

The translation of a general land office archive paper from the original Spanish into English, made by the Spanish translator in the general land office, and attached to his deposition as an exhibit, with his certificate of its correctness, is admissible in evidence, in connection with his testimony, showing his ability to read and write the Spanish language, and that he had attached the exhibit as a translation of the archive Spanish paper. *Houston v. Blythe*, 60 Tex. 506.

3. Commissioner of Land Office.

The commissioner of the general land office is competent to testify as to the meaning of record entries on tabular statement on record in his office, as understood by officers employed under him. *Shinn v. Hicks*, 68 Tex. 277, 280, 4 S. W. 486.

In an action involving the priority of location of a tract of land, the opin-

ion of the commissioner of the general land office that the patent under which defendant claims was improperly issued is inadmissible. *Houston & T. C. R. Co. v. McGehee*, 49 Tex. 481.

In trespass to try title, the land commissioner's certificate, stating that land was sold to a certain party, and that it was abandoned and again placed on the market at a date subsequent to that of plaintiff's application, being merely a conclusion of the commissioner, is not admissible to show that the land was not on the market at the time plaintiff made his application. *Hamilton v. McAuley*, 65 S. W. 205, 27 Tex. Civ. App. 256.

4. Contractors and Builders.

A builder and contractor of 12 years' experience, shown to be familiar with the construction and dimensions of the building burned, and with the material used, is competent, in an action on a fire insurance policy, to give an opinion as an expert as to whether the walls were sufficient to sustain the building. *Continental Ins. Co. v. Pruitt*, 65 Tex. 125.

A contractor having special knowledge of the cost of constructing buildings may testify to the cost of constructing a building, the plans and specifications of which he has seen. *Joske v. Pleasants*, 39 S. W. 586, 15 Tex. Civ. App. 433.

5. Civil Engineers; Construction of Railroads, Dams, Culverts, Bridges, etc.

Construction of Railroad.—In an action against a railroad company for an accident caused by sand which had been washed upon the track, a civil engineer who has acted as such in the construction of defendant's road may testify to his opinion whether the road was properly constructed at the place where the accident occurred, and whether it was constructed in the usual manner. *St. Louis, A. & T. Ry. Co. v. Johnston*, 78 Tex. 536, 15 S. W. 104.

And so may a witness who, though

not a civil engineer, has had experience in railroad construction, and is familiar with the defendant's road. *St. Louis, A. & T. Ry. Co. v. Johnston*, 78 Tex. 536, 15 S. W. 104.

A witness need not have scientific or expert knowledge to testify that there is a steep grade at a certain point on a railroad, and that at the foot of a hill there is a sharp, sudden reverse curve. *Galveston, H. & S. A. Ry. Co. v. Ford*, 54 S. W. 37, 22 Tex. Civ. App. 131.

The matters indicated by testimony that there was a steep grade at a certain place on a railroad, and that at the foot of a hill there was a sharp sudden reverse curve, are not matters of opinion, but facts. *Galveston, H. & S. A. Ry. Co. v. Ford*, 54 S. W. 37, 22 Tex. Civ. App. 131.

In an action against a railroad company for the death of a locomotive fireman, caused by defects in the track, witnesses who had been intrusted with the duty of keeping the track in proper condition, and had several years' experience in railroading, are competent to testify that such track was not properly constructed. *Ft. Worth & D. C. Ry. Co. v. Wilson*, 3 Tex. Civ. App. 583, 24 S. W. 686.

One who has had long service in the railroad business in various capacities is competent to give an opinion as to whether or not a track is safe. *San Antonio & A. P. Ry. Co. v. Brookings (Civ. App.)*, 51 S. W. 537.

Frogs and Switches.—Men who have for years been in the service of railroads, and engaged in that branch of the service where they would be acquainted with the mode of construction of frogs and switches, are competent to give opinions as to the relative safety of blocked and unblocked switches. *Galveston, H. & S. A. Ry. Co. v. Hughes*, 54 S. W. 264, 22 Tex. Civ. App. 134.

Care of Track.—A witness who is an expert in the care of railroad tracks,

and has had many years' experience as section foreman, is competent to testify as to the necessity of a track walker in a particular freight yard, although he has not worked in such yard within two years. *Galveston, H. & H. R. Co. v. Bohan* (Civ. App.), 47 S. W. 1050.

Culverts.—A city engineer, who is a graduate of a school of engineering and who has taken post graduate work on rivers and harbors, and has had some experience in railroad engineering, is qualified to testify as an expert on the sufficiency of openings in a railroad embankment to carry away water in times of overflow. *Gulf, C. & S. F. Ry. Co. v. Wynne* (Civ. App.), 91 S. W. 823.

In an action for injuries resulting from a defective culvert used by a railroad company, a witness who has had 20 years' experience in the construction of railways may testify, after stating the manner in which the culvert was constructed, that it was not proper. *Bonner v. Mayfield*, 82 Tex. 234, 18 S. W. 305.

Bridges.—Evidence of a witness who testifies: "I don't know anything about a bridge of that kind. It seemed to be good, except the sidings, which were shabby,"—is not admissible. *Baldrige & C. Bridge Co. v. Cartrett*, 75 Tex. 628, 13 S. W. 8.

Operation of Flood.—Witnesses held competent to testify that certain flood washed away railway embankment. *Missouri, etc., R. Co. v. McGregor* (Civ. App.), 68 S. W. 711, affirmed in 97 Tex. 641, no op.

6. Machinery; Equipment.

Where, in an action for injuries, plaintiff testified that he had been in the railroad business for more than 20 years as a brakeman and conductor, and was inspector of cars on an important railroad for 4 years, he was competent to testify, as an expert, whether a defect in a brakestaff, which caused his injuries, could have been discovered by proper inspection. In-

ternational & G. N. R. Co. v. Collins, 75 S. W. 814, 33 Tex. Civ. App. 58.

Where, in an action against a railroad company for injuries to an employee caused by a defective handhold, wherein there was evidence tending to show that the car had been "cornered" (that is, struck by something on the corner), a witness who had been a railroad man for 10 years, in the capacity of brakeman and conductor, was competent to give an expert opinion as to whether the concerning of a car necessarily injured the handhold on the corner injured. *Missouri, K. & T. Ry. Co. of Texas v. Baker* (Civ. App.), 68 S. W. 556.

Where plaintiff in an action for breach of warranty in a sale of threshing machinery had worked around threshers for 30 years, and had run other threshers for 17 years, and was familiar with their operation, he was competent to testify as an expert that the machinery in question was old and worn out when delivered. *Standefer v. Aultman & Taylor Machinery Co.*, 78 S. W. 552, 34 Tex. Civ. App. 160.

In an action for injuries caused by a hook used in a drilling machine falling upon plaintiff, a witness who had used similar drilling machines for 25 years was competent to testify that in his opinion the piece of string used in the place of a becket on the hook would be more apt to allow the hook to fall. *Chicago, R. I. & G. Ry. Co. v. Denton* (Civ. App.), 101 S. W. 452.

Where a motor was sold under a warranty and the purchasers sued to recover its value, alleging that it proved to be wholly worthless, witnesses who had qualified themselves as expert machinists familiar with the operation of machinery, were competent to testify as to whether the motor was operated under normal and proper conditions, and it was not error for the court to admit their testimony. *Westinghouse, etc., Co. v. Troell*, 30 Tex. Civ. App. 200, 70 S. W. 324, 326, affirmed in 97 Tex. 651, no op.

Locomotives.—Where witnesses testified that they had had experience in running stationary engines, knew a great deal about them, and that the blow-off cock and injector of a stationary engine are used for the same purpose and work on the same principle as in a locomotive, which was not contradicted, they were competent to testify as experts as to the action of a locomotive blow-off pipe and injector in throwing off hot water and steam, by which plaintiff's wife was injured. *Gulf, C. & S. F. Ry. Co. v. Tullis*, 91 S. W. 317, 41 Tex. Civ. App. 219.

7. Operation of Trains.

One who had been railroading for 10 years, and who testified that he knew the proper manner in which a train of cabooses should have been operated while being switched, was competent to testify that there should have been a man on top of the last caboose. *St. Louis & S. F. R. Co. v. Smith* (Civ. App.), 90 S. W. 926.

In an action against a railroad for damages from fire communicated by a spark from a locomotive, one who was fireman on the engine at the time, and who had been a fireman for some time on the road, and for two years on other roads, was competent to give an opinion as an expert as to whether the locomotive was properly handled when passing plaintiff's premises. *Texas Southern Ry. Co. v. Hart*, 73 S. W. 833, 32 Tex. Civ. App. 212.

It was not improper on the ground that it was one that the engineer could have answered. *Texas Southern Ry. Co. v. Hart*, 73 S. W. 833, 32 Tex. Civ. App. 212.

In an action against a railway company for the death of a pedestrian at a street crossing, witnesses shown to be old and experienced engineers, familiar with the operation of engines, running trains with like equipment and appliances as used when the accident occurred, were competent as ex-

perts to testify as to their opinion within what distance the train could have been stopped by the use of the appliances at hand. *Galveston, H. & S. A. Ry. Co. v. Murray* (Civ. App.), 99 S. W. 144.

Ability to See Objects on Engine or Track.—In an action for the death of a railroad employee by being run over by an engine, testimony of one who had had 14 months' experience as an engineer, and who showed his competency to testify on the subject, as to the distance that he could see an object on the track while operating an engine at a certain rate, was admissible. *Missouri, K. & T. Ry. Co. of Texas v. Jones*, 80 S. W. 852, 35 Tex. Civ. App. 584.

Speed.—Locomotive engineers, foremen, switchmen, and yard foremen are prima facie competent as experts to give an opinion as to the speed of a train. *Brown v. Rosedale St. Ry. Co.*, 4 Willson, Civ. Cas. Ct. App. § 179, 15 S. W. 120.

A lawyer, though he had at one time been engaged as a claim agent for a railroad company, and had then posted himself thoroughly as to the construction of engines, watched them in the shops, questioned the engineers about them, and noticed the effect of the speed of a train, is not competent to testify as an expert that a particular train could not be run with safety at a greater rate of speed than from 10 to 15 miles per hour, since he was not educated in the business, and did not have any special knowledge and skill in the particular calling to which the inquiry related. *Ft. Wort & D. C. Ry. Co. v. Thompson*, 2 Tex. Civ. App. 170, 21 S. W. 137.

Loading Cars.—Experienced railroad men were competent witnesses to testify that ties which fell and injured were not properly loaded. *Texas Cent. R. Co. v. Lyons* (Civ. App.), 34 S. W. 363.

A witness who had been a railroad

fireman, and had noticed the manner of loading cars with lumber and who had worked as a car repairer, one of his duties in that position being to rearrange and adjust lumber on the cars when it became disarranged, was competent to testify that lumber properly loaded and fastened with sticks would not shift or get out of position when being pulled in a train from 80 to 100 miles. *Southern Pac. Co. v. Godfrey*, 48 Tex. Civ. App. 861, 107 S. W. 1135.

Coupling Cars.—In an action against a railroad for injuries to a passenger, a witness, who had been in a railway service as switchman, brakeman, and conductor for 12 years, was qualified to testify that the force with which a coupling of cars, alleged to have been negligently made, was made, was not unusual. *Mullen v. Galveston, H. & S. A. Ry. Co. (Civ. App.)*, 92 S. W. 1000.

Where, in an action by a brakeman for injuries received in attempting to make a coupling, and alleged to have been caused by a defective draw-head and coupling link, plaintiff testified to experience as a brakeman, and stated that he knew a brakeman's duties, he could testify that he attempted to make the coupling in the usual manner. *Texas Mexican Ry. Co. v. King*, 37 S. W. 34, 14 Tex. Civ. App. 290.

The testimony of a witness who had traveled a great deal on freight trains that the force of the concussion of a freight train and the caboose, when coupling, was very unusual and unnecessary, was not incompetent as being an opinion. *Missouri Pac. Ry. Co. v. Martin*, 2 Willson, Civ. Cas. Ct. App. 655.

Derailments; Cause of.—On an issue as to the cause of a railroad wreck, it was error not to permit a witness who had had considerable experience in examining railroad wrecks to testify that he had examined the wreck and could find no cause therefor.

Southern Kansas Ry. Co. of Texas v. Sage, 43 Tex. Civ. App. 38, 94 S. W. 1074.

The evidence of a witness who was a fireman on the engine at the time it was derailed, and who helped to construct the road, was admissible to show the liability of the track to "get out of line" at that point by reason of rain. *Ft. Worth & D. C. R. Co. v. Thompson*, 75 Tex. 501, 12 S. W. 742.

8. Competency of Employees, Fellow Servants, etc.

Opinion of a witness who only knew an employee for one day before his death, is inadmissible to prove his incompetency in action by fellow-servant for damages. *East Line, etc., R. Co. v. Scott*, 68 Tex. 694, 697, 5 S. W. 501.

An old brakeman, who had worked on a train operated by a certain engineer for two weeks, is qualified to testify as to the competency and carefulness of the engineer as to all matters which do not involve a technical knowledge of the machinery of the engine. *Houston & T. C. Ry. Co. v. Patton (Sup.)*, 9 S. W. 175.

A person who had been in the service of railroads for 10 years, and a part of the time as a conductor, is competent to testify that the engineer of his train "would pull a train down hill just as fast as he could turn a wheel." (Civ. App.), *Galveston, H. & S. A. Ry. Co. v. Davis*, 45 S. W. 956, reversed 48 S. W. 570, 92 Tex. 372.

In an action against a railroad company for an injury caused by the explosion of an engine, two depositions by the same witness were before the court, and counsel for plaintiff proposed to read an answer to an interrogatory as to whether the engineer in charge of the exploded engine was competent, whereupon objection was interposed, on the ground that the witness in his other deposition had declared that he "knew nothing about

the competency, carelessness, or skill of the engineer." Held, that the evidence should have been excluded. *East Line & R. R. Co. v. Scott*, 68 Tex. 694, 5 S. W. 501.

Men who are experienced in the business of constructing telegraph lines may testify that men with whom they have worked were incompetent. *Postal Tel. Cable Co. of Texas v. Coote* (Civ. App.), 57 S. W. 912.

Where a witness testified that he had run a drill press over a year, and handled the particular press at which plaintiff was injured for a month and a half; that he had known plaintiff's helper, by whose alleged negligence it was claimed the injury was caused, for three months, and had worked with him as a helper in other things; that it required a strong man for the position of helper on a drill press, and that plaintiff's helper was sickly, incompetent, and negligent—the witness qualified himself as an expert, and was competent to testify concerning the capacity of plaintiff's helper, though he had not worked with him in connection with a drill press. *Kansas City Consol. Smelting & Refining Co. v. Taylor*, 48 Tex. Civ. App. 605, 107 S. W. 889.

On an issue as to whether plaintiff was experienced in the refining of petroleum, experts in such business who had been intimately associated with plaintiff for many years and had seen him engaged in the work were entitled to give their opinion as to plaintiff's competency. *United Oil & Refining Co. v. Grey*, 47 Tex. Civ. App. 10, 102 S. W. 934.

9. Medical Experts.

A physician held competent to give his opinion as to probable duration of plaintiff's injuries. *San Antonio, etc., R. Co. v. Moore*, 31 Tex. Civ. App. 371, 72 S. W. 226.

The opinion of the family physician who has observed symptoms of insanity in defendant, is admissible on

the question of his sanity. *Pigg v. State*, 43 Tex. 108.

Though a physician had a license to practice medicine, not being a graduate of any school of medicine, and it not appearing that he had read any books on surgery or that he was at all familiar with gunshot wounds, he was not qualified as an expert in a murder trial to give an opinion as to the cause of decedent's death. *Smith v. State* (Cr. App.), 99 S. W. 100.

Where, in an action for injury caused by electric shock, a physician of 35 years' practice testifies that he has read the best of authorities on the subject, and knew what they said as to the result of electricity on the human system, but that he had had no personal experience, was not an expert, and did not feel qualified to give an opinion, an objection to his testifying as an expert should be sustained. *Wehner v. Lagerfelt*, 27 Tex. Civ. App. 520, 66 S. W. 221.

A witness shown to have been in the employ of a railway company as local surgeon for about a year and a half, and to have examined the plaintiff when he applied for the position of fireman, and to have then had in his possession the rules of the company in regard to the physical qualifications of applicants for employment, is competent to testify as to whether he considered the loss of two toes to be a serious and permanent injury, and whether such injuries rendered the person sustaining them physically not acceptable as a locomotive fireman, according to the standard of railroad companies. *Chicago, R. I. & P. Ry. Co. v. Hiltibrand*, 44 Tex. Civ. App. 614, 99 S. W. 707.

10. Life Expectancy.

A physician who testified that he had practiced medicine 20 years, during which time he had read reports on the subject of life expectancy, and that he had made reports for life insurance

companies and had examined their mortality tables, was properly permitted to testify as to a life expectancy in an action for personal injuries, over objections that the sources from which he obtained the information on which his opinion was based was the better evidence, and that his testimony, based on information derived from the reports, was hearsay, where no objection was made to his testimony on the ground that he had not shown such knowledge of the tables as qualified him to state the life expectancy to which he testified. *Ft. Worth, etc., R. Co. v. Spear* (Civ. App.), 107 S. W. 613.

11. Physicians' and Nurses' Charges.

A witness who was a plasterer by trade had paid some doctors' bills and two surgical bills, but had never practiced medicine or surgery. When asked whether certain physicians' charges were reasonable or not, he answered, "Oh, I don't know; it seems to be customary." Held, that he was incompetent to testify as an expert as to the value of such services. *Missouri, K. & T. Ry. Co. of Texas v. Craig*, 44 Tex. Civ. App. 583, 98 S. W. 907.

A physician who is not a nurse, and who has never employed one, and has no personal knowledge of compensation of professional nurses in a city, except as to what a few of them told him, is not qualified to testify as to the reasonable and customary compensation of a professional nurse in such city. *Cameron Mill & Elevator Co. v. Anderson*, 78 S. W. 971, 34 Tex. Civ. App. 229.

12. Value.

a. Personality.

Market Value, Generally.—A witness who has gained his knowledge of the state of the market by market reports and by telegrams and accounts of sale may testify as to the market value of an article. *Galveston, etc., R. Co. v. Karrer* (Civ. App.), 109 S. W. 440.

Held, in this case, that the testimony of a certain witness, standing alone, would not have been proper evidence of the value of the goods at the time of seizure, but, taken in connection with that of other witnesses was admissible, and might be looked to to ascertain the value of the goods. *Barber v. Hutchins*, 66 Tex. 319, 323, 1 S. W. 275.

Railroad Bonds.—One having knowledge of the financial condition of a railroad company, the location and character of its road, the productive capacity of the country tributary thereto, and the market value of railroad bonds, is competent to give opinion evidence as to what the bonds of such road would have sold for, if issued. *Houston & T. C. Ry. Co. v. Shirley*, 89 Tex. 95, 31 S. W. 291.

Jewelry.—A jeweler is competent to testify as to the market value of certain articles of jewelry alleged to have been stolen, on a showing that he is acquainted with the market value of goods of such character, even though he has no personal knowledge of the articles in question. *Baden v. State* (Cr. App.), 74 S. W. 769.

Where, in an action for loss of a diamond ring, a witness knew the weight, color, and value of the stone at the time he sold it to plaintiff, and that the price received for it was its market value at that time, and he also knew the percentage of increase in the market value of diamonds from that time until the case was tried, he was competent to testify to the value of the stone at the time of the trial, though he had then forgotten its weight. *Pullman Co. v. Vanderhoven*, 48 Tex. Civ. App. 414, 107 S. W. 147.

Saloon Goods.—When there is a question as to the value of a stock of saloon goods levied on by the sheriff and claimed by a third person, a witness who has been in the saloon business for seven years in the town where the levy was made, and who states that he knows the value of

such goods, is competent to testify as to their value. *Allen v. Carpenter*, 66 Tex. 138, 18 S. W. 347.

Secondhand Goods.—In an action against a carrier for loss of secondhand clothing, household goods, etc., it is not error to exclude evidence of the relative value of such secondhand and new goods where the witness states that he is a dealer in new goods only, and has no knowledge of the value of such secondhand goods. *International & G. N. Ry. Co. v. Nicholson*, 61 Tex. 550.

In such a suit a question asked a witness as to "what per cent was lost on goods by being used, or the value of secondhand goods," was properly excluded as too general. *International, etc., R. Co. v. Nicholson*, 61 Tex. 550.

Secondhand Vehicles.—Carriage dealers and repairers, shown to have sufficient knowledge of the cost and value of secondhand vehicles, were competent to testify as experts in an action against a carrier for the loss of a shipment of secondhand vehicles. *Texas & P. Ry. Co. v. Wilson Hack Line*, 46 Tex. Civ. App. 38, 101 S. W. 1042.

Rough Rice.—Where a witness testified that he obtained his knowledge of the market price of rough rice at a certain time from what he heard others say at that time, including the general manager of the plaintiff, a rice milling company, and from general quotations in the newspapers, he was qualified to testify as to the market price. *El Campo Rice Milling Co. v. Montgomery* (Civ. App.), 95 S. W. 1102.

Grass Pasturage.—In a suit for the value of certain grass, witnesses who are old settlers and own pastures are competent to testify as to its value. *Galveston, etc., R. Co. v. Polk* (Civ. App.), 28 S. W. 353. See, also, *Gulf, etc., R. Co., v. Dunman*, 85 Tex. 176, 19 S. W. 1073; *Scalf v. Collin County*, 80 Tex. 514, 16 S. W. 314.

Live Stock.—See, also, post, "Damage to Live Stock," III, B, 15, b; "Transportation of Live Stock," III, B, 16.

In an action to recover the value of a jack, witnesses who testify that they have had much experience in the business for which such animals are usually kept are competent to testify as to its value. *Texas & P. Ry. Co. v. Virginia Ranch, Land & Cattle Co.* (Sup.), 7 S. W. 341.

On the question of the value of a cow killed by a railroad, a witness, who testified that he was in the produce business, owned a ranch, had been in the habit of buying cows, and had personal knowledge of several sales and the prices paid, was a competent witness as to the value of the cow killed. *Texarkana & Ft. S. Ry. Co. v. Bell* (Civ. App.), 101 S. W. 1167.

In an action to recover for damage to cattle by defendant's negligent delay in transporting them to the point of sale, testimony of plaintiff that the cattle brought 50 cents per 100 pounds less than they would have otherwise brought, because of the decline in the market price and the appearance of the cattle, was not objectionable on the ground that the estimate was based in part on the decline in the market value between two days, on one of which plaintiff was not at the market and had no personal knowledge of the prices, where plaintiff was an experienced cattleman and had sold cattle at that market for a number of years, and based his estimate upon the market quotations for that day, stating in his testimony the data on which he based his conclusions, since he was qualified to testify as to that question. *St. Louis, I. M. & S. Ry. Co. v. Rogers*, 49 Tex. Civ. App. 304, 108 S. W. 1027.

There was no error in allowing plaintiff to state the market value of his stock at a certain place in the condition they were in and the difference

in such value in the condition they should have been in on arrival there. Where he was in such place about three weeks after arrival; had been there a day or two before he sold three of his horses, and had made inquiries and posted himself as to the market value of horses and cattle while there, of parties who were buying and selling, and saw horses and cattle sold there on the market. *Gulf, etc., R. Co. v. Gann*, 8 Tex. Civ. App. 620, 28 S. W. 349, 350; *Texas, etc., R. Co. v. Donovan*, 86 Tex. 378, 25 S. W. 10, affirming 23 S. W. 735.

A witness having knowledge of the market value of horses, independent of information received from others, is competent to testify to the market value of horses. *Ft. Worth & R. G. Ry. Co. v. Hickox* (Civ. App.), 103 S. W. 202.

A witness, on his preliminary examination to qualify as an expert to prove the value of horses at a town in another state, showed that his knowledge of the horse market at that place was based on what had been communicated to him through letters and telegrams from persons not shown to have had any knowledge of the market. The witness had sold horses at that market the year before, and had occasional notice of sales of horses in a newspaper sent to him from that market. He had also made inquiries of persons who had an opportunity to know the state of the market the previous year. Held, that the witness was not competent to testify as to the value of horses at that market. *Pecos & N. T. Ry. Co. v. Hughes*, 44 Tex. Civ. App. 135, 98 S. W. 410.

b. Real Estate.

Witness who is familiar with facts is competent to testify as to value of use and occupation land, although he knows of no market value for like property. *Gulf, etc., R. Co. v. Dunman*, 85 Tex. 176, 19 S. W. 1073.

Productive Capacity and Rental Value.—In an action against a railroad for negligently subjecting land to overflow, it was proper to permit a witness, who resided in the vicinity of the land, was familiar with its character and productiveness, and knew the kind of year that the year of the overflow was for raising cotton, to testify to the amount of cotton which land like that in question, which had been shown to be fine bottom land and fine farm land, would produce per acre in a season like the one in question. *Chicago, R. I. & G. Ry. Co. v. Seale* (Civ. App.), 89 S. W. 997.

In an action against a railroad for negligently subjecting land to overflow, a witness testified that he was familiar with the land and the amount of cotton it would produce; that the land was owned by witness and another; and that witness rented the other's interest, hiring a third person to work the same on shares for a certain year. There was evidence that the land would produce on an average from three-fourths of a bale to a bale of cotton per acre, that it took 1,600 pounds of lint cotton to make a bale, and that lint cotton was worth from 3 to 3¼ cents per pound. Held, that it was proper to overrule a motion to exclude testimony of the witness, based on the above facts, that the reasonable rental value of the land he could not put in cultivation was \$12.50 per acre. *Chicago, R. I. & G. Ry. Co. v. Seale* (Civ. App.), 89 S. W. 997.

13. Weight.

Live Stock.—In an action for injuries to hogs, shipped by plaintiff over defendant's railway, it is not an abuse of the trial court's discretion to admit the testimony of a witness as to the weight of the hogs at the time of shipment, based on his opinion or estimate of the weight, where he was 45 years of age, had raised hogs all his life, and had been accustomed to weigh them ever since he was a boy.

Southern Pac. Ry. Co. v. Duncan, 3 Willson, Civ. Cas. Ct. App. § 234.

14. Diseases of Animals.

A witness who is not a veterinary surgeon may testify as an expert on diseases of horses from knowledge acquired by experience, observation, and reading scientific works upon the subject. *Nations v. Love* (Civ. App.), 26 S. W. 232.

In an action against a railroad for damages to cattle, a witness who testified that he knew something about "dry murrain;" that he thought he knew in a general way how it affected cattle, although he did not know what produced the disease; that it was supposed to be dry grass; that he owned the pasture from which the cattle had been taken; that it was abundantly supplied with grass and water; that the cattle at the time of shipment were without disease, and that immediately thereafter other cattle had been placed in the pasture and had not developed dry murrain—was competent to testify that the cattle were not afflicted with dry murrain when they were shipped, as alleged by defendant. *Ft. Worth & D. C. Ry. Co. v. Hagler*, 84 S. W. 692, 38 Tex. Civ. App. 52.

15. Damages.

a. Generally.

Testimony of a witness as to his estimate of plaintiff's loss, as an expert, who had not seen the goods and did not know their value, held properly rejected. *Missouri, etc., R. Co. v. Davidson*, 25 Tex. Civ. App. 134, 60 S. W. 278.

A witness who has had 10 years' experience in inspecting cotton seed is qualified as an expert to testify to the extent of the deterioration in value of seed through delay in transportation and subjection to dampness. *San Antonio & A. P. Ry. Co. v. Josey* (Civ. App.), 71 S. W. 606.

b. Damage to Live Stock.

Where a witness did not disclose,

from his examination, that he was qualified to give an opinion as to the cause of the death of a jack, for whose loss suit was brought, other than the statement that he had handled jacks for 20 years, and was well acquainted with their propensities, his deposition as evidence was improperly admitted. *Texas & P. Ry. Co. v. Weakly*, 2 Willson, Civ. Cas. Ct. App. § 827.

In an action by plaintiff for damages on account of defendant's failure to supply sufficient water to plaintiff's cattle while defendant was pasturing them under a contract with plaintiff, a witness testified that such cattle as defendant had undertaken to pasture for plaintiff, were not likely to fatten in that locality in one season, and though the witness admitted on cross-examination that he had never seen any cattle that he knew to be from Old Mexico, and that the cattle he was testifying about as having been handled and seen by him were said to have been Old Mexico cattle, he testified that he saw the cattle in controversy when they came to the pasture; that they were Old Mexico cattle, and that he was familiar with Old Mexico cattle; that he had handled them himself, and that "they were just about the same stock as these." Held, that the testimony of the witness as to the prospects of fattening the cattle was not objectionable, on the ground that he failed to show that he was familiar with that class of cattle. *Tuttle v. Robert Moody & Son* (Civ. App.), 94 S. W. 134.

In Transportation; Cause of.—A witness familiar with cattle would be competent to testify from the appearance of cattle as to what caused their condition, provided he gave the data upon which he based his opinion. *San Antonio & A. P. Ry. Co. v. Barnett*, 66 S. W. 474, 27 Tex. Civ. App. 498.

In an action against a carrier for damage to cattle a witness was prop-

erly allowed to testify that the bad condition of the cattle was caused by bad handling and delay, where he was shown to have bought and shipped cattle to market for several years, and to have cut the cattle in question, assisted in loading them, and accompanied them to their destination, and when he also detailed the facts on which his opinion was based. (Civ. App.), *St. Louis, I. M. & S. Ry. Co. v. J. H. White & Co.*, 76 S. W. 947, judgment reversed, 80 S. W. 77, 97 Tex. 493.

Same; Extent of Damage.—In an action against a carrier for shrinkage in the weight of cattle, the shipper could testify that the cattle brought a certain amount less per head than they would have sold for if they had been transported in a reasonable time and with reasonable care, where he stated the facts on which his estimate was based, and showed himself acquainted with the market and an expert as to the effect of delay and rough handling in the shipment of cattle. *Ft. Worth & D. C. Ry. Co. v. Richards* (Civ. App.), 105 S. W. 236.

In an action against a carrier for loss by shrinkage in cattle resulting from defendant's negligence, a person at the market to which they were consigned, who knew the cattle, their market value, and the value of such cattle if in good condition, is competent to state how much per head their market value was diminished on account of the bad condition in which they arrived. *Missouri, K. & T. Ry. Co. v. Woods* (Civ. App.), 31 S. W. 237.

In an action for damages from defendant's delay in transporting cattle to market, where plaintiff was an experienced cattleman, and knew the condition of his cattle when shipped and when they arrived at destination, and was familiar with the market prices on the market where they were sold, he was qualified to speak as an

expert on the value of the cattle as affected by the delays. (Civ. App.), *St. Louis, I. M. & S. Ry. Co. v. Boshear*, 108 S. W. 1032, judgment affirmed (Sup.), 113 S. W. 6, 102 Tex. 76.

In an action by shippers of cattle against a railroad company for damages caused by overcrowding the cattle in the cars, it was error to allow an agent of plaintiffs, after testifying that he had been in the business of handling and shipping cattle for several years, and knew the market value of the cattle at the time they were shipped, and at the time they arrived in Chicago, to give his opinion as to what the damage per head was on their arrival at Chicago. *Ft. Worth & D. C. Ry. Co. v. Word*, 2 Tex. Civ. App. 598, 21 S. W. 607.

In an action against a railroad company for damages to cattle received during carriage, it would not be necessary for a witness acquainted with values at the point of destination and with stock generally, and who saw the cattle at their destination point, to have seen or known the cattle when shipped or en route, in order to testify as to their value in the condition in which they arrived at their destination, and as to the condition they would have been in if they had been properly carried, provided such testimony was elicited by proper hypothetical questions. *San Antonio & A. P. Ry. Co. v. Barnett*, 66 S. W. 474, 27 Tex. Civ. App. 498.

Same; Loss of Weight.—In an action for delay in shipment of cattle to St. Louis, rendering necessary a reshipment to Chicago, an experienced cattleman, engaged in shipping cattle to St. Louis and Chicago for years, was properly allowed to testify as to his opinion as to the loss in weight caused by the delay and reshipment. *St. Louis, I. M. & S. Ry. Co. v. Gunter*, 44 Tex. Civ. App. 480, 99 S. W. 152.

A witness who has had large ex-

perience in the shipment of cattle, though he may have no personal knowledge of the cattle in controversy, may give his opinion as to their loss in weight caused by a wreck and ensuing delay, after the fact of the wreck and its results as to the injury and delay of the cattle are stated to him as an hypothetical case. *Ft. Worth & D. C. Ry. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834.

Beef cattle were shipped over a railroad to Chicago, to be there sold immediately on arrival. In an action against the carrier for negligence in carrying the cattle, by which they lost in weight, it was shown that by reason of a wreck they were shaken up and bruised, and were confined in the cars several hours longer than they would otherwise have been. Their weight when they arrived in Chicago was proven, but their weight at the point of shipment was not known. Held, that a witness familiar with the shipment of cattle from such point to Chicago, who was with the cattle in transit, and was present and saw the effect of the wreck, was properly allowed to give his opinion as to the loss of the cattle in weight by reason of the wreck, and of the consequent delay. *Ft. Worth & D. C. Ry. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834.

16. Transportation of Live Stock.

Where, in an action for delay in the shipment of cattle, plaintiff testified that he knew the time ordinarily consumed in such a shipment, he was properly permitted to state the time, though he also testified that he never accompanied but one shipment. *Texas & N. O. Ry. Co. v. Farrington*, 88 S. W. 889, 40 Tex. Civ. App. 205.

A person is not competent to give his opinion as to what is the usual time required for the transportation of a shipment of cattle from one point to another, where his opinion is based on one shipment testified to by him. *Gulf, C. & S. F. Ry. Co. v. Kimble*, 49 Tex. Civ. App. 622, 109 S. W. 234.

In an action for damage to plaintiff's cattle by defendant's negligent delay in transporting them, plaintiff, having shipped cattle between the points in question for a long period, and being familiar with the route and distance between the places, was qualified to give an opinion as to what would be a reasonable time in which to ship the cattle between the two points. *St. Louis, I. M. & S. Ry. Co. v. Rogers*, 49 Tex. Civ. App. 304, 108 S. W. 1027.

In an action to recover for negligent delay in transporting cattle to market, experienced cattlemen who had frequently shipped cattle between the points in question on different lines were qualified to state the usual time required to transport cattle between the points in question, where they gave the data and facts upon which their conclusions were based. (*Civ. App.*), *St. Louis, I. M. & S. Ry. Co. v. Bosh-ear*, 108 S. W. 1032.

Damage to Stock in Transportation.

—See ante, "Damage to Live Stock," III, B, 15, b; post, "Transportation of Live Stock," VI, P, 5; "Damage to Live Stock," VI, P, 6; "Injuries to Live Stock in Transportation," VII, C, 9, f, et seq.

17. Nautical and Marine Subjects.

Witness sixty-five years of age whose principal occupation had been that of a sailor and who was acquainted with the locality, may answer the question: "With a wind sixty miles an hour, what would have been the size of the waves in that immediate vicinity?" *Ilfrey v. Sabine*, etc., R. Co., 76 Tex. 63, 65, 13 S. W. 165.

C. HEARING, DETERMINATION AND REVIEW.

As to how far a witness is qualified to give an opinion is a question largely within the discretion of the trial judge, and ordinarily the action of the trial judge upon the qualification of an expert witness will not be revised. *Gulf, etc., R. Co. v. Norfleet*, 78 Tex. 321, 14

S. W. 703; *Southern Pac. R. Co. v. Duncan*, 3 App. Civ. Cases, § 234.

Witnesses having qualified themselves as experts, the supreme court can not, from an inspection of their evidence on the merits, hold that they were not qualified. *Gulf, C. & S. F. Ry. Co. v. Norfleet*, 78 Tex. 321, 14 S. W. 703.

The court in refusing to permit a witness showing familiarity with the stopping of electric cars and the conditions and circumstances influencing the stopping of the same to testify that at the time a street car collided with a traveler the mortorman made a good stop, and as quick a stop as could be made at the time and place, did not abuse its discretion. *Dallas Consol. Electric St. Ry. Co. v. English*, 42 Tex. Civ. App. 393, 93 S. W. 1096.

Exceptions and Objections.—An objection that certain testimony was “an opinion” did not raise a question as to the qualification and competency of a witness to testify as an expert. *Texas & P. Ry. Co. v. Warner*, 42 Tex. Civ. App. 280, 93 S. W. 489.

When it is sought to reverse a judgment on the ground that a witness was permitted to testify as an expert without first being shown to be such, it would be shown by bill of exceptions or otherwise that examination was made touching his capacity to testify as an expert, or that no examination into his qualification was made. Otherwise, the presumption will obtain that the court became satisfied of the competency of the witness. *Hardin v. Sparks*, 70 Tex. 429, 7 S. W. 769.

Harmless Error.—Where a witness, who on direct examination qualified as an expert, gave testimony only as to matters of fact which required no scientific knowledge, a refusal to strike out his testimony after cross-examination had disclosed that he was not an expert, if error, was harmless. *Gulf, etc., R. Co. v. Steele* 29 Tex. Civ. App. 328, 69 S. W. 171.

D. DISQUALIFICATION BY REASON OF INTEREST.

Where plaintiff was qualified to testify as an expert, the fact that he was a party to the suit and interested in the event thereof did not disqualify him. *Standefer v. Aultman & Taylor Machinery Co.*, 78 S. W. 552, 34 Tex. Civ. App. 160.

IV. Examination of Experts.

A. PLACING UNDER THE RULE.

Where, in an action for personal injuries, all the witnesses were placed under the rule, it was not an abuse of discretion to refuse to relax the rule in favor of defendant's medical experts, whose assistance defendant desired in aiding its counsel to cross-examine one of plaintiff's medical experts. *Missouri, etc., R. Co. v. Smith*, 31 Tex. Civ. App. 332, 72 S. W. 418, affirmed in 97 Tex. 641, no op.

B. PRELIMINARY EXAMINATION.

Questions to one introduced as an expert, propounded by the adversary, and which go to his credibility, are not proper on a cross-examination of the witness when being examined before the presiding judge as to his qualifications as an expert. Such question went to his credibility as a witness, and not to his competency as an expert, and was properly ruled out at that stage of the examination. *Smith v. Caswell*, 67 Tex. 567, 571, 4 S. W. 484.

In an action for injuries by being struck by a train, a rule of the defendant held admissible to show the qualifications of an alleged expert witness, though it was not claimed that the train by which plaintiff was struck violated such rule. *Missouri, etc., R. Co. v. Owens* (Civ. App.), 75 S. W. 579, affirmed in 97 Tex. 641, no op.

Where, in an action for injuries to a person walking along a railway track, an expert witness had testified as to the construction of certain rules and

bulletins of the defendant offered in evidence, one of which provided that whenever the word "train" was used it should be understood to include an engine in service with or without cars, equipped with signals, as provided in rules 33 and 34, which was contrary to the evidence of the witness, it was competent for plaintiff to introduce rule 33, requiring trains to display certain green flags and green lights, etc., as bearing on the qualifications of the witness as an expert, though it was not claimed that the train which struck plaintiff did not display the signals called for in the rule. *Missouri, K. & T. Ry. Co. of Texas v. Owens* (Civ. App.), 75 S. W. 579.

C. DUTY TO GIVE FACTS UPON WHICH OPINIONS BASED.

Expert witnesses must, if called upon therefor, give the facts upon which their opinions rest. *Haney v. Clark*, 65 Tex. 93, 96.

Unless the facts on which the opinions of these witnesses are based are stated, their opinions would not be admissible, even if they were medical men. *Rogers v. Crain*, 30 Tex. 284, 290.

Where witnesses have qualified themselves as experts their opinions, given on the trial, will be regarded as admissible, though given without showing upon what their opinions were formed. *Galveston, H. & S. A. Ry. Co. v. Borsky*, 2 Tex. Civ. App. 545, 21 S. W. 1011.

D. SUFFICIENCY OF KNOWLEDGE UPON WHICH OPINION BASED.

In suit against a carrier for delay in transportation of cattle, where plaintiff had no personal knowledge of weight of cattle or their value at point of destination, he could not testify in regard to those points from memoranda furnished by his commission merchant at such place. *Missouri, etc., Ry. Co. v. Huggins* (Civ. App.), 53 S. W. 1029, 1030.

Expert testimony based upon matters read by witness in newspaper is inadmissible. *Williams v. State*, 37 Tex. Cr. App. 348, 356, 39 S. W. 687.

Medical Experts.—The attending physician of a person injured in a railroad crossing accident may give his opinion as to what caused the injury. *St. Louis S. W. Ry. Co. of Texas v. Laws* (Civ. App.), 61 S. W. 498.

Testimony of physician and surgeon who attended plaintiff and had recently examined him is admissible to show plaintiff's condition and probable future effect of his injuries. *Gulf, etc., R. Co. v. Harriett*, 80 Tex. 73, 83, 15 S. W. 556.

A practicing physician, who had treated plaintiff and assisted in the operation performed on him for his injuries, was competent to testify as to the probable duration of the injuries. *San Antonio & A. P. Ry. Co. v. Moore*, 72 S. W. 226, 31 Tex. Civ. App. 371.

A physician who was called in by an attending physician, about three weeks after plaintiff in an action for personal injuries had been hurt, is a competent witness to show nature and extent of plaintiff's injuries, and may give his opinion as to their probable effect. *Sabine, etc., R. Co. v. Ewing*, 7 Tex. Civ. App. 8, 12, 26 S. W. 638, affirmed in 93 Tex. 649, no op.

The opinion of a medical man that his patient died of a disease, the character of which he stated, is admissible evidence, although he had not seen the patient for two weeks before her death, it being an opinion upon a question of science and skill by a medical witness founded upon facts within his own knowledge. *Rogers v. Crain*, 30 Tex. 284.

The opinion of a physician as to the nature and extent of personal injuries is admissible, although formed from an examination made two years previous to the trial. *Missouri Pac.*

Ry. Co. v. Callahan (Sup.), 12 S. W. 833.

Where other evidence showed that a physician had personally examined and treated plaintiff for injuries received, the physician's testimony as to the character, extent, and probable continuance of plaintiff's disabilities was proper, though he did not himself testify to the treatment and examination. *Ft. Worth & D. C. Ry. Co. v. Stingle*, 2 Willson, Civ. Cas., Ct. App. § 705.

Testimony of physician as to matters gained from the study of standard medical works, rather than from actual practice, is admissible. *Fordyce v. Moore* (Civ. App.), 22 S. W. 235.

In an action against a railroad company for damages alleged to have been caused by the employment of an incompetent surgeon in the company's hospital to treat plaintiff, evidence that a physician, testifying as a witness, who had never examined the surgeon, did not consider him well versed in the science of medicine, was immaterial. *Poling v. San Antonio & A. P. Ry. Co.*, 75 S. W. 69, 32 Tex. Civ. App. 487.

As to Insanity and Mental Capacity.

—See post, "Insanity; Mental Capacity," VI, S. 8.

E. EXPERIMENTS AND DEMONSTRATIONS; NON EXPERT ASSISTANTS.

In an action for personal injuries, it is not error to permit a physician to demonstrate to the jury the nature and extent of the injury by experimenting with plaintiff in their presence. *Missouri, etc., R. Co. v. Lynch*, 40 Tex. Civ. App. 543, 90 S. W. 511, affirmed in 101 Tex. 648, no op.

In an action for injuries, plaintiff's attending physician, who had treated her, was entitled to testify that he employed certain tests to ascertain whether she could feel pain in her limbs, and that she was not simulating the absence of pain on the application

of such tests; he having previously testified that she had no feeling in her limbs. *McGrew v. St. Louis, S. F. & T. Ry. Co.*, 74 S. W. 816, 32 Tex. Civ. App. 265.

Where, in an action for injuries, plaintiff claims the presence of anæsthetic spots on portions of his body, a physician who examined him professionally pending the litigation to qualify as an expert as to the extent of his injuries may testify that on such examination he stuck pins into such portions of plaintiff's body, and he showed no signs of pain. (Civ. App.) *Missouri, K. & T. Ry. Co. of Texas v. Johnson*, 67 S. W. 769, judgment affirmed 67 S. W. 768, 95 Tex. 409.

Where, in an action for injuries, a physician in examining the plaintiff, who complains of anæsthetic spots in portions of his body, testifies that he stuck pins into portions of his body not affected, and plaintiff flinched, such testimony, though it may not have been a necessary part of the examination, is not injurious to defendant. *Missouri, etc., R. Co. v. Johnson* (Civ. App.), 67 S. W. 769, affirmed in 95 Tex. 409, 67 S. W. 768.

Where a servant claimed that he was injured, while operating a rip saw, by the incompetency of a fellow servant, nonexpert witnesses called by defendant's general manager, who was an expert, to witness tests made by him, could testify that, when the saw caught in a timber on the opposite side from the operator, it threw the timber in the operator's direction, and not in the way claimed by plaintiff. *Krueger v. Brenham Furniture Mfg. Co.*, 85 S. W. 1156, 38 Tex. Civ. App. 398.

Evidence of such experiment was admissible, after defendant's general manager had qualified as an expert and had shown that the conditions under which the experiment was conducted were practically the same as those existing at the time of the accident. *Krueger v. Brenham Mfg. Co.*, 38 Tex. Civ. App. 398, 85 S. W. 1156.

Testimony of an expert, as to the details of examination as to the quality of beer, made by other experts, at his instance, but not shown to have been made in his presence, is inadmissible. *Texas Brewing Co. v. Walters* (Civ. App.), 43 S. W. 548.

To prove incompetency of plaintiff as a brewer, in justification of his discharge, defendant offered expert testimony as to the quality of beer made, deprived by witness from other experts, employed by him, but not shown to have made their investigations in his presence, held, that the evidence was properly excluded. *Texas Brewing Co. v. Walters* (Civ. App.), 43 S. W. 548.

F. QUESTIONS ASSUMING ISSUABLE FACTS.

A question to an expert witness is not objectionable because assuming issuable facts, if the testimony tends to prove such facts. *International & G. N. R. Co. v. Mills*, 78 S. W. 11, 34 Tex. Civ. App. 127, affirmed in 98 Tex. 621, no op.

G. QUESTIONS CALLING FOR MERE CONCLUSION.

A question asked an expert held not objectionable as calling for a conclusion. *International, etc., R. Co. v. Collins*, 33 Tex. Civ. App. 58, 75 S. W. 814, affirmed in 97 Tex. 637, no op.

H. LEADING QUESTIONS.

It is ordinarily permissible to ask an expert witness a leading question when his opinion is sought upon a matter about which, by reason of his professional knowledge, he has peculiar information. *Galveston, H. & S. A. Ry. Co. v. Powers* (Civ. App.) 101 S. W. 250, judgment reversed (Sup.) 105 S. W. 491.

In an action for injuries, questions asked an alleged expert whether he was qualified from experience and knowledge to state whether a defect, if

any, that existed in a certain brakestaff could have been discovered by a proper test, and asking him to state from his experience, etc., whether in his opinion the condition of the brake was such as could have been ascertained by proper inspection, were not objectionable as leading. *International & G. N. R. Co. v. Collins*, 75 S. W. 814, 33 Tex. Civ. App. 58.

In an action for injuries to plaintiff's wife, a question to a physician, "Then, in your judgment, if I understand you, on examination on the second day you found no evidence that the condition you found existing, existed prior to the time she was hurt?" was not leading. *Denison, etc., R. Co. v. Powell*, 35 Tex. Civ. App. 454, 80 S. W. 1054, affirmed in 98 Tex. 614, no op.

In an action for injuries, a question asked one of plaintiff's medical witnesses, "If any one is suffering from concussion of the brain or injuries of the brain, is it not a fact that upon excitement or work the symptoms are more marked than if he had been at rest and quiet?" was objectionable as leading. *International & G. N. R. Co. v. Bibolet*, 57 S. W. 974, 24 Tex. Civ. App. 4.

In an action for injuries, one of plaintiff's medical witnesses was asked the following questions: "The brain is one of the nervous centers. If a blow is received on the head from which concussion occurs at the time, and the person receiving the blow recovers from that, is it not a fact that, where there is a concussion of the brain, ordinarily the party recovers after a certain length of time, and for maybe two months feels almost as well as he did before, and then it comes on him again and develops?" Held, that defendant's objection to the question, that it was leading, should have been sustained. *International & G. N. R. Co. v. Bibolet*, 57 S. W. 974, 24 Tex. Civ. App. 4.

I. HYPOTHETICAL QUESTIONS.**1. Necessity, Use and Admissibility.**

Where an expert's opinion is desired as to effect of given facts in producing results it should be elicited by stating a hypothetical case. *Armen-daiz v. Stillman*, 67 Tex. 458, 463, 3 S. W. 678.

Hypothetical questions are not necessary where the evidence shows but one state of facts, about which there is no conflict. *Sherman, S. & S. Ry. Co. v. Eaves*, 61 S. W. 550, 25 Tex. Civ. App. 409.

Fact of wreck and delay and injury to cattle may be stated to expert as hypothetical case, and his opinion asked as to effect on cattle. *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 109, 17 S. W. 834.

See facts for evidence of physician, testifying as experts, bearing upon the mental condition of a testator and based upon the facts proved in the case, held admissible. *Vance v. Upson*, 66 Tex. 476, 1 S. W. 179.

2. Hypothesis Must Be Based upon the Evidence.**a. In General.**

The opinion of an expert upon a hypothetical case will be excluded unless there be evidence tending to prove the supposed facts. *Vance v. Upson*, 66 Tex. 476, 1 S. W. 179; *Gulf, etc., R. Co. v. Compton*, 75 Tex. 667, 13 S. W. 667; *Prather v. McClelland*, 76 Tex. 574, 588, 13 S. W. 543; *Williams v. State*, 37 Tex. Cr. App. 348, 39 S. W. 687; *Gulf, etc., R. Co. v. Craft* (Civ. App.), 102 S. W. 170; *Texas Midland R. Co. v. Ritchey*, 49 Tex. Civ. App. 409, 108 S. W. 782.

An answer to a hypothetical question is properly excluded where one of the facts on which the hypothesis is based is not shown to exist. (Civ. App.) *Hicks v. Galveston, H. & S. A. Ry. Co.*, 71 S. W. 322, judgment reversed 72 S. W. 835, 96 Tex. 355.

Facts Too Remote.—Questions

asked an expert medical witness, which called for opinions based on facts too remote to make them material, were properly disallowed. *Mutual Life Ins. Co. of Kentucky v. Mel-lott* (Civ. App.), 57 S. W. 887.

b. Questions Testing Witness' Knowledge or Qualification.

On cross-examination of an expert, he may, for the purpose of testing his skill and accuracy, be asked hypothetical questions pertinent to the injury, though the facts assumed in such questions have not been testified to; the extent to which such questions may be made being in the sound discretion of the court. (Civ. App.) *Missouri, K. & T. Ry. Co. v. Johnson*, 49 S. W. 265, affirmed 48 S. W. 568, 92 Tex. 380.

c. Upon Assurance That Evidence Will Be Developed Later.

Where in an action for personal injuries, a hypothetical question relative to danger in attempting to remove a sliver of a certain size from a portion of a machine in motion was allowed upon a statement that the facts on which the question was hypothesized would be developed later, evidence that the sliver or splinter in question was considerably larger than it was stated to be in the hypothetical question did not render the allowance of that question erroneous in the absence of any showing that the size of the splinter either increased or diminished the danger incident to the operation. *Rice v. Dewberry* (Civ. App.), 93 S. W. 715.

d. Illustrations.

Questions Held to Be Supported by the Evidence.—In an action against a railroad for damage to land caused by overflows resulting from the construction of a roadbed without constructing sufficient culverts to allow the water to flow away, testimony that witness had been on the dump of the railroad several times when the water was up, and that, at such times, the water was

higher above the dump than below on an average of from $2\frac{1}{2}$ to 3 feet every time he saw it, was sufficient to authorize a hypothetical question asking an expert witness whether, if the water banked up above the dump from 2 to 3 feet higher than it was below during overflows, and that should occur 6 or 7 times in the same year, the openings would, in the judgment of the expert, be sufficient to allow the water to pass off in its natural way. *Gulf, C. & S. F. Ry. Co. v. Wynne* (Civ. App.), 91 S. W. 823.

In an action against a railroad for the death of an engineer, testimony that where the engineer was on a siding, waiting for trains to pass, it was usual for him, if he was placed in any position that he could not know whether all the trains had passed, to rely on the statement of the conductor that the track was clear, and obey his orders to pull out, was not objectionable as being an answer to a hypothetical question not based on the evidence; there being testimony that he had dropped asleep from exhaustion, but none that he was absent from his engine. (Civ. App.) *Galveston, H. & S. A. Ry. Co. v. Brown*, 59 S. W. 930, judgment reversed 63 S. W. 305, 95 Tex. 2.

Where defendant was standing "near by the side" of a railroad track, on which there was an approaching train, when he was ordered to remove an obstruction from the track, and was injured in the attempt, the question, asked by an expert witness, whether or not a person standing upon a railroad track can tell with accuracy the speed of a train coming towards him on a straight track, was not objectionable as being a hypothetical case which was not the case made by the evidence. *Gulf, C. & S. F. R. Co. v. Duvall*, 12 Tex. Civ. App. 348, 35 S. W. 699.

Where a physician, previous to answering a hypothetical question, had

testified that he had examined plaintiff, and found a swelling in the lumbar region of the back, and there was other testimony that she was bruised on the breast, hip, knee, and wrist, and received the injuries in an accident on which the suit was based, a question assuming that plaintiff was previously a strong, healthy woman, and that she met with an accident by being thrown from a buggy, and received several severe bruises, one on the small of the back, and a number of other severe bruises were indicated on her person, and that since that time she had not been well, and asking the witness' opinion as to what was the cause of the accident, was not objectionable as not sufficiently specific, and as assuming facts not sustained by the evidence. *Galveston, H. & S. A. Ry. Co. v. Baumgarten*, 72 S. W. 78, 31 Tex. Civ. App. 253.

Held No Basis in Evidence for Question.—In a murder trial, where decedent survived a gunshot wound a short time, an answer to the question asked a witness, "If there had been nothing done to this man from the time you left him, * * * would he, in your opinion as a medical expert, have been alive the next morning?" was properly excluded; there being no testimony to show that anything had been done to the wound sufficient to cause death after witness examined it. *Smith v. State* (Cr. App.), 99 S. W. 100.

It was error to allow the question, asked a physician, if he would consider the testator of sound mind, supposing that he was in a maudlin state during the interval between the time when the fever left him and the time he signed the codicil, where there was no evidence that he was in a maudlin condition during that time. *Prather v. McClelland* (Civ. App.), 26 S. W. 657.

A medical man testifying as an expert was asked his opinion upon an hypothesis made by collecting the

facts in evidence upon the mental condition of the testator. On cross-examination witness was asked if, in addition, the "man takes charge of all his wife's estate, wills it away in this condition, and then several days after forgets what provision he had made for his wife, he having limited her to \$150 per month the balance of her lifetime, do you think he was in a condition to make a will?" The answer of the witness was, "I should not think that this would indicate it." There was nothing in the evidence tending to show that the testator had "willed away all of his wife's estate." Held, that the question and answer should have been excluded. *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543.

3. Form and Requisites.

a. In General.

There was nothing objectionable in the form of the question asked the witness: "If a man was injured more than a year and a half ago, and he was for more than a year prior to the present time seen doing ordinary farmwork, and if he looked to be in the condition that [plaintiff] seems to be, what would be your opinion as to whether he had suffered from a fracture of the inner table of the skull?" *Chicago, R. I. & M. Ry. Co. v. Harton*, 88 S. W. 857, 40 Tex. Civ. App. 235.

As to Whether Question Sufficiently Specific.—See ante, "Illustrations," IV, I, 2, d.

b. Latitude as to Assumption of Facts.

Counsel in propounding a hypothetical question to an expert may assume within the limits of the evidence any state of facts which he claims the evidence justifies and obtain such expert's opinion on the facts thus assumed. *Gulf, etc., R. Co. v. Compton*, 75 Tex. 667, 673, 13 S. W. 667.

It is not necessary that the hypothetical facts on which an expert bases his opinion as to the existence of a fact sought to be established should

be uncontroverted, but it is sufficient if there is evidence from which the jury might find the existence of the supposed facts. *Collins v. Chipman*, 95 S. W. 666, 41 Tex. Civ. App. 563.

Where Evidence Not Conflicting.—

Where there was no conflict as to the facts, an expert witness was properly asked the question: "Assuming the testimony given to be true, to what would you attribute the injuries of E.?" *Sherman, etc., R. Co. v. Eaves*, 25 Tex. Civ. App. 409, 61 S. W. 550, affirmed in 94 Tex. 711, no op.

Harmless Error.—Assumptions of facts in a hypothetical question to a medical expert did not constitute grounds for reversal, where it did not appear, that, if the question had been correct, the opinion of the witness would have been different from the one given. *Rogers v. Mexico, etc., Banking Co.*, 46 Tex. Civ. App. 475, 103 S. W. 461.

c. Embodying Evidence or Facts in Question.

When a witness is to be examined as an expert, the facts shown by the evidence must be stated to him as the basis for a hypothetical question. *Galveston, etc., R. Co. v. Pitts (Civ. App.)*, 42 S. W. 255.

Necessity for Embracing All the Evidence or Facts.—The hypothesis upon which a question asked an expert witness is based, should include all the facts shown by the evidence. *German Ins. Co. v. Pearlstone*, 18 Tex. Civ. App. 706, 709, 45 S. W. 832, affirmed in 93 Tex. 683, no op.

A hypothetical case stated to an expert witness must be of the whole case, that is, all of the facts bearing upon the issue must be grouped and stated to him. *Williams v. State*, 37 Tex. Cr. App. 348, 39 S. W. 687.

When a hypothetical question on the subject of sanity is asked an expert, it is proper for the court to see that it embodies all material facts bearing on

the issue. *Williams v. State* (Cr. App.), 53 S. W. 859.

Same; Qualifications.—A hypothetical case need not cover the full range of the facts, provided enough is given to enable the witness to formulate an intelligent opinion. *Ft. Worth & D. C. Ry. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834.

The opinion of an expert upon a hypothetical case need not embrace every fact proved or which there is evidence tending to prove. *Gulf, Colorado & Santa Fe Ry. Co. v. Compton*, 75 Tex. 667, 13 S. W. 667.

Although it is not necessary for a hypothetical question to embrace the entire testimony on the point of inquiry, it should not exclude such facts as would render the answer of witness of no value to the jury in passing on the issue. *El Paso Electric Ry. Co. v. Bolgiano* (Civ. App.), 109 S. W. 388.

Effect of Failure to Correctly Embody Facts.—Failure of accurate statement of facts in propounding hypothetical question does not render it inadmissible but simply affects weight of witness' response. *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 109, 17 S. W. 834.

Where the prosecution formulates a hypothetical question to an expert, embracing such facts bearing upon insanity as it deems proper, but not embracing all the facts, there is no error in allowing an answer thereto, when the defense is given full opportunity to cross-examine. *Williams v. State* (Cr. App.), 53 S. W. 859.

A hypothetical question to an expert as to the number of persons who should be put in charge of a water train, where there were four regular trains, each day, passing over the road, is properly allowed, though it appears that only two of the trains would be met by the water train, as the opposite party can embody that fact, if material, in a question put on cross-examina-

tion. *Gulf, C. & S. F. Ry. Co. v. Compton*, 75 Tex. 667, 13 S. W. 667.

d. Questions Calling for Conclusions and Deductions Which Encroach upon the Province of the Jury.

A hypothetical question to an expert witness is not objectionable because calling for an answer drawing deductions from the facts, and bearing on a fact in issue which must be decided by the jury. *International, etc., R. Co. v. Mills*, 34 Tex. Civ. App., 127, 78 S. W. 11, affirmed in 98 Tex. 621, no op.

The proper method of examining an expert witness upon a hypothetical case is to ask his opinion as to the conclusion to be adduced from certain facts which there is some testimony to establish, upon the theory that the facts stated are true. If the facts should be found by the jury to be true, then the opinion of the expert is to be weighed by the jury in connection with the other testimony in the case bearing upon the point. If the supposed facts are found not to be true, then the opinion of the witness is valueless and goes for naught. The truth or falsity of the facts hypothetically stated in the interrogatory is never a matter to be considered by the expert whose opinion upon the case so stated is sought to be elicited. *International, etc., R. Co. v. Goswick*, 98 Tex. 477, 480, 85 S. W. 785, affirming 83 S. W. 423.

The opinion of an expert can not be asked as to the permanency of injuries where it is required that it be based on his own examination and also on the statements of the injured party as affected by a consideration of the fact that such party had a suit pending for the recovery of damages, since his opinion as to the effect of such interest on credibility is inadmissible. *International, etc., R. Co. v. Goswick*, 98 Tex. 477, 85 S. W. 785, affirming 83 S. W. 423.

"The hypothetical question put to

Dr. Barnitz, by the appellant, was improper and correctly excluded by the court. It was not based on facts proved, but consisted largely of deductions drawn from the character of the papers of which probate was sought, about which there might be a broad diversity of opinion, and besides, assumed the very fact in controversy, i. e., that the papers taken together were such 'only as a rational man would make.' The question in effect was this: 'If no person other than one having testamentary capacity (a rational man) would execute such papers as his last will, then, do these papers show that the testator had testamentary capacity at the time they were executed?' *Vance v. Upson*, 66 Tex. 476, 489, 1 S. W. 179.

Where evidence as to construction of a jetty, and its effect in changing current of a river, to plaintiff's injury, is conflicting, it is error to receive opinion of expert witness, who has heard such evidence, but who has a limited knowledge of the facts, as to whether any damage was caused to plaintiff by the jetty. *Armendaiz v. Stillman*, 67 Tex. 458, 464, 3 S. W. 678.

In an action for personal injuries the admission of the testimony of a physician after testifying fully about plaintiff's injuries and his examination, and after having been asked in the form of a hypothetical case as to the cause and result of the injuries, that the injury received by plaintiff would cause the condition he was in, was not erroneous as calling for the conclusion of a witness on an issue to be determined by the jury. *Missouri, K. & T. Ry. Co. v. of Texas v. Hawk*, 69 S. W. 1037, 30 Tex. Civ. App. 142.

e. Questions Calling for Categorical Answers.

A witness can not be compelled to answer "yes" or "no" when the nature of the question is not such as to make such an answer appropriate; in

such a case it is not only the right but the duty of the witness so to answer that he may state the very truth, and have the jury clearly to understand his answer *Vance v. Upson*, 66 Tex. 476, 1 S. W. 179.

f. Mentioning Names of Parties.

The fact that the names of the parties were mentioned, in putting hypothetical questions, is not objectionable. *Lee v. Heuman*, 10 Tex. Civ. App. 666, 32 S. W. 93.

4. Answer Must Assume Truth of Hypothesis; Not to Be Based on Witness' Understanding of Evidence.

An expert asked a hypothetical question may not give an answer based partly on his understanding of the evidence, and not solely on the facts supposed in the question. Judgment (Civ. App.) 71 S. W. 322, reversed. *Hicks v. Galveston, H. & S. A. Ry. Co.*, 72 S. W. 835, 96 Tex. 355.

5. Exceptions and Objections.

Where a hypothetical case was stated to a witness before his examination was begun, as a basis upon which his opinion was sought, and the subsequent examination of him was based upon the facts thus stated, without repeating them with each question, they constituted a part of such questions, when referred to by the questioner as a basis for the answer sought; and hence an assignment of error to a question asked such witness, which contained, in addition to the question objected to as propounded by the questioner, an insertion at the place necessarily understood of the facts upon which the question was based, was the proper and only method for presenting the error on appeal *Galveston, etc., R. Co. v. Powers*, 101 Tex. 161, 105 S. W. 491, reversing 101 Tex. 250.

J. CROSS-EXAMINATION.

1. Generally.

Much latitude should be given on

cross-examination of a witness, when the purpose of the cross-examination is to ascertain the accuracy of the knowledge, skill, and judgment of a witness testifying as an expert. See the opinion in this case for a practice approved in the cross-examination of a witness on the question of handwriting. *Brown v. Chenoworth*, 51 Tex. 469, 470.

In suit for personal injuries resulting from fall of an elevator when expert witness testified that elevator was best make, he could be asked on cross-examination if some first-class elevators did not have safety attachment. *Oriental v. Barclay*, 16 Tex. Civ. App. 193, 210, 41 S. W. 117.

Where in an action for fraudulent representations by which plaintiff was induced to purchase corporate stock, experts had testified from an inspection of the books and statements of the corporations that at the time of plaintiff's purchase the stock was worth above par, it was competent on cross-examination to ask them if the fact that something more than a year after the purchase there were no assets whatever did not show that the books and statements contained an overvaluation of the assets. *Collins v. Chipman*, 95 S. W. 666, 41 Tex. Civ. App. 563.

Where, in an action for injuries to a passenger while boarding a train, the plaintiff and his physician stated that at the time of the accident he had entirely recovered from a rupture sustained previously, and another physician, as a witness for the railway company, stated that in his opinion plaintiff could not have been cured at that time, it was proper on his cross-examination to show that plaintiff's physician was in a better position to know whether or not plaintiff had been cured than witness, whose opinion was based on a hypothetical question. *Galveston, H. & S. A. Ry. Co. v. Fink*, 44 Tex. Civ. App. 544, 99 S. W. 204.

The fact that a physician testifying for plaintiff in a personal injury action had been habitually called by plaintiff's counsel, and that his fees had been contingent on the recovery of judgment for damages might be shown on his cross-examination and on his failure to recall the number of cases in which he had testified, the cases might be mentioned to him, but he could not be asked as to the correctness of his opinion given in such cases. *Horton v. Houston, etc., R. Co.*, 46 Tex. Civ. App. 639, 103 S. W. 467, affirmed in 102 Tex. 585, no op.

Where defendant in an action for injuries attempted on cross-examination of physicians to show a conspiracy to testify for plaintiff, it was proper to allow one of them to testify that, when he was called on by the other to wait on plaintiff, it was not the first time he had been called on by physicians. *Denison, etc., R. Co. v. Powell*, 35 Tex. Civ. App. 454, 80 S. W. 1054, affirmed in 98 Tex. 614, no op.

2. Principles Laid Down by Standard Authorities.

a. Generally.

It is not proper to ask a physician, on cross-examination, whether it is not a fact that all the authorities lay down a certain rule, where he has not referred to any book or authority in such a way as to make it admissible to contradict him. (Civ. App.) *Galveston, H. & S. A. Ry. Co. v. Hanway*, 57 S. W. 695, writ of error denied *Hanway v. Galveston, H. & S. A. Ry. Co.*, 58 S. W. 724, 94 Tex. 76.

b. Quoting Extracts; Naming Author.

On cross-examination of a medical expert for purpose of testing his knowledge, extracts from medical authorities, the author being named, may be incorporated in the question. *Gulf, etc., R. Co. v. Farmer*, 102 Tex. 235, 115 S. W. 260.

Incorporating a question, on cross-examination of a medical expert for the purpose of testing his knowledge,

an expert from a medical work, naming the author, does not make the statement from the book evidence before the jury. *Gulf, etc., R. Co. v. Farmer*, 102 Ga. 235, 115 S. W. 260, reversing 108 S. W. 729.

The reference to books in such cases is not made for the purpose of making the statements in the books evidence before a jury, but solely for the purpose of ascertaining the weight to be given to the testimony of the witness. *Gulf, etc., R. Co. v. Farmer*, 102 Tex. 235, 115 S. W. 260, 262.

If in any aspect of the case the jury could look on quotations from medical works, in a question on cross-examination of a medical expert, as evidence, the difficulty could be overcome by an instruction that it was not to be so considered. *Gulf, etc., R. Co. v. Farmer*, 102 Tex. 235, 115 S. W. 260.

To permit counsel for plaintiffs to recount in detail to an expert medical witness the history of a typhoid fever epidemic in a foreign country, and of the experiments made to determine whether disease germs had been conveyed in water filtered through the ground for a distance of one mile, and ask if such statement was not a correct statement of the facts, was error, though it did not appear that the statement was read from a book. *Elliott v. Ferguson*, 83 S. W. 56, 37 Tex. Civ. App. 40.

K. UNRESPONSIVE ANSWERS.

Where a medical witness, testifying by deposition as to the physical condition of one injured, was asked to state what his condition was on a certain day, the witness' statement as to what he observed on a subsequent day, not being responsive to the question, should have been excluded on defendant's motion. *Roth v. Travelers Ass'n*, 102 Tex. 241, 115 S. W. 31.

L. IMPEACHING WITNESS.

Though a medical witness in an ac-

tion against a railroad for personal injuries received by a passenger in alighting from a train testified that he could not say positively that the coccyx of the injured person was broken by the fall, because he had not made a thorough examination; that he thought, a few months after, that it was caused by the fall, but that he would not say that the injury to the coccyx was or was not caused by childbirth—a predicate is not thereby laid for impeaching the witness in reference to statements made by him at the time of the examination of the injured person. *Missouri, etc., R. Co. v. Criswell*, 34 Tex. Civ. App. 278, 78 S. W. 388.

M. EXCEPTIONS AND OBJECTIONS.

That the answer to a question, proper in itself, is shown to be an opinion of a witness not an expert as to the matter inquired about, is no ground for ruling out the question before it is answered. The proper practice is to move the exclusion of the answer if its objectionable character is not developed until a cross-examination. *Ft. Worth, etc., Co. v. Hogsett*, 67 Tex. 685, 4 S. W. 365.

Questions, and answers thereto, relating to matters of opinion or of law, may be objected to, when offered; such objections do not relate to the manner and form of taking and returning depositions. *Purnell v. Gandy & Son*, 46 Tex. 190.

Objections were made to interrogatories, on the ground that they were leading, and on the ground that the answers were conclusions of law; and the court refused to entertain them, because they were not taken in writing before the commencement of the trial. Such objections to interrogatories and answers are not of the class which go only to the form and manner of taking the depositions, and are not therefore required to be made in writing and before the trial. *Pur-*

nell v. Gandy & Son, 46 Tex. 190, 199.

Where plaintiff, in an action for injuries, introduced as a witness upon the extent of his injuries a physician who had examined him solely for the purpose of qualifying himself to testify upon the subject, a general objection to such witness' testifying to anything plaintiff said or did while being so examined, made before the witness had given any testimony at all, was insufficient to raise any question as to the admissibility of the testimony, since some of such declarations might be admissible, and the court could not pass upon them until it knew what they were. *Missouri, etc., R. Co. v. Johnson*, 95 Tex. 409, 67 S. W. 768, affirming 67 S. W. 769, reversing 67 S. W. 881.

N. HARMLESS ERROR.

Exclusion of the opinion of a qualified expert was harmless, where he testified on the same point as a matter of fact. *Bath v. Houston, etc., R. Co.*, 34 Tex. Civ. App. 234, 78 S. W. 993.

V. Credibility and Weight of Expert Evidence.

A. PROVINCE OF JURY.

Expert opinions as means of proof do not conclusively establish or disprove an alleged matter of fact submitted to investigation. *Southern Kansas Ry. Co. of Texas v. West* (Civ. App.), 102 S. W. 1174.

It is the peculiar province of the jury to weigh the evidence and pass on the credibility of the witnesses and it can not arbitrarily be held that the theorizing of two medical witnesses as to what might or might not happen from an injury should be credited by the jury in preference to the positive testimony of a witness, even though he be the plaintiff in the case. *Galveston, etc., R. Co. v. Harris*, 48 Tex. Civ. App. 434, 107 S. W. 108, 111.

A jury may, and should, consider

the opinion of an expert as it is their duty to consider other evidence, and if, in their judgments, in view of all the evidence before them, it is not entitled to credence, they may disregard it. *Kennedy v. Upshaw*, 66 Tex. 442, 1 S. W. 308.

If a witness offered as an expert bases his opinion on a state of facts which he has heard other witnesses testify to, the value of his opinion depends upon the actual existence of the facts on which he bases it. *Armendaiz v. Stillman*, 67 Tex. 458, 463, 3 S. W. 678.

Illustrations.—Where a suit was brought to recover attorney's fees, and a full history of the services rendered was before the jury, it was proper for the court to refuse to charge that, in determining the amount due, the jury are not bound by the opinion of expert witnesses, unless, in view of all the facts and circumstances, they think such opinions are correct. *International & G. N. R. Co. v. Clark*, 81 Tex. 48, 16 S. W. 631.

In an action by a landlord for a gross sum as rent, defended on the ground that the tenant was only to pay a certain sum per tillable acre, a surveyor's evidence that he had surveyed the cultivated land and ascertained its amount is not conclusive, so as to exclude the testimony of one familiar with the place that, in his judgment, there was more tillable land than allowed for in the survey. *Turner v. Meier*, 30 Tex. Civ. App. 584, 70 S. W. 984.

The testimony of scientific railway engineers that they had constructed a road bed skillfully, and in accordance with scientific rules, should not—in a suit for damages claimed on account of injury to crops caused by water being backed up by the road bed after a rainfall, not extraordinary in its character—prevail over the testimony of others, if such other testimony is believed by the jury to the effect that

the road bed did in fact cause the injury. *Sabine, etc., R. Co. v. Hadnot*, 67 Tex. 503, 4 S. W. 138.

In an action against a railway company for the death of an engineer in a derailment, expert opinions as to the speed the engine was running when derailed were not conclusive upon the jury, where the facts upon which the opinions were founded were before the jury. *Galveston, H. & S. A. Ry. Co. v. Gillespie*, 48 Tex. Civ. App. 56, 106 S. W. 707.

The science of surgery has not yet established rules by which can be determined, with certainty, the direction which a bullet will take after entering a human body. See the opinion in this case for a discussion of the deflections to which such missiles are subject. *Saunders v. State*, 37 Tex. 710.

B. SUFFICIENCY TO RAISE ISSUE.

On a trial for delay in transporting calves to E., and for injury in transit, there is no evidence to raise the issue of market value for the calves in their damaged condition at E., though D. testified that he knew the market value of such calves at E., and that it was about \$4 or \$5 per head, and after plaintiff had testified that his calves would have been worth from \$10 to \$12 per head, had they arrived at E. with ordinary care and in a reasonable time. A. testified that, if a calf that would bring \$10 or \$12 at E. in good condition was delayed 50 or 60 hours and arrived there in bad condition, it would be worth \$3 or \$4 less; D. and A. having testified as experts, and not having been at E., when the calves arrived, to test the market, and C., to whom the shipment was consigned, having testified that he offered the calves on the market at E., and could get no bona fide offer for them because of their injured condition, and that they were then shipped to and sold at C. *Texas, etc., R. Co. v.*

Coggin, 44 Tex. Civ. App. 474, 99 S. W. 431, affirmed in 102 Tex. 594, no op.

C. SUFFICIENCY TO SUSTAIN VERDICT.

Where, in an action against a carrier for injuries to a shipment of cattle, there was direct evidence of the shrinkage of the cattle, occasioned by the delay in transporting them, and testimony of experts based on hypothetical questions embracing the facts proven, a verdict for the shipper was not against the evidence, as failing to show that the cattle were injured by the carrier's negligence. *Gulf, etc., R. Co. v. House*, 40 Tex. Civ. App. 105, 88 S. W. 1110.

VI. Particular Subjects of Expert Evidence and the Evidence Admissible upon the Same.

A. GENERAL RULE AS TO WHAT MAY BE THE SUBJECT OF EXPERT TESTIMONY.

Every employment having a particular class devoted to its pursuit is an art or trade, and a person instructed therein by study or experience may, as to a matter peculiar to such employment, give his opinion as an expert when testifying as a witness. *Ft. Worth & Denver City Ry. Co. v. Thompson*, 75 Tex. 501, 12 S. W. 742.

B. ARCHITECTURE AND BUILDING.

Where a building contract fixed the size of sills on which certain columns were to rest, and did not expressly state the diameter of the base of the columns, evidence by an expert as to the proper diameter of the base of such columns to rest on such sills is admissible. *Linch v. Paris Lumber & Grain Elevator Co.*, 80 Tex. 23, 15 S. W. 208.

C. BOOKKEEPING AND ACCOUNTING.

A bookkeeper can not be allowed to

explain as an expert books not shown to have been kept in accordance with any technical or scientific system of bookkeeping. *McKay v. Overton*, 65 Tex. 82.

Where an expert bookkeeper, in a suit for the settlement of the accounts of a firm, testified to what the firm books showed, it was not error to prevent him from stating whether or not the partner or copartner was debtor or creditor of the firm. *Morgan v. Barber* (Civ. App.), 99 S. W. 730.

Evidence of expert bookkeepers that a treasurer's report, including money deposited in an insolvent bank, and thereby lost as part of the balance of cash on hand, was according to the rules of correct bookkeeping, is properly excluded. (Civ. App.), *Coe v. Nash*, 40 S. W. 235, reversed in 41 S. W. 473, 91 Tex. 113.

In an action for libel in charging that the plaintiff as school treasurer had misappropriated public money, the testimony of experts that plaintiff's books showed all money received to have been properly accounted for is admissible to show the falsity of the charge, and that it was made wantonly, the books being public records open to defendant's inspection. *Forke v. Homann*, 14 Tex. Civ. App. 670, 39 S. W. 210, affirmed in 93 Tex. 683, no op.

A statement that both compound and usurious interest were computed in an account, but the opinion of the witness upon a question of law, and such statements by a witness are not to be received, and are not evidence. It is only as to matters of fact that the statements of a witness are evidence. *Andrews v. Hoxie*, 5 Tex. 171, 195.

D. BOUNDARIES AND SURVEYS.

In trespass to try title, an expert surveyor was properly permitted to testify whether the property described by field notes in the petition was embraced within the metes and bounds given in deeds examined by him. *Camp*

v. League (Civ. App.), 92 S. W. 1062.

On an issue as to whether one survey conflicted with another, it was error to permit a surveyor to testify that there was no conflict, as that question was to be determined by the jury. *Bugbee Land & Cattle Co. v. Brents* (Civ. App.), 31 S. W. 695.

On an issue of the location of a survey where boundaries depended on the location of other surveys, opinions of surveyors as to how they would locate the latter, and that, if such surveys were located in a certain manner, it would be contrary to the field notes for the same, is inadmissible, since such testimony involves a question of law. *Fulcher v. White* (Civ. App.), 48 S. W. 881.

A surveyor's report based upon a modern survey of an old grant and made up of arguments and conclusions upon such evidence as was accessible to him as to the true location of the lines of the surveys in question, was properly suppressed. *Schunior v. Russell*, 83 Tex. 83, 18 S. W. 484.

As a circumstance, it was competent to prove by an expert surveyor the character of the work of the surveyor whose work is in litigation. The witness testified that the work of the old surveyor was generally good. *Schunior v. Russell*, 83 Tex. 83, 18 S. W. 484.

Meanderings of Stream.—On the issue of boundary, a surveyor who had surveyed a line, and to whom another had pointed out a cove where he claimed the original grantee said the line ran, was properly permitted to testify that in his opinion the line run out by him and coinciding with plaintiff's contention was the line of the survey as pointed out to him. *Goodson v. Fitzgerald*, 40 Tex. Civ. App. 619, 90 S. W. 898.

Testimony of a surveyor that his meanderings of a river corresponded with those of certain field notes is inadmissible, where the two sets of

meanderings are introduced in evidence, and leave no room for the expression of opinion as to their correspondence, unless some question arises as to the identity or comparative identity of calls, in which event the surveyor may testify as an expert. *Goodson v. Fitzgerald*, 90 S. W. 898, 40 Tex. Civ. App. 619.

In trespass to try title, testimony of a surveyor that meanderings of a stream shown by a former survey would fit only one particular part of the stream was admissible after he had testified to an actual survey by himself. *Camp v. League* (Civ. App.), 92 S. W. 1062.

A deed made the branch of a certain creek the boundary line of the property to the end of a certain call, and there was evidence that this branch was the line for the entire distance, as contended for by defendants, including the testimony of the surveyor, who ran it originally, and wrote the deed for the parties. Held, that it was error to receive in evidence the opinion of other surveyors that the line should be run by course and distance, rather than by following the branch. *Griffin v. Barbee*, 29 Tex. Civ. App. 325, 68 S. W. 698.

Actual Survey or Office Survey.—It is incompetent for a surveyor to testify to his opinion whether a line he had examined was actually run by the surveyor before making the field notes. The question is for the jury upon all the facts in evidence. *Reast v. Donald*, 84 Tex. 648, 19 S. W. 795.

"Whether the land was actually located and surveyed or was what is known simply as an office survey should be determined by the jury from all the facts in evidence." *Reast v. Donald*, 84 Tex. 648, 651, 19 S. W. 795; *Randall v. Gill*, 77 Tex. 351, 14 S. W. 134.

It was erroneous to permit surveyors to testify to their opinions that when the original survey in litigation

was made none but one of its lines was run. The testimony should have been restricted to facts as they had found them upon the ground. The jury should pass upon such facts. *Randall v. Gill*, 77 Tex. 351, 14 S. W. 134.

In a cause involving boundaries, surveyors, who were witnesses, were permitted to express their opinions to the effect that when the original survey was made none but the western line was actually run. In this there was error. It was not a fact to be proved by expert evidence. The witnesses had surveyed the land and had described the facts as they found them to exist on the ground. That was as much as it was proper for them to be permitted to do. It was the province of the jury to conclude from the facts proved whether or not the lines were actually run. *Randall v. Gill*, 77 Tex. 351, 355, 14 S. W. 134.

In a prosecution for violating the local option law, it was not error to permit the county surveyor, who made the plat from which the field notes bounding the division in which the local option law was put into operation were taken, to testify that the field notes set out in the indictment closed. *Matkins v. State* (Cr. App.), 62 S. W. 911.

E. DAMAGES.

See, generally, the title DAMAGES, vol. 5, p. 824. As to damages to real property, see post, "Nonexpert Opinion," VII, et seq. As to damage to goods, see post, "Goods," VI, K. As to damage to live stock, see post, "Transportation of Live Stock," VI, P, 5.

F. ELECTRICITY.

In Action to Recover Price of Light Plant.—In an action to recover the price of an electric light plant, where defendant denies compliance with the terms of the contract, it is not error to exclude the testimony of a witness

to the effect that the plant was substantially as contracted for, and that after its completion he operated it, and found it to be in satisfactory running order, since such evidence is merely the opinion of the witness *A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co.*, 57 S. W. 575, 23 Tex. Civ. App. 328.

Stringing Wires.—In an action against a railroad company and a telegraph company for injury caused by a wire crossing a highway so low as to interfere with loaded wagons, the testimony of a qualified witness as to the usual height of wires over highways, in order that they should not operate as obstructions thereto, was admissible. *Houston & T. C. R. Co. v. Hopson* (Civ. App.), 67 S. W. 458.

In an action for death caused by a telephone wire breaking and falling across another wire charged with a dangerous current, an electrical expert could testify for plaintiff that there is a method whereby wires of an upper system may be prevented from falling upon those of a lower system, as preliminary to testimony as to the practicability of such methods. *Citizens' Telephone Co. v. Thomas*, 45 Tex. Civ. App. 20, 99 S. W. 879.

Injury to Lineman.—In an action for injuries to an electric lineman, a question asked by a witness as to whether a cut-off box, in the condition it was in when plaintiff's foreman went to cut off the current, not knowing that the wires had been jumped out of the box, would indicate that the current had been cut off, was not objectionable, as calling for an opinion. *Dallas Electric Co. v. Mitchell*, 76 S. W. 935, 33 Tex. Civ. App. 424.

In an action for injuries to an electric lineman, questions asked a witness as to whether, a man seeing cut-off boxes pulled and the wires south of the box dead, it would be his duty to see what wires passed through the box, and whether it was his duty to

see that the wires passing through it had been killed, were objectionable as calling for the witness' opinion. *Dallas Electric Co. v. Mitchell*, 76 S. W. 935, 33 Tex. Civ. App. 424.

Where an electric lineman was directed to work on certain wires after his foreman had attempted to cut off the current in a cut-off box, and was injured, a question, in an action therefor, as to whether experienced linemen, under the conditions in which plaintiff's foreman found the box, would have thought it necessary to have climbed the pole to see whether or not the wires had been jumped out of the box, was properly excluded as calling for an opinion. *Dallas Electric Co. v. Mitchell*, 76 S. W. 935, 33 Tex. Civ. App. 424.

G. EXCHANGE, RATE OF.

Witnesses qualified as experts on the question of the customary rate of exchange may, in an action by one who paid a draft to recover overcharges for interest and exchange alleged to have been included therein, testify to the usual and customary rate of exchange where interest on the amount for which drafts have been drawn has been charged, and that, when interest is charged, exchange is not customarily charged. *D. Sullivan & Co. v. Owens* (Civ. App.), 90 S. W. 690.

H. EXPLOSIVES AND FIRES.

The cause of an explosion of a locomotive is a proper subject of expert testimony. *Missouri, K. & T. Ry. Co. of Texas v. Sherman* (Civ. App.), 53 S. W. 386.

In an action for injury caused by an explosion resulting from the drawing of gasoline from tanks near a furnace, it was proper to show by one who qualified as an expert, and thoroughly acquainted with gasoline, that gas given off by gasoline is ignitable at distances remote from the gasoline, and to show the distances; conditions

having been shown upon which to predicate the testimony. *Waters-Pierce Oil Co. v. Snell*, 47 Tex. Civ. App. 413, 106 S. W. 170.

I. FENCES.

Where, in an action for damages to plaintiff's steers by defendant's bulls breaking into the same pens, plaintiff qualified as an expert, it was error to refuse to permit him to testify that in his opinion the fence inclosing his cattle, which was broken by the bulls, was sufficient to turn cattle of ordinary disposition with reference to breaking fences. *Trammell v. Turner* (Civ. App.), 82 S. W. 325.

J. GENUINENESS OF INSTRUMENT.

See, also, the title **HANDWRITING**.

Where two deeds purporting to be executed by one person are offered in evidence by opposing parties, expert testimony that one person did not execute both is admissible on issue as to which, if either, is genuine. *Bell v. Hutchings* (Civ. App.), 41 S. W. 200.

On an issue involving the fraudulent alterations of a bounty warrant, it was proper to permit a witness, who, as an officer, had taken evidence of the transfers made by parties claiming under it, and who had witnessed the execution of some of them to state: "I know that the land warrant and the transfers attached thereto are all genuine, honest instruments, and entitled to full faith and credit" for the objecting party had a right, if he desired, to examine the witness and ascertain upon what facts he based his statement that the certificate itself was genuine. *Shinn v. Hicks*, 68 Tex. 277, 4 S. W. 486.

Where an abstract purports to be certified by P., register of deeds, his testimony that he made no abstract to the land, and that the abstract was not genuine, is a statement of facts, and not a conclusion. *Paul v. Chenault* (Civ. App.), 59 S. W. 579.

K. GOODS.

1. Storage and Handling.

The proper method of stacking flour in fifty-pound sacks is a subject of expert testimony. *Commerce Milling & Grain Co. v. Gowan* (Civ. App.), 104 S. W. 916.

On the issue, in an action on a lease for rent, whether the premises were so damaged by fire as to render them "unfit for occupancy" for the purposes for which they were leased, a dry goods business, the lease, by its terms, ceasing in such event, testimony of experts that dampness in the premises would have a bad effect on almost all kinds of goods carried in a dry goods store, and damage the sale thereof, and that it would not have been safe or practical to have put a stock of goods in the building in the condition it was in after the fire, was admissible. *Meyer Bros. Drug Co. v. Madden, Graham & Co.*, 45 Tex. Civ. App. 74, 99 S. W. 723.

2. Damage to Goods.

In Transportation.—Testimony of a carrier's agent at the delivering point, that barrels in which flour was shipped were green when loaded on the cars, and that, by piling them several tiers deep, the barrels were bent out of shape, and the flour spoiled, may be regarded as a statement of an opinion. *Gulf, C. & S. F. Ry. Co. v. A. B. Frank Co.* (Civ. App.), 48 S. W. 210.

In an action against carriers for injuries to cotton, witnesses who had qualified as experts were entitled to testify that in their opinion the cotton had been damaged by fresh, and not by salt, water. *Houston & T. C. R. Co. v. Bath*, 90 S. W. 55, 40 Tex. Civ. App. 270.

In an action against carriers for injuries by water to a shipment of cotton by both railway and ship, in which the initial carrier, a railroad, claimed that the cotton was injured by rain before being received by it, and also that it was receipted for by the ship's

mate as in good order, opinion evidence that it could not have been in good order when received by the ship, and that it would be damaged less by being handled by a railroad company for two or three days than by being exposed for three months in the open air, was properly excluded as invading the province of the jury. *Bath v. Houston & T. C. Ry. Co.*, 78 S. W. 993, 34 Tex. Civ. App. 234.

3. Quality, Identity and Similarity.

In an action for breach of warranty in a sale of meal for fodder, where samples of other meal are introduced to show defects in the quality of meal furnished under the contract, testimony of a witness that the samples were similar to the meal furnished under the contract is not expert evidence. *Taylor Cotton-Seed Oil & Gin Co. v. Pumphrey* (Civ. App.), 32 S. W. 225.

4. Value.

See post, "Value," VI, Y.

L. INSURANCE.

1. Fire Insurance.

Compliance with Conditions of Policy.—In suit on insurance policy, experts may explain the meaning of technical words or phrases, but should not be permitted to give an opinion as to whether or not certain facts constitute compliance with a contract. *German Ins. Co. v. Pearlstone*, 18 Tex. Civ. App. 706, 709, 45 S. W. 832, affirmed in 93 Tex. 683, no op.

Condition as to Keeping Books Showing Record of Business.—In a suit on a fire policy which required the insured to keep a set of books showing complete record of the business transacted, expert evidence that merchants in general failed in some particulars to keep books, and in lieu thereof kept records upon cash register slips, was irrelevant and inadmissible; the preservation of cash register slips not being a compliance with the requirement that a set of books

should be kept. *Monger v. Queen Ins. Co.*, 44 Tex. Civ. App. 629, 99 S. W. 887, affirmed in 102 Tex. 588, no op.

It would be an invasion of the province of the jury for an expert to answer the question in an insurance case: "Would you consider the furnishing of a ledger and a journal a substantial compliance with the contract requiring the furnishing of a set of books showing a complete record of the business transacted, the evidence in this case having shown that seven or eight different books were kept?" *German Ins. Co. v. Pearlstone*, 45 S. W. 832, 18 Tex. Civ. App. 706.

Increased Risk.—On an issue as to increased risk under a fire policy the testimony of experts is not admissible. *Merchants' Ins. Co. v. Dwyer*, 1 Posey Unrep. Cas. 441.

Whether or not the erection of a tenpin alley, in proximity to a store covered by a policy of insurance, would increase the danger of fire in regard to such store, is not a subject of expert evidence; it being a matter of common knowledge, on which an uneducated mind is capable of forming a judgment. *Merchants' Ins. Co. v. Dwyer*, 1 Posey, Unrep. Cas. 441.

2. Life Insurance.

Construction of Charter.—It is not error in an action on a life certificate to exclude evidence of a witness' construction of an article in defendant's constitution. *National Fraternity v. Karnes*, 60 S. W. 576, 24 Tex. Civ. App. 607.

Construction of Premium Contract.—Where the deceased made application for a term insurance to a given date and for a twenty payment policy beginning at the expiration of the term, and there was a controversy as to whether the amount of the premiums was to be based upon the applicant's age as of the date of the application or as of the date of the expiration of the term policy, the testimony of an expert in life insurance matters was

admissible to show the meaning and interpretation given by all insurance men in such a case. *Ætna Life Ins. Co. v. Hocker*, 39 Tex. Civ. App. 330, 89 S. W. 26, affirmed in 101 Tex. 627, no op.

Life Expectancy.—See post, "Life Expectancy," VI, O.

M. INTERPRETATION AND CONSTRUCTION.

1. Written Instruments Generally.

Expert testimony should not be admitted to determine the meaning of a written contract where the court could determine the meaning of the terms used without such evidence. *Smith v. Jefferson County*, 41 S. W. 148, 16 Tex. Civ. App. 251.

It is the duty of the court to construe written instruments, and expert evidence as to their meaning is inadmissible where the meaning can be determined from the face of the writing. *Smith v. Jefferson County*, 16 Tex. Civ. App. 251, 41 S. W. 148; *McFarlane v. Howell*, 16 Tex. Civ. App. 246, 253, 43 S. W. 315, affirmed in 93 Tex. 645, no op.

Railroad Contract.—In a suit by a brakeman for injuries, defendant railroad answered that plaintiff was injured while in the employ of L. & Co., independent contractors engaged in the construction of a road for defendant under a written contract, and offered the deposition of one of its engineers that the duties of L. & Co. were to build the road so that it would be accepted by the engineer in chief; that deponent controlled the work only indirectly, and as manager of his superior; that the details were left to the contractors; and that "the results of the work were what the railway company was after." Held, that as the contract stated the relative duties of the contractors and of the engineer, and the relation of the latter to the former, the deposition was a mere opinion as to the legal effect of the contract, and inadmissible. *Gulf,*

C. & S. F. Ry. Co. v. Shearer, 1 Tex. Civ. App. 343, 21 S. W. 133.

Description in Deed.—The effect of a description in a deed, so far as it can be determined from the instrument, is for the court to declare, and is not a subject for expert testimony. *Benson v. Cahill* (Civ. App.), 37 S. W. 1088.

Whether Improvements Included in Deed.—Testimony that particular improvements to defendant's property, into which material furnished entered, were intended to be provided for by a deed of trust executed by defendant, was a mere opinion or conclusion of the witness. *Martin v. Texas, etc., Coal Co.* (Civ. App.), 77 S. W. 651, affirmed in 98 Tex. 80.

Bill of Lading.—For the purpose of showing what the ultimate destination of the goods was, the railroad agent, having shown what purported to be a copy of the bill of lading, over the objection of the appellants, was permitted to state that the ultimate destination was Corsicana. This action of the court was erroneous; for if the bill of lading given by the railway could be looked to as conclusively fixing the destination which would end the transit, its legal effect was for the determination of the court, and not matter proper to be submitted to the opinion of a witness. *Half v. Allyn & Co.*, 60 Tex. 278, 280.

If the bill of lading given by the railway could be looked to as conclusively fixing the destination which would end the transit, its legal effect was for the determination of the court, and not matter proper to be submitted to the opinion of a witness. *Half v. Allyn & Co.*, 60 Tex. 278, 280.

Fire Insurance.—See ante, "Fire Insurance," VI, L, 1.

Life Insurance.—See ante, "Life Insurance," VI, L, 2.

2. Words Peculiar to Business, Art, Trade or Profession.

An inquiry can be made into the

meaning of words by persons in particular business, such words having no fixed legal signification. *Kelly v. Robb*, 58 Tex. 377, 380.

Commercial Report.—In an action involving the meaning of a report by a commercial agency it is competent to call an expert to explain the meaning of the terms and characters used. *Bradstreet Co. v. Gill*, 72 Tex. 115, 9 S. W. 753.

In an action against a commercial agency from making false report of plaintiff's business standing, witnesses in possession of a key to defendant's report may testify as to the meaning of a report in blank, but not as to the general effect it would have upon the business standing of the person so rated; that being a matter of special damage, which must be proven. *Bradstreet Co. v. Gill*, 72 Tex. 115, 9 S. W. 753.

Railroading.—Where the language used by the foreman of a railroad yard in giving an order to a switchman was peculiar to the railroad business, and not ordinarily understood, it was permissible to allow expert witnesses to explain its meaning. *Missouri, K. & T. R. Co. v. Crane*, 13 Tex. Civ. App. 426, 35 S. W. 797.

A witness testified that he knew the meaning of an order "to 'work' the train between San Marcos and Hunter Station," but did not state its meaning. Held, that his testimony was not objectionable as stating the conclusion of the witness. *International & G. N. R. Co. v. Telephone & Telegraph Co.*, 69 Tex. 277, 5 S. W. 517.

In an action by a servant for personal injuries, the admission of testimony of plaintiff to explain the meaning of the phrase, "having his train under control," as used in a rule of the company, was not erroneous, as the meaning thereof might not be understood by the jury. *Texas & N. O. R. Co. v. Mortensen*, 66 S. W. 99, 27 Tex. Civ. App. 106.

"Conscripted" as Applied to Cattle.

—On the trial of one indicted for theft of a yearling, the district attorney asked a witness who had stated that defendant had some young cattle, how he obtained them, to which the witness answered, over the objection of defendant, that "defendant has some young cattle, but had no stock cattle; that he 'conscripted' those he had, and that witness understood conscription to mean the taking of cattle that did not belong to the one taking, or in other words, stealing." The refusal of the court to exclude the answer, held to be error. *Debbs v. State*, 43 Tex. 650.

Meaning of Word "Yearling."—In suit for breach of contract for sale of "yearlings" it is competent to prove by cattlemen the meaning of word "yearling" as to age of cattle. *Parks v. O'Connor*, 70 Tex. 377, 8 S. W. 104.

"Saw Timber."—The meaning of the term "saw timber," in a contract, is properly determined by evidence, as the term has no fixed legal signification. *Kelly v. Robb*, 58 Tex. 377.

"Taking Stock."—As the expression "taking stock" has no technical meaning as applied to any art or trade, the opinion of a witness is not admissible to explain its meaning. *Ginnuth v. Blankenship & Blake Co. (Civ. App.)*, 28 S. W. 828.

"Medical Treatment."—It is not error to allow a physician to explain that medical treatment, as understood in the profession, does not include extraordinary operations by surgery. *Bonart v. Lee (Civ. App.)*, 46 S. W. 906.

N. LAW.

1. Foreign Law or Custom.

The testimony of an attorney that he is acquainted with the laws of a foreign state named, and that "the common law prevails and obtains in that state, except as modified by statute, is not sufficient proof that the common-law rule as to the marital rights of the wife in respect to her

separate estate prevails in the foreign state. *Clardy v. Wilson*, 58 S. W. 52, 24 Tex. Civ. App. 196.

The testimony of a witness, in response to the question how roads are opened, worked, and kept in order in the Indian Territory, to the effect that the roads are worked by the citizens and not by taxation, is not objectionable as a conclusion of the witness, and is proper on the issue of the character of roads in the territory. *Missouri, K. & T. Ry. Co. of Texas v. Hollan*, 49 Tex. Civ. App. 55, 107 S. W. 642.

2. Parliamentary Law.

Where plaintiff alleged, and was permitted to prove, that the proceedings of a convention of which he was a member, excluding him from his rights as such, were conducted in a harsh, unfair, and irregular manner, it was error to exclude the testimony of witnesses who were shown to be experienced parliamentarians, and were present during the proceedings, that such proceedings were in accordance with the rules and regulations as understood and adopted by such convention. *Cranfill v. Hayden*, 22 Tex. Civ. App. 656, 55 S. W. 805.

O. LIFE EXPECTANCY.

An expert may testify to a person's life expectancy. *St. Louis Southwestern Ry. Co. of Texas v. Hall* (Civ. App.), 106 S. W. 194.

In suit against carrier for permanent injury to passenger, testimony of actuary as to number of years plaintiff would probably live was admissible. *Texas, etc., R. Co. v. Douglass*, 69 Tex. 694, 7 S. W. 77, not followed. *Galveston, etc., R. Co. v. Cooper*, 2 Tex. Civ. App. 42, 48, 20 S. W. 990, affirmed in 85 Tex. 431.

It was error to permit a physician who was familiar with plaintiff's physical condition, but who did not base his opinion on any mortality table, to state, as a practicing physician, the life expectancy of the plaintiff before the

injury. *Chicago, R. I. & T. Ry. Co. v. Long*, 65 S. W. 882, 26 Tex. Civ. App. 601.

A physician who testified that he had practiced medicine 20 years, during which time he had read reports on the subject of life expectancy, and that he had made reports for life insurance companies, and had examined their mortality tables, was properly permitted to testify as to the life expectancy in an action for personal injuries, over an objection that his testimony based on information derived from the reports was hearsay, where no objection was made to his testimony on the ground that he had not shown such knowledge of the tables as qualified him to state the life expectancy to which he testified. *Ft. Worth & D. C. Ry. Co. v. Spear* (Civ. App.), 107 S. W. 613.

Evidence of the probable duration of life by experts in the business of life insurance is admissible in suits for negligently causing the death of a son, etc., but it is not necessary. Our law contemplates that the jury shall judge of this upon proof being made of the party's age and physical condition. *Gulf, etc., R. Co. v. Compton*, 75 Tex. 667, 13 S. W. 667.

While a life insurance agent who testified that he was familiar with the *Carlyle Mortuary Tables* and had worked under them may give his opinion as an expert as to matters shown by such tables without producing the tables themselves, the more satisfactory method would be to produce the tables. *International & G. N. Ry. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. 58.

P. LIVE STOCK.

1. Quality of Animal.

It was not error to permit plaintiff to testify that a sale was conditioned on the horses comparing favorably with a previous shipment, and that they did compare favorably, there being no question as to the qualification of the

witness. *Texas & P. Ry. Co. v. Stewart*, 43 Tex. Civ. App. 399, 96 S. W. 106.

2. Number of Animals.

On an issue as to the number of cattle in a stock on the range, testimony of a witness who had gathered the cattle and worked with them for some time and was more familiar with them than anyone else, as to his estimate of the number in the stock, was not objectionable as being only witness' opinion. *Cabanness v. Holland*, 19 Tex. Civ. App. 383, 388, 47 S. W. 379, affirmed in 93 Tex. 680, no op.

The number of stock of a particular brand running in a range may be proved by the opinion of stockmen accustomed to ride in quest of other stock through the same range, if it is the best attainable evidence, though the witnesses may have had no interest in nor charge of the stock inquired about. *Albright v. Corley*, 40 Tex. 105.

One acquainted with the cattle business may give his opinion as to the number of cattle contained in defendant's stock, basing it on information given him as to the number of calves branded by defendant in a year, and the rule which the states is in general use by stockmen, to multiply the number of calves branded by four to get the number of cattle in the brand. *Cabanness v. Holland*, 47 S. W. 379, 19 Tex. Civ. App. 383.

3. Nature and Habits.

Witnesses who qualify themselves from their business to speak of the habits of cattle may testify thereto. *Snow v. Price*, 1 White & W. Civ. Cas. Ct. App. § 1344.

The question whether an ordinarily gentle horse "will stand when cars are bumping together right by his head" is not within the scope of expert evidence and the testimony should not be allowed. *Ft. Worth, etc., R. Co. v. Sivells*, 28 Tex. Civ. App. 497, 67 S. W. 517.

4. Brands and Marks.

Whether or not a brand on a cow

is a "picked brand" is a matter of common observation, and need not be proved by experts. *Clark v. State* (Cr. App.), 43 S. W. 522.

5. Transportation of Live Stock.

Reasonable Time.—In an action for damages to live stock, caused by delay in transit, witnesses who are properly qualified may testify what would constitute a reasonable time for the completion of the transit in question. *Texas & P. Ry. Co. v. Ellerd*, 87 S. W. 362, 38 Tex. Civ. App. 596.

In an action against a carrier for delay in transporting cattle, the shipper was incompetent to testify as to what would be a reasonable run or a reasonable length of time to make the run. *Galveston, H. & S. A. Ry. Co. v. Nollke* (Civ. App.), 110 S. W. 82.

In an action for delay in transportation of live stock, testimony as to what a witness from his experience as a cattleman considered a reasonable time within which to transport the live stock in question, if done with ordinary care and diligence, was inadmissible as the opinion of the witness on a mixed question of law and fact, as the witness must have first determined for himself what would constitute ordinary care, and then have deduced from a consideration of all elements that would in his opinion enter into the question of reasonable time, a conclusion as to what that time should be. *Houston & T. C. R. Co. v. Roberts*, 101 Tex. 418, 108 S. W. 808.

Where the time required by stock trains to make a trip was fully shown by witnesses testifying from their own knowledge, the admission of opinion by witnesses based upon trips made by them, two of whom spoke of also knowing the time from conversations with others and from general reputation, if erroneous, was not prejudicial. *St. Louis, etc., R. Co. v. Boshear*, 102 Tex. 76, 113 S. W. 16.

Delays.—In an action against a connecting carrier for injuries to cattle

from delay in its yards at the junction point, expert evidence that a delay of two hours at such point for making up of trains, getting orders and clearing the track to move the cattle forward was not unreasonable, was admissible. *Chicago, R. I. & T. Ry. Co. v. Kapp*, 83 S. W. 233, 37 Tex. Civ. App. 203.

On issue as to cause of railroad's delay in transporting plaintiff's cattle, engineer could not testify as to the opinions of certain other persons regarding the apparent necessity for his uncoupling his engine from his train and going to relief of passenger train. *Southern Kansas R. Co. v. Crump*, 32 Tex. Civ. App. 222, 74 S. W. 335, affirmed in 97 Tex. 647, no op.

Loading, Handling and Feeding.—

In an action against a carrier for death of a mule delivered to it for transportation, but found dead before destination was reached, there was evidence that the mule was tied with a rope when put in a car, and, when found, that the rope was either broken or cut. A conductor in charge of one of the trains in which the mule was transported testified that he discovered on the neck and shoulders of the mule places which looked like boils or sores, and other witnesses testified that there was no negligence in handling the train. Held, that a witness of experience in loading animals, having testified that he loaded the mule, tied him with a rope, and partially closed the car door for ventilation, should have been permitted to express his opinion as to whether the mule was tied in a proper place and manner, and whether the opening in the door provided sufficient ventilation. *International & G. N. R. Co. v. Nowaski*, 48 Tex. Civ. App. 144, 106 S. W. 437.

In suit against carrier for negligent death of a hog, testimony of witness familiar with hogs, that if crate in which hog was shipped had been opened, and hog allowed to walk about when unloaded at platform, it would not have died was admissible, on question

of defendant's negligence, witness being present at time. *Pacific Ex. Co. v. Lothrop*, 20 Tex. Civ. App. 339, 342, 49 S. W. 898.

In an action against a carrier for damages to cattle transported, expert opinion evidence as to the transportable condition of the cattle when they were offered, the effect on them and their value of delay and bad treatment from the carriers, what constituted overloading, and what was a reasonable time to transfer them from one carrier to another at a junction point, was admissible. *Chicago, R. I. & T. Ry. Co. v. Carroll*, 81 S. W. 1020, 36 Tex. Civ. App. 359.

In an action against a railroad company for negligently transporting cattle, an expert in shipping cattle may properly be allowed to state whether it would have been necessary to feed the cattle at a certain point if they had been promptly shipped and expeditiously transported. *Gulf, C. & S. F. Ry. Co. v. Irvine & Woods* (Civ. App.), 73 S. W. 540.

Where, in an action against a carrier for injuries to a shipment of cattle, no witness testified that the cattle failed to get a "fill" before they were sold, it was error to permit a witness to testify as an expert that a cow weighing a certain number of pounds would take a specified "fill." *Texas & P. Ry. Co. v. Leggett*, 44 Tex. Civ. App. 296, 99 S. W. 176.

On an issue as to the damages for a carrier's failure to seasonably unload cattle at their destination, evidence of an expert in handling and shipping cattle that they would have suffered no more from remaining in the cars until the next morning than they would have suffered from being unloaded in mud and rain is admissible. *Galveston, H. & S. A. Ry. Co. v. Botts* (Civ. App.), 70 S. W. 113.

Damages.—See post, "Damage to Live Stock," VI, P. 6.

6. Damage to Live Stock.

Condition at Time of Shipment.—In an action against a railroad company for negligence in the shipment of cattle, plaintiff may testify as to their condition and weight when he purchased them as tending to show the value of the cattle. *St. Louis S. W. Ry. Co. v. Williams* (Civ. App.), 32 S. W. 225.

Cause of Injury.—In an action for damages to stock from failure to provide cars in a reasonable time for their shipment, where witnesses had testified to the condition of the stock before shipment, but had not seen them, and knew nothing of their condition or treatment, after shipment, or of intervening causes which there was testimony to show might have caused their death, it was not error to exclude evidence of such witnesses that in their opinion the death of the stock was caused by poor feed for several months, since, though such witnesses were experts, their opinion was valueless without knowledge of all the facts that might have conduced to the death. *International & G. N. R. Co. v. True*, 57 S. W. 977, 23 Tex. Civ. App. 523.

In suit against a carrier to recover value of a jack injured in transportation, and which afterwards died, it was error to permit a witness to state that in his opinion the injury inflicted caused the death of the jack. *Texas, etc., R. v. Weakly*, 2 App. Civ. Cases, § 826.

Nature and Extent.—In an action against connecting carriers for injuries to cattle shipped, a witness, properly qualified, was entitled to give his estimate of the weight and shrinkage of the cattle. *St. Louis, I. M. & S. Ry. Co. v. Dodson* (Civ. App.), 97 S. W. 523.

Witness who has qualified as expert is competent to give opinion as to shrinkage in weight of cattle as result of railroad accident. *Ft. Worth, etc., R. Co. v. Greathouse*, 82 Tex. 104, 109, 17 S. W. 834.

Where, in an action against a carrier

for delay in a shipment of cattle, it was shown that cattle would shrink from 50 to 60 pounds every 24 hours during transportation, it was not error to permit an expert to testify as to the difference in the value of cattle on account of such shrinkage. *Gulf, C. & S. F. Ry. Co. v. House & Watkins*, 40 Tex. Civ. App. 105, 88 S. W. 1110.

On an issue as to the damages for a carrier's failure to seasonably unload cattle at their destination, expert evidence as to the loss sustained if they had been seasonably delivered held admissible. *Galveston, etc., R. Co. v. Botts* (Civ. App.), 70 S. W. 113.

Plaintiff shipped cattle to St. Louis, and by a delay of the railroad company the cattle did not arrive in time for the market on a certain day, and plaintiff then shipped to Chicago. Held, that evidence as to how much less the cattle would have lost in weight had they been shipped directly from the point of shipment to Chicago was improper, as the contract with defendant contemplated a shipment to St. Louis only. *St. Louis, I. M. & S. Ry. Co. v. Gunter*, 39 Tex. Civ. App. 129, 86 S. W. 938.

In an action for a penalty for failure to furnish freight cars, under Acts 20th Leg., the failure to furnish the cars having compelled plaintiff to drive his cattle to another railroad, an expert in the care and shipment of cattle may testify "how much said cattle were damaged." *Missouri Pac. Ry. Co. v. Harmonson*, 4 Willson Civ. Cas. Ct. App. § 91, 16 S. W. 539.

7. Value of Live Stock.

In action against railroad for damages for injury to hogs shipped, there is no error in admitting opinion of witness shown to be expert, as to value of hogs. *Southern Pac. R. Co. v. Duncan*, 3 App. Civ. Cases, § 234.

Q. LUMBER, LOGS AND LOGGING.

Mensuration of Timber.—Evidence showing witness to be an expert in

lumber business, the opinion of such witness as to number of feet of lumber offered to be shipped without ascertaining quantity by measurement is admissible. *Texas, etc., R. Co. v. Hays*, 2 App. Civ. Cases, § 390.

In an action to recover for timber removed, a witness, showing himself to be an expert in scaling logs, was properly permitted to testify that a certain scale was one in general use, and that he had not heard of any other scaling rod being used in the country for years, with the exception of one other rod, which was used to some extent. *Wall v. Melton* (Civ. App.), 94 S. W. 358.

Where, in an action to recover for plaintiff's timber removed by defendants, plaintiff's estimate as to the amount cut was obtained by measuring the stumps, the distance from stump to top, and by measuring the top, calculating from such measurements the number of feet contained in the log removed, plaintiff, desiring such calculations to be taken in preference to the estimate made by defendants from measurements of the logs themselves, expert lumbermen were properly permitted to testify that the measurements made by plaintiff did not form a correct basis for calculating the amount of timber contained in the logs. *Wall v. Melton* (Civ. App.), 94 S. W. 358.

Logging.—One familiar with a river, and who has had experience in rafting logs on it, may give his opinion as to whether he can accomplish a certain work in rafting logs on the river in a certain time. *Long v. McCauley* (Sup.), 3 S. W. 689.

R. MACHINERY.

Character of, as Safe, Suitable, Dangerous, etc.—In an action for injuries to a servant, it is permissible for an expert to state his opinion as to whether or not there is danger attending the operation of the machine, where it is difficult of description, so that

the danger arising from its operation can not be easily explained or understood. *Gammel-Statesman Pub. Co. v. Montfort* (Civ. App.), 81 S. W. 1029.

In an action for injuries to a servant caused by a dangerous machine, it was proper to permit an expert to state the reasons why an inexperienced person should not have been placed in charge of the machine. *Gammel-Statesman Pub. Co. v. Montfort* (Civ. App.), 81 S. W. 1029.

One who is qualified may testify as to what are reasonably safe appliances for and methods of raising cars. *Austin Rapid-Transit Ry. Co. v. Groethe* (Civ. App.), 31 S. W. 197.

Efficiency.—In an action for the price of an engine, an expert's testimony that at the time the engine was shipped it had been tested, and was "in perfect condition, and, with proper management, would develop 6.45 horse power," was not objectionable as a conclusion of the witness. *Schuwirth v. Thumma* (Civ. App.), 66 S. W. 691.

Use.—In an action involving the issue of whether machinery in an ice plant had been impaired by negligent use, testimony of an expert was admissible that according to the records of the plant the machinery had been improperly used. *Alamo Mills Co. v. Hercules Iron Works*, 1 Tex. Civ. App. 683, 22 S. W. 1007.

S. MEDICAL EXPERTS.

1. General Rule as to Admissibility.

The opinions of medical men on the facts stated by them are constantly admitted as to the cause of disease or death, or the consequences of wounds, and as to the sane or insane state of a person's mind. *Pigg v. State*, 43 Tex. 108, 111; *Beavan v. McDonnell*, 26 Eng. Law and Eq. Rep. 541; *Shelton v. State*, 34 Tex. 663, 666; *Thomas v. State*, 40 Tex. 60.

The opinion of a medical man is evidence per se upon the state of a person's health. *Rogers v. Crain*, 30

Tex. 284; *Newman v. Dodson*, 61 Tex. 91, 96.

The testimony of an attending physician as to the nervous condition of a testator is admissible. *Kennedy v. Upshaw*, 66 Tex. 442, 1 S. W. 308.

As to Whether Patient Must Have Realized His Own Condition.—A physician can not testify as to whether a certain ailment would bring to a man a knowledge that he was not in perfect health. *Mutual Life Ins. Co. v. Simpson* (Civ. App.), 28 S. W. 837.

2. Opinions Based in Part on Declarations and Statements of Patient.

The opinion of a physician as to the condition of a person's health is admissible, though it is in part founded on such person's declarations. *Newman v. Dodson*, 61 Tex. 91.

The opinion of a medical man is evidence per se upon the state of a person's health and the grounds of his opinion, which may be partly the answers of the patient to his inquiries, are admissible collaterally in evidence to support and explain his opinion. *Rogers v. Crain*, 30 Tex. 284; *Newman v. Dodson*, 61 Tex. 91, 96.

In suit to recover damages for personal injuries, an expert can testify as to the nature, cause, curableness and probable continuance of the plaintiff's injuries, and state as a part of the facts on which his opinion is based, statements made by the plaintiff when seeking his professional services as to his condition. *Ft. Worth, etc., R. Co. v. Stingle*, 2 App. Civ. Cases, § 703.

Statements by an injured person made to his physician as to his feelings of pain and the like, made after the act causing the injury, are competent as a basis for the opinion of the physician upon the physical condition of the injured party. *Texas Trunk R. Co. v. Ayres*, 83 Tex. 268, 18 S. W. 684.

Testimony of a medical expert as to condition of one treated or examined by him may include such person's statements as to his sufferings and

symptoms both past and present. *Gulf, etc., R. Co. v. Brown*, 16 Tex. Civ. App. 93, 112, 40 S. W. 608 (see 93 Tex. 684, no op.).

Physician's opinion based upon history of injury and description of symptoms from time of accident to that of examination derived from the plaintiff, is admissible. *Missouri, etc., R. Co. v. Rose*, 19 Tex. Civ. App. 470, 474, 49 S. W. 133, affirmed in 93 Tex. 735, no op.; *Atchison, etc., R. Co. v. Click* (Civ. App.), 32 S. W. 226, 227, affirmed in 93 Tex. 699, no op.

Physician attending plaintiff during illness alleged to have resulted from exposure, may state what she told him about exposure at place where left by defendant's servants, as well as his own opinion as to cause of illness. *Pullman, etc., Co. v. Smith*, 79 Tex. 468, 14 S. W. 993.

The descriptive statement of injured persons can be admitted in evidence only when made, first, to a medical attendant or nurse for the purpose of medical treatment; or, second, when relating to existing pain or other symptoms from which the person is then suffering; or, third, such statements of explanatory symptoms are admissible when the medical attendant or nurse is called upon to give a conclusion based in part upon them as are explanatory of the conclusion of such medical attendant or nurse. *Runnells v. Pecos, etc., R. Co.*, 49 Tex. Civ. App. 150, 107 S. W. 647.

Statements Made to Physician While Making Examination for Purpose of Testifying.—Statements of plaintiff in respect to the pain which he suffers, made to a physician who examined him for the sole purpose of testifying as an expert in his behalf at the trial, are inadmissible in a suit for personal injuries. *Tyler, etc., R. Co. v. Wheeler* (Civ. App.), 41 S. W. 517, affirmed in 91 Tex. 356.

The error admitting the testimony of a physician, who examined plaintiff

for the sole purpose of testifying as an expert in his behalf at the trial, as to the complainants of pain and suffering made by plaintiff to him, is not rendered harmless by the fact that the plaintiff testifies to the same pains and sufferings of which he complained to the physician. *Tyler, etc., R. Co. v. Wheeler* (Civ. App.), 41 S. W. 517, affirmed in 91 Tex. 356.

The mere declaration by plaintiff of the fact of his suffering pain, made to a medical expert, on an occasion prepared by himself, for the sole purpose of furnishing the expert with information on which to base an opinion favorable to plaintiff in his suit for damages from personal injury, are not admissible; but exclamations, shrinkings, and other expressions of a party which appear to be instinctive and spontaneous betrayal of pain are admissible though made under such circumstances. *Missouri, etc., R. Co. v. Johnson*, 95 Tex. 409, 67 S. W. 768, affirming 67 S. W. 769, reversing 67 S. W. 881.

In an action for injuries received, evidence of a physician making an examination for the purpose of testifying in the case as to statements by plaintiff of past pain suffered was improperly received. *St. Louis, etc., R. Co. v. Martin*, 26 Tex. Civ. App. 231, 63 S. W. 1089.

3. Opinions Based upon Statements of Other Physicians and Third Persons.

A physician called to examine an injured person may state what was told him as the history of the case, which is made the basis of his opinion as to the cause of the injury. *St. Louis S. W. Ry. Co. v. Freedman*, 46 S. W. 101, 18 Tex. Civ. App. 553.

In suit against a railroad company for personal injuries, it was not error to permit the physician who attended plaintiff to testify to the statements made to him as to plaintiff's condition by herself and another physician who

first attended her, as part of basis on which his opinion of the nature of her injuries was formed. *St. Louis, etc., R. Co. v. Freedman*, 18 Tex. Civ. App. 553, 560, 46 S. W. 101, affirmed in 93 Tex. 738, no op.

4. Statements of Physician to or about Patient.

Evidence that plaintiff's doctor, after examining him, told him that his injuries were caused by his expulsion from defendant's train, is inadmissible in an action for such expulsion. *Missouri, etc., R. Co. v. Dawson*, 10 Tex. Civ. App. 19, 29 S. W. 1106.

"The statement was not connected with any facts whatever which would relieve it from the category of the mere expression of opinion of a person unsworn, and who was not in possession of the facts. The evidence was not admissible, and the court erred in not sustaining appellant's objection to the introduction of the same." *Missouri, etc., R. Co. v. Dawson*, 10 Tex. Civ. App. 19, 29 S. W. 1106, 1107; *Houston, etc., R. Co. v. Burke*, 55 Tex. 323; 1 Greenl. Ev., § 99.

It is not competent for a physician to testify that a passenger suing for injuries had consulted him as to the cause of the ailment complained of, and that he had advised her that the ailment was not due to the hardship sustained by her during her trip, and had advised her not to sue; the opinion being hearsay. *Texas, etc., R. Co. v. Harrington*, 44 Tex. Civ. App. 386, 98 S. W. 653.

A physician's statement to a plaintiff bitten by a dog, through the negligence of defendant, that she was in danger of hydrophobia, lockjaw, and blood poisoning, is incompetent to show mental suffering. *Trinity, etc., R. Co. v. O'Brien*, 18 Tex. Civ. App. 690, 46 S. W. 389.

Physician's Statements as Res Gestæ.—Physicians were called in a case of poisoning by morphine. The opinion expressed at the time they were en-

gaged in examining the patient with reference to his condition were in the nature of *res gestæ* and admissible on a trial involving the issue whether it was a case of accidental or intentional suicide. The declarations were in the course of their business and while engaged in a professional duty. *Mutual Life Ins. Co. v. Tillman*, 84 Tex. 31, 19 S. W. 294.

5. Value of Professional Services.

In an action for surgical services, it is proper to ask an expert what would be a reasonable charge for such operations in ordinary cases, if there was evidence of the assumed facts upon which the opinion is to be based. *Lee v. Heuman*, 10 Tex. Civ. App. 666, 32 S. W. 93.

In an action for medical services, a question which calls for the opinion of an expert as to the value of the services, based upon his knowledge of the patient, and not upon his knowledge of the character of the services, is objectionable. *Lee v. Heuman*, 10 Tex. Civ. App. 666, 32 S. W. 93.

In an action involving the value of a surgical operation, it is proper to ask an expert the reasonable charge for a successful similar operation upon a man worth \$10,000. *Lee v. Heuman*, 10 Tex. Civ. App. 666, 32 S. W. 93.

Where the opinion of a medical expert as to the value of medical services is asked, it is not competent for him to state that a man who had not consented to the operation would not feel bound to pay. *Lee v. Heuman*, 10 Tex. Civ. App. 666, 32 S. W. 93.

6. Ability of Laymen to Measure or Compound Medicines.

The court properly admitted, over objection, the question, "Could a man have any conception as to how much a quarter of a grain or an eighth of a grain of morphine was if he was not accustomed to handling it?" and the answer, "I don't think a layman could tell the difference between a

quarter and an eighth of a grain if he was not accustomed to handling it." *Mutual Life Ins. Co. v. Tillman*, 84 Tex. 31, 19 S. W. 294.

7. As to Life Expectancy.

See ante, "Life Expectancy," VI, O.

8. Insanity; Mental Capacity.

There can be no doubt about the admissibility of the opinion of medical men in an insanity case. *Thomas v. State*, 40 Tex. 60, 65.

A person who shows himself qualified to give an opinion as to mental capacity has the right to give it as to the degree or extent of the mental infirmity. *Scaif v. Collin County*, 80 Tex. 514, 16 S. W. 314.

Evidence of physicians testifying as experts, bearing upon mental condition of a testator, and based upon facts proved in the case, is admissible. *Vance v. Upson*, 66 Tex. 476, 489, 1 S. W. 179.

Opinions of medical men as to sanity of accused, formed after brief examination are admissible upon issue of insanity but are not deemed satisfactory. *Thomas v. State*, 40 Tex. 60, 65.

Expert Evidence—Physician.—A physician could not testify as a witness in the case, expressing his opinion as to the insanity of the maker based upon what had been told him by others; but as an expert he might state such opinion where it was based on facts detailed by other witnesses in the case. *First Nat. Bank v. McGinty*, 29 Tex. Civ. App. 539, 69 S. W. 495.

An expert witness can not give his opinion as to the sanity of a person, based on part of the evidence of one only of several witnesses, heard by the expert, and on an account of the evidence in the same case on a former trial as published in a newspaper, which he has read. *Williams v. State*, 39 S. W. 687, 37 Tex. Cr. R. 348.

Where a will is contested on ground of decedent's mental incompetency, her physician's evidence as to condition of her mind when he ceased to attend

her, is competent. *Trezevant v. Rains* (Civ. App.), 25 S. W. 1094, 1095, affirmed in 93 Tex. 652, no op.

Where defendant's sanity was an issue, the testimony of doctors as to what medical authorities state in regard to the ability of experts to detect periodical insanity, while those so afflicted are in their lucid moments, was inadmissible. *Carlisle v. State* (Cr. App.), 56 S. W. 365.

On the probate of a will, which was contested on the ground of the mental incapacity of the testatrix, where it was shown that testatrix had an insane antipathy to her husband, evidence of a physician that in his opinion, testatrix was capable of acting intelligently with reference to her husband, did not violate the rule that experts can not express an opinion as to the capacity of a person to do the very thing in issue, as such witness was entitled to testify, in regard to testatrix's delusion as to her husband, that she was sane and intelligent on that subject. *Lindsey v. White* (Civ. App.), 61 S. W. 438.

In an action against a street railroad for injuries to a child ten years of age, it is competent to prove plaintiff's age and all other facts necessary to enable the jury to decide the question of her contributory negligence, and persons, who are acquainted with her, may testify that she is intelligent or the reverse; but after such facts have been narrated, the inference and conclusions to be drawn therefrom are for the jury, and it is not competent for witnesses, whether experts or nonexperts, to testify to their opinion that plaintiff is not of sufficient intelligence to appreciate the danger of going on a street car track without looking and listening for a car and has not the circumspection to avoid danger which an adult person would have. *Citizens' R. Co. v. Robertson*, 41 Tex. Civ. App. 324, 91 S. W. 609 (see 101 Tex. 631, no op.).

9. Obstetrics.

Plaintiff, a physician, having shown himself competent to testify as an expert, could give his opinion as to whether the child would have been born alive if he had received medical assistance in time. *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 9 S. W. 598.

Physicians differed on the issue as to whether womb trouble from which plaintiff's wife suffered was produced by the accident in question. The one who attended her in childbirth was unable to say whether her womb resumed its normal position during the month thereafter, but said that she complained of her back and headache. Held, that this did not indicate that such a condition was produced at childbirth as to call for an effort to replace the womb, and, in the absence of other evidence, no hypothesis was presented authorizing expert testimony as to probable results of a failure to replace the same. *Dallas Consol. Electric St. Ry. Co. v. Rutherford* (Civ. App.), 78 S. W. 558.

10. Personal Injuries.

a. Confining Evidence to Questions at Issue.

Where, in a personal injury action, plaintiff pleads the nature and character of his injuries, it is proper to permit his physician to testify that plaintiff's susceptibility to colds was increased by his injuries, though he did not allege such consequence. *Missouri, etc., R. Co. v. Crum*, 35 Tex. Civ. App. 609, 81 S. W. 72, affirmed in 98 Tex. 625, no op.

Where, in a suit for personal injuries, plaintiff testifies that he has a dull headache pretty much all the time, particularly in the back of his head, evidence of a physician, testifying as an expert, that plaintiff complained all the time of a roaring and a dull, aching pain in his head, more especially in the back of his head, is not objection-

able as evidence in respect to an injury or disease not testified to by plaintiff. (Civ. App.), *Tyler S. E. Ry. Co. v. Wheeler*, 41 S. W. 517, modified in *Wheeler v. Tyler S. E. Ry. Co.*, 43 S. W. 876, 91 Tex. 356.

b. As to Simulation of Injuries, Symptoms, etc.

A physician who had examined plaintiff may testify, as an expert, that plaintiff could not very well have feigned his injuries, and that he also could not have stood an operation which was performed without the aid of chloroform. *Missouri, K. & T. Ry. Co. of Texas v. Wright*, 47 S. W. 56, 19 Tex. Civ. App. 47.

A physician who treated plaintiff after he was run into by defendant's train, and who had stated that plaintiff complained of certain pains, may give his opinion as an expert as to whether plaintiff was injured, and the nature and extent of his injuries, and whether, in his opinion, the complaints were real or simulated. *Austin & N. W. Ry. Co. v. McElmurry* (Civ. App.), 33 S. W. 249.

In an action for injuries, plaintiff's attending physician held entitled to testify that plaintiff was not simulating the absence of pain; he having previously testified that she had no feeling in her limbs. *McGrew v. St. Louis, etc., R. Co.*, 32 Tex. Civ. App. 265, 74 S. W. 816 (see 97 Tex. 639, no op.).

A physician who testifies as to personal injuries, and whether the complaints of the injured person were real or simulated, can not give as a reason for his opinion his confidence in plaintiff. *Austin & N. W. Ry. Co. v. McElmurry* (Civ. App.), 33 S. W. 249.

It is not error to exclude testimony of an expert that other persons had simulated injuries such as plaintiff complained of where such expert and others were permitted to testify that all but one of the symptoms complained of could be simulated. *Gulf C. & S. F. Ry. Co. v. Brown*, 40 S. W. 608, 16 Tex. Civ. App. 93.

c. Right of Opposition to Make Physical Examination.

See the title INSPECTION AND PHYSICAL EXAMINATION.

d. Temperate Habits of Injured Person.

In a personal injury case, a physician was asked whether, from his examination of plaintiff, plaintiff impressed him as a temperate or intemperate man. Defendant's counsel said: "I object to that. I don't think it is a proper question." Held, that it was not error to overrule the objection; no grounds therefor being stated. *San Antonio v. Potter*, 31 Tex. Civ. App. 263, 71 S. W. 764, affirmed in 97 Tex. 629, no op.

In a personal injury action, in answer to a question as to whether plaintiff impressed the witness as being temperate or intemperate, the latter replied, over objection, that, knowing the possibility of plaintiff's condition being brought on by excessive alcoholism, he had carefully examined the manifestations of the disease. Held, that the overruling of the objection was harmless error, the witness' answer not being prejudicial. *San Antonio v. Potter*, 31 Tex. Civ. App. 263, 71 S. W. 764, affirmed in 97 Tex. 629, no op.

e. Cause of Injury; Whether Trouble Actually Due to Injury Complained of.

Where, in an action for personal injuries, there was no conflict in the evidence as to the manner in which plaintiff had been affected by his injuries, it was not error to permit counsel for plaintiff to ask a physician to explain the cause of plaintiff's symptoms, basing his opinion on the testimony which the witness had heard on the trial. *St. Louis Southwestern Ry. Co. of Texas v. Hall* (Civ. App.), 81 S. W. 571.

The answer of the witness that he could not say but what the pain in plaintiff's hip was more probably

caused by an injury to the nerve of the hip was not objectionable. *St. Louis Southwestern Ry. Co. of Texas v. Hall* (Civ. App.), 81 S. W. 571.

In an action for injuries, the admission of the testimony of a physician that the injury received by plaintiff would cause the condition he was in, held not erroneous. *Missouri, etc., R. Co. v. Hawk*, 30 Tex. Civ. App. 142, 69 S. W. 1037.

In an action for personal injuries, expert testimony is admissible to show that plaintiff's nervous condition is a result of such injuries. *Galveston, H. & S. A. Ry. Co. v. Stoy*, 44 Tex. Civ. App. 448, 99 S. W. 135.

In an action for injuries to plaintiff's wife, it was not error to permit a physician to testify as to what he thought caused the wife's bodily infirmities, about which he had testified, as to whether they were the result of violence or disease. *Gulf, C. & S. F. Ry. Co. v. Booth* (Civ. App.), 97 S. W. 128.

The issue in an action for personal injuries was whether or not the condition of the injured person after the accident was due to the injuries she then received, and there was no conflict as to the facts. An expert witness was asked the question, "Assuming the testimony given to be true, to what would you attribute the injuries of E.?" Held, that this did not call for his opinion on the evidence given, there being no conflict therein. *Sherman, S. & S. Ry. Co. v. Eaves*, 61 S. W. 550, 25 Tex. Civ. App. 409.

Physicians familiar with the condition of plaintiff may testify whether, in their opinion, her injuries were such as would likely result from a railway collision, as alleged. *Texas Cent. Ry. Co. v. Burnett*, 80 Tex. 536, 16 S. W. 320.

Where a medical witness in an action against a railroad for personal injuries received by a passenger in alighting from a train has testified to facts

which he has himself ascertained in treating the injured person, it is proper for him to give his opinion as to the cause of the injury, assuming as true the facts to which he had previously testified. *Missouri, K. & T. Ry. Co. of Texas v. Criswell*, 78 S. W. 388, 34 Tex. Civ. App. 278.

Whether Caused by Stock or External Violence.—In a suit for personal injuries alleged to have been caused by a boiler explosion, the testimony of physicians that plaintiff's injuries were the result of a shock or external violence is admissible. (Civ. App.), *Tyler S. E. Ry. Co. v. Wheeler*, 41 S. W. 517, modified in *Wheeler v. Tyler S. E. Ry. Co.*, 43 S. W. 876, 91 Tex. 356.

In an action for personal injuries, an opinion by an expert witness that the condition of plaintiff's lungs was due to some injury inflicted from the outside was not objectionable on the ground that it was a question for the jury. *Galveston, H. & S. A. Ry. Co. v. Williams*, 62 S. W. 808, 26 Tex. Civ. App. 153.

In an action for personal injuries an opinion by a physician that they were produced by traumatism was not objectionable as invading the province of the jury. *Galveston, H. & S. A. Ry. Co. v. Cherry*, 44 Tex. Civ. App. 344, 98 S. W. 898.

Prior and Intervening Causes.—Where, in an action for injury to plaintiff's ear, caused by the explosion of dynamite, a physician, who was an expert in the treatment of diseases of the ear, testified without objection that plaintiff's ear was diseased prior to the explosion, it was competent for him to give his opinion that, if the explosion did not injure the ears of those nearer by, it did not injure the ear of plaintiff, who was farther away. *Hickey v. Texas & P. Ry. Co.* (Civ. App.), 95 S. W. 763.

In an action for injuries, it was proper to permit plaintiff's medical

witness to testify on cross-examination as to what effect confinement in a schoolroom for a number of years would have upon the plaintiff in producing her then condition. *Dallas, etc., Co. v. Black*, 40 Tex. Civ. App. 415, 89 S. W. 1087.

f. Nature and Extent of Injuries.

An expert witness may express an opinion as to the character of the injury suffered. *Galveston, H. & S. A. Ry. Co. v. Parrish* (Civ. App.), 43 S. W. 536; *Sabine, etc., R. Co. v. Ewing*, 7 Tex. Civ. App. 8, 26 S. W. 638, affirmed in 93 Tex. 649, no op.

In an action for injuries, a physician, testifying as an expert, was entitled to express his opinion as to whether plaintiff's injuries were slight or serious. (Civ. App.), *St. Louis Southwestern Ry. Co. of Texas v. Rea*, 84 S. W. 428, judgment reversed in 87 S. W. 324, 99 Tex. 58.

Testimony of an expert that the conditions named by him and shown by the evidence would produce pain is competent. *Western Union Telegraph Co. v. Stubbs*, 43 Tex. Civ. App. 132, 94 S. W. 1083.

Evidence of medical experts that the cicatrices of wounds received in the collision are apt to break down and form ulcers, more or less serious in character, and the reasons for their opinion, are admissible to show the extent of the injuries at the time of the trial. *Gulf, C. & S. F. Ry. Co. v. Harriett*, 80 Tex. 73, 15 S. W. 556.

In an action for personal injuries, it was competent for a physician acquainted with the nature and character of the injury to give his opinion that the injured person could not have used her limbs or ankle without the aid of crutches sooner than she did. *Galveston, H. & H. R. Co. v. Alberti*, 47 Tex. Civ. App. 32, 103 S. W. 699.

A physician may testify that plaintiff, whom he examined for the purpose of testifying in the case, "was confined to his bed and unable to walk

without aid," since it is a pure statement of fact. *Missouri, K. & T. Ry. Co. of Texas v. Wright*, 47 S. W. 56, 19 Tex. Civ. App. 47.

As to Permanency.—A medical expert may testify, in a personal injury action, that in his opinion, based on the history of the case, and on what he saw about plaintiff and the length of time that elapsed since the injury, the injury indicates permanency. *Missouri, K. & T. Ry. Co. of Texas v. Lynch*, 90 S. W. 511, 40 Tex. Civ. App. 543.

In an action for personal injuries, a physician can testify as to the probable permanence of the injuries received. *Sabine & E. T. Ry. Co. v. Ewing*, 7 Tex. Civ. App. 8, 26 S. W. 638.

Whether a Mortal Injury.—In a prosecution for assault with intent to murder, it is competent for a surgeon to testify that the blow inflicted on the assaulted party would have resulted in death but for a surgical operation. *Henry v. State* (Cr. App.), 49 S. W. 96.

g. Present and Future Effects.

Effect on Respiration.—Where, in an action for personal injury, defendant has given evidence that, at a certain time after the accident, plaintiff was well, and there was evidence that his respiration was then thirty to the minute, it is competent for plaintiff to introduce the testimony of an expert that assuming such facts, and that since then he had become afflicted with the troubles he had at the time of the trial, his respiration would have increased. (Civ. App.), *Missouri, K. & T. Ry. Co. v. Johnson*, 49 S. W. 265, affirmed in 48 S. W. 568, 92 Tex. 380.

Effect on Eyes.—In a personal injury case, a physician may testify that the injuries have caused defects in plaintiff's eyes, though such testimony is based on statements made by plaintiff during treatment. *Atchison, T. & S. F. Ry. Co. v. Click* (Civ. App.), 32 S. W. 226.

Whether Brain Affected.—In an action by an employee for injuries, the opinion of a physician, based on the fact that plaintiff was doing farmwork for more than a year prior to the trial, and seemed to be in good health, as to whether or not plaintiff's brain was in any way affected by the injury, was competent. *Chicago, R. I. & M. Ry. Co. v. Harton*, 88 S. W. 857, 40 Tex. Civ. App. 235.

Evidence Limited to Reasonably Probable Results.—Plaintiff's recovery for future results of personal injuries should have been restricted by giving a requested charge limiting it to such results as were probable; and the evidence of a medical expert as to future results should also have been confined to such as were probable. *Lentz v. Dallas*, 96 Tex. 258, 72 S. W. 59, reversing 69 S. W. 166.

On Life Expectancy.—Expert testimony of a physician in giving his opinion as to the character of plaintiff's injury, that, unless a dangerous operation was performed, plaintiff's injury would shorten her life expectancy one-half, was not objectionable because it was a conclusion. *Houston, etc., R. Co. v. McDade*, 34 Tex. Civ. App. 497, 79 S. W. 100, affirmed in 98 Tex. 620, no op.

"Neither expert witnesses nor the jurors may be turned loose in the domain of conjecture as to what may by possibility ensue from a given statement of facts. The witness must be confined to those which are reasonably probable, and the verdict must be based upon evidence that shows with reasonable probability that the injury will produce a given effect." *Galveston, etc., R. Co. v. Powers*, 101 Tex. 161, 105 S. W. 491, reversing 101 Tex. 250.

In an action for injuries to a servant, a question to an expert witness as to the possibility of epilepsy resulting from the injury was improper, the master being liable only for con-

sequences which would follow with reasonable probability from the injury, and not for results which might possibly occur. *Galveston, etc., R. Co. v. Powers*, 101 Tex. 161, 105 S. W. 491, reversing 101 Tex. 250.

11. Cause of Death.

"A physician, in many cases, can not so explain to a jury the cause of the death, or other serious injury of an individual, as to make the jury distinctly perceive the connection between the cause and the effect. He may, therefore, express an opinion that the wound given, or the poison administered, produced the death of the deceased; but, in such case, the physician must state the facts on which his opinion is founded." *Cooper v. State*, 23 Tex. 331, 336.

Where a physician was called to see deceased as soon as he was taken from a locomotive tank which he was painting, and before he was dead, such physician could testify as an expert that in his opinion death was caused from the effects of inhaling the fumes of paint, based in part on his observation and in part on undisputed statements as to the circumstances under which intestate died. *Houston & T. C. R. Co. v. Rutherland*, 45 Tex. Civ. App. 621, 101 S. W. 529.

On a trial for murder the opinion of a medical man as to the cause of the death, and whether the neck of the deceased was broken before or after death, was competent evidence. Such evidence is indispensable to the ends of justice in such cases as the present, where there was no witness present at the death of the deceased. *Shelton v. State*, 34 Tex. 663.

T-U. NAUTICAL AND MARINE SUBJECTS.

An expert opinion as to the height of waves during a certain storm is not improper, although other witnesses testified to their height from actual ob-

servation. *Ilfrey v. Sabine, etc., R. Co.*, 76 Tex. 63, 65, 13 S. W. 165.

V. RAILROADING.

1. In General.

"The business of railroading comes sufficiently within the rule to make opinions of those who are engaged in it admissible." *Ft. Worth, etc., R. Co. v. Thompson*, 75 Tex. 501, 504, 12 S. W. 742.

2. Condition of Tract and Bed.

Witnesses who have actual knowledge of the condition of the track, and who have testified to the facts regarding its condition, may give their opinion as to whether the track, at the place of the accident, was unsafe. *San Antonio & A. P. Ry. Co. v. Parr* (Civ. App.), 26 S. W. 861.

In an action against a railway company for the death of a brakeman, admission of an expert's opinion as to the condition of the track held not error, where he afterward detailed the facts on which his conclusion rested. *San Antonio, etc., R. Co. v. Waller*, 27 Tex. Civ. App. 44, 65 S. W. 210, affirmed in 95 Tex. 685, no op.

3. Construction, Inspection and Repair.

Experts may testify as to the proper construction of railroad crossing, and to the readiness with which sand washed upon track could be seen and engine stopped. *St. Louis, etc., R. Co. v. Johnston*, 78 Tex. 536, 541, 15 S. W. 104.

In an action for death alleged to have been caused by the defective condition of a railway switch, evidence by an expert that the rails leading onto the switch track had too much expansion at the joint was not objectionable as opinion evidence, where he afterwards detailed facts showing the basis on which his conclusion rested. *San Antonio & A. P. Ry. Co. v. Waller*, 65 S. W. 210, 27 Tex. Civ. App. 44.

Necessity for Track Walker.—The opinion of an expert in the operation

of railroads as to whether a track walker was necessary is admissible. *Galveston, H. & H. R. Co. v. Bohan* (Civ. App.), 47 S. W. 1050.

The opinion of an expert as to whether it was as necessary that defendant have a track walker in its freight yard on Sunday as on any other day is admissible. *Galveston, H. & H. R. Co. v. Bohan* (Civ. App.), 47 S. W. 1050.

Cost of Construction.—Experts may testify what, in their opinion, will be the probable cost of completing a railroad, in a suit between the company and a contractor to build the road. *Waco Tap R. Co. v. Shirley*, 45 Tex. 355.

4. Machinery and Equipment.

Whether Safe and Proper for Purpose for Which Used.—Train conductor's expressed opinion as to safety of tools used by company to assist passengers in alighting is incompetent as evidence. *Gulf, etc., R. Co. v. Southwick* (Civ. App.), 30 S. W. 592, 593.

One qualified as an expert may give his opinion as to the efficiency of a spark arrester used by a railroad in its engine. *St. Louis Southwestern Ry. Co. of Texas v. Parks*, 90 S. W. 343, 40 Tex. Civ. App. 480.

Condition, as Being Defective or Otherwise.—A witness may state the condition of a car, and his opinion as to whether it was defective. *Gulf, C. & S. F. Ry. Co. v. Colbert* (Civ. App.) 31 S. W. 332.

In an action by a brakeman against a railway company for personal injuries alleged to have been caused by the defective condition of an angle cock in an air hose, which caused the hose to be jerked from plaintiff's hands and strike him on the knee when he uncoupled it, a question as to what it would indicate in reference to an angle cock if the hose was jerked out of the workman's hand as he went in to uncouple it, after cutting off the air at

the angle cock, was a proper subject for expert testimony. *International & G. N. R. Co. v. Mills*, 78 S. W. 11, 34 Tex. Civ. App. 127.

In a damage suit against a railroad company for personal injuries, testimony of expert that sound truck of empty car would not break in sixty feet after leaving track and that car would not leave straight track, was admissible. *Jones v. Shaw*, 16 Tex. Civ. App. 290, 294, 41 S. W. 690, affirmed in 93 Tex. 665, no op.

Negligence in Failing to Discover Defects.—Where a witness was qualified as an expert, a question asking his opinion whether a defect in a brakestaff could have been ascertained by proper inspection was not objectionable as a calling for a conclusion. *International & G. N. R. Co. v. Collins*, 75 S. W. 814, 33 Tex. Civ. App. 58.

Construction and Repair.—The conclusions of an expert in building and repairing railroad cars is admissible, on the subject, as expert testimony. *Jones v. Shaw*, 41 S. W. 690, 16 Tex. Civ. App. 290.

5. Operation of Trains.

a. Rules; Requirement; Construction.

Where a conductor is injured in a collision occurring from delay in his train in taking a sidetrack, an expert can not testify as to the precautions he should have taken under the rules for his protection, over objection that the rules were the best evidence. *Missouri, etc., R. Co. v. Pawkett*, 28 Tex. Civ. App. 583, 68 S. W. 323, affirmed in 95 Tex. 683, no op.

b. Loading and Unloading Cars.

In an action for the death of a brakeman, where it has been shown that he was killed by a steel rail falling from a flat car on which it was loaded, testimony of an expert in railroad matters that the rail could not have fallen off if properly loaded is admissible to show negligence. *McCray v. Galveston, H. & S. A. Ry. Co.*, 89 Tex. 168, 34

S. W. 95, reversing judgment (Civ. App.), 32 S. W. 548.

c. Assisting Passengers.

Where, in an action for injuries to a female passenger while alighting from a street car, the issue was whether the conductor was negligent in failing to assist her, though she was a young, robust, and active woman, it was proper to refuse permission to a street car conductor of several years' experience to give his opinion as to the necessity of assisting women who were not infirm or who were not carrying bundles, etc. *San Antonio Traction Co. v. Flory*, 45 Tex. Civ. App. 233, 100 S. W. 200.

d. Making Up Trains.

Testimony by trainmen that the train was being made up and handled in the usual and customary way at time of accident, is not objectionable as mere matter of opinion though not permissible for them to state that it was done "in a careful and cautious manner." *De Walt v. Houston, etc., R. Co.*, 22 Tex. Civ. App. 403, 55 S. W. 534.

e. Starting and Stopping.

Necessity for Use of Steam.—

Whether or not in certain circumstances a locomotive required steam to start it, or would move on the release of the brakes, is a fact properly provable by expert testimony. *Galveston, H. & S. A. Ry. Co. v. Mitchell*, 48 Tex. Civ. App. 381, 107 S. W. 374.

Power to Stop Train or Car.—In an action for personal injuries, it was proper to ask the engineer, who started loose cars which ran down a grade and collided with a train, whether, if the brakes on the cars had been in good condition, the person attempting to stop them could have done so. *Galveston, H. & S. A. Ry. Co. v. Croskell*, 6 Tex. Civ. App. 160, 25 S. W. 486.

Distance in Which Car Can Be Stopped.—

In an action for injuries received in a collision, it is competent for an experienced railroad man to testify

as to whether or not a street car can be stopped in a much shorter space than a steam locomotive or a number of cars. *Northern Texas Traction Co. v. Caldwell*, 44 Tex. Civ. App. 374, 99 S. W. 869.

f. Duty to Keep Lookout; Ability to See Ahead.

The admission of testimony of one not shown to be acquainted with the rules of defendant railroad company, that, under the rules, it was the duty of the fireman to keep a lookout ahead, is harmless, where there is other testimony to the same effect. *Galveston, etc., R. Co. v. Clark*, 21 Tex. Civ. App. 167, 51 S. W. 276, affirmed in 93 Tex. 706, no op.

Testimony of an experienced railroad man that, if a fireman was looking out of the engine window on the inside of the curve, he would have a better view of the track ahead than would the engineer on the opposite side, is competent, although the witness was not acquainted with the track at that point; there being evidence that there were no obstructions to the view at that point. *Galveston, etc., R. Co. v. Clark*, 21 Tex. Civ. App. 167, 51 S. W. 276, affirmed in 93 Tex. 706, no op.

Where plaintiff was injured in a collision between the passenger train on which he was riding and freight cars which had been standing on a switch, but which had backed down so as to project over the main track, it was not error to refuse to permit a witness to state, as an expert, that the cars of the freight train would appear to be clear of the track, since the question was not one for expert testimony. *Gulf, C. & S. F. Ry. Co. v. Bell*, 58 S. W. 614, 24 Tex. Civ. App. 579.

g. Interpretation of Orders.

Testimony of the conductors of trains in collision that their orders gave them the right to be where they were when the collision occurred, was admissible as expert testimony, if the

orders would not bear such construction. *Galveston, H. & S. A. Ry. Co. v. Robinett* (Civ. App.), 54 S. W. 263.

On trial of suit for damages against a railroad company for personal injuries resulting from a collision, evidence of the conductors of the colliding trains, as to which had the right of track under orders received was admissible as expert testimony, the orders appearing ambiguous. *Galveston, etc., Ry. v. Robinett* (Civ. App.), 54 S. W. 263, 264, affirmed in 93 Tex. 707, no op.

h. Observance of Signals.

A qualified witness may state what is the proper and general rule for an engineer with regard to awaiting signals from a brakeman engaged in coupling cars before putting them in motion. *Galveston, etc., R. Co. v. Henning*, 90 Tex. 656, 40 S. W. 392, affirming 39 S. W. 302.

In an action for injuries received by a brakeman while coupling cars, it was proper to permit a witness to testify that it was plaintiff's duty, before making the coupling, to see that the switching foreman, to whom he had given the signal, had received it. *Missouri, K. & T. Ry. Co. of Texas v. Baker* (Civ. App.), 58 S. W. 964.

In an action against a railroad for an injury to an engineer in a collision with the forward section of his train, running with the same orders as to time, but starting about two hours earlier, it was error to permit another engineer to testify as an expert that, had he been on an engine approaching the station at which the forward section had stopped, with a semaphore board held red against him, and there had been a box car near the tank at that station, without a signal light of any character on it, he would not have run into the box car. *Quinn v. Galveston, H. & S. A. Ry. Co.* (Civ. App.), 84 S. W. 395.

Where an experienced section foreman had testified that a brakeman

could have stopped a hand car in about a rail length, but that it went about three rails before stopping at the time of the accident, his testimony that, if his signal had been observed, the car would have been stopped, and the accident averted, was admissible. *Galloway v. San Antonio & G. Ry. Co.* (Civ. App.), 78 S. W. 32.

i. Same; Distance at Which Seen or Heard.

In an action by a railroad employee for injuries caused by jumping from a hand car on seeing a train approach around a bend in the track, it was not error to admit testimony of a railroad expert that, if a person on a train can hear another train whistle a mile off, he could hear such train that distance if on a hand car. *Houston & T. C. R. Co. v. Rodican*, 40 S. W. 535, 15 Tex. Civ. App. 556.

j. Flagging Trains.

The question as to whether a rule established by a railway company as to work trains flagging regular trains was a safe one was for the jury, and the opinion of witnesses was inadmissible. *Gulf, C. & S. F. Ry. Co. v. Hays*, 89 S. W. 29, 40 Tex. Civ. App. 162.

In an action for injuries to a railroad section foreman at a curve in the track, on the question of contributory negligence by plaintiff, in failing to send a man ahead to flag the train, it was proper to allow a witness who had knowledge of the situation to testify that the curve where the accident occurred was not such as required a section foreman, in the exercise of ordinary care, to flag the train. *Gulf, etc., R. Co. v. Winter*, 38 Tex. Civ. App. 8, 85 S. W. 477.

k. Switch Lights.

In a suit by a railroad employee for injuries, it was error not to sustain an objection to the testimony of witnesses as to whether a switch would have been safer with or without a light thereon, since the inquiry was a ques-

tion to be decided by the jury, and was not a subject for expert testimony. *Galveston, H. & S. A. Ry. Co. v. English* (Civ. App.), 59 S. W. 626, rehearing denied 59 S. W. 912.

l. Precaution for Safety of Car Inspectors.

In an action for injuries to a car inspector by the movement of the train while he was between a car and the engine, evidence of a witness, appearing to testify from personal knowledge, that it was the duty of the switchmen to couple the cars together and set the air brakes as a means of safety to the car inspectors and repairers, was not objectionable as a conclusion. (Civ. App.) *St. Louis Southwestern Ry. Co. of Texas v. Rea*, 84 S. W. 428, judgment reversed 87 S. W. 324, 99 Tex. 58.

m. Having Train under Control.

Where defendant, in an action by a servant for personal injuries, alleges that plaintiff was negligent in entering the yard without giving signals, or controlling or attempting to control his engine, although he knew of a custom for trains to stop to take water, it is not error to allow the plaintiff to testify that he had his train under control. *Texas & N. O. R. Co. v. Mortensen*, 66 S. W. 99, 27 Tex. Civ. App. 106.

n. Running Train over Submerged Track.

In an action for injuries to a passenger by derailment of a train, evidence of defendant's roadmaster that the running of passenger trains over submerged tracks is not dangerous if the train is run slowly, especially if a freight train has just passed over the track with safety, was properly excluded, the witness' opinion not being limited to the conditions and surroundings of the accident in question. *Chicago, R. I. & P. Ry. Co. v. Cain*, 84 S. W. 682, 37 Tex. Civ. App. 531.

o. Effect of Striking Person on Track.

The question of whether a train, on

striking a man standing or walking on the track, would throw him off or run over him, and whether or not it would be more apt to run over him if he were lying on the track, is peculiarly within the knowledge of locomotive engineers and other persons familiar with such accidents, and hence is a proper subject for expert testimony. *Gulf, C. & S. F. Ry. Co. v. Matthews*, 66 S. W. 588, 28 Tex. Civ. App. 92, rehearing granted 67 S. W. 788, 28 Tex. Civ. App. 92.

p. Operation of Hand Car.

Since the matter of operating a hand car is not a matter of general knowledge, it may be shown by expert testimony. *International & G. N. R. Co. v. Martinez* (Civ. App.), 57 S. W. 689.

q. Cause of Accident.

In suit against a railway company for personal injuries sustained by brakeman in being thrown from a train, the opinion of an expert as to the cause of the parting of the train based on the condition he saw them in several hours after the accident was admissible. *Cox v. Missouri, etc., R. Co.*, 20 Tex. Civ. App. 250, 252, 48 S. W. 740.

In an action against a railroad company for injuries sustained in coupling cars a witness can not testify that if the drawheads on the cars had been in good order plaintiff would not have been injured. *Gulf, C. & S. F. Ry. Co. v. Colbert* (Civ. App.), 31 S. W. 332.

Evidence that one drawhead of a car was lower than another, and that witness could see by certain dents in the woodwork that one drawhead had slipped over the other, is not inadmissible as opinion evidence. *Galveston, H. & S. A. Ry. Co. v. Briggs* (Civ. App.), 30 S. W. 933.

Where a witness qualifies as an expert, and states that certain indentations on a drawbar were made by a round instrument, he should be allowed to state what, in his opinion,

that instrument was. *Galveston, H. & S. A. Ry. Co. v. Briggs*, 4 Tex. Civ. App. 515, 23 S. W. 503.

Evidence that the accident by which plaintiff's team and wagon were injured "was caused by the train backing up, and because the rear brakeman did not give any signals," and that witness "supposed the train crew saw the wagon and team in time to stop," was incompetent, as stating a conclusion of the witness. *Houston & T. C. R. Co. v. Rippetoe* (Civ. App.), 64 S. W. 1016.

Contributory Negligence.—Where, in an action for injuries received in a collision with a hand car, a witness testified to all the circumstances attending the accident, it was not error to exclude his evidence that plaintiff knew of the approach of the hand car in time to enable him to get out of the way. *Chicago, R. I. & T. Ry. Co. v. Long*, 65 S. W. 882, 26 Tex. Civ. App. 601.

W. CARE AND COMPETENCY OF EMPLOYEES.

Where witnesses, in an action for injuries caused by a coemployee's negligence, had qualified as experts, their opinion that he was incompetent was admissible in an issue as to whether his incompetency was known to defendant, or could have been discovered with due care. *International & G. N. R. Co. v. Jackson*, 62 S. W. 91, 25 Tex. Civ. App. 619.

A witness may testify as to the competency of an engineer, by stating that the latter was careless and reckless and unskilled in operating his engine. *Terrell v. Russell*, 42 S. W. 129, 16 Tex. Civ. App. 573.

A witness who is acquainted with a party, and knows what his occupation has been, may be allowed to testify that he "did not have any experience in stopping hand cars with brakes." *Galveston, H. & S. A. Ry. Co. v. Parrish* (Civ. App.), 43 S. W. 536.

X. TRADEMARKS, LABELS, ETC.

All the facts were before the court; the trademarks, the labels, the jugs, and the packages, as presented for sale in the market by the proprietor of "Radam's Microbe Killer," and by proprietor of the "Microbe Destroyer." It was the province of the court trying the case without a jury to decide what impression would be made by them upon persons of ordinary intelligence and care. In such a case an expert should not be allowed to decide for him. It was therefore no error in the trial court in rejecting testimony offered to prove the similarity of the two trademarks. *Radam v. Microbe Destroyer Co.*, 81 Tex. 122, 16 S. W. 990.

Y. VALUE.

Opinions of witnesses having knowledge of the particular subject matter are admissible in evidence as to question of value. *G., C. & S. F. R. Co. v. Maetze*, 2 App. Civ. Cases, § 631, 637.

Value of Goods.—In an action against a carrier for the loss of a stock of merchandise, experts' evidence as to the value of the goods after they had testified that such value was fixed by the cost price plus the cost of carriage, and that, except as varied by the freight at different points, such property had a uniform value in the section of the state in which the business was carried on, was competent to establish the extent of the loss, being unobjectionable on the ground that the experts called such value the market value. *Texas & P. Ry. Co. v. Townsend* (Civ. App.), 106 S. W. 760.

In an action against a carrier for the loss of a stock of merchandise, experts' evidence as to the value of the goods after they had testified that such value was fixed by the cost price plus the cost of carriage, and that, except as varied by the freight to different points, such property had a uniform value in the section of the state in

which the business was carried on, was sufficient to establish the extent of the loss. *Texas & P. Ry. Co. v. Townsend* (Civ. App.), 106 S. W. 760.

Machinery.—In an action for the breach of a contract to deliver specific machinery, the difference in value between the machinery as furnished and as contracted for, the same being the measure of damages, may be ascertained by the testimony of experts, taking the price and expense of delivery as a basis, and estimating the difference between that amount and the value of the machinery actually delivered. *Stark v. Alford*, 49 Tex. 260.

Value of Crops.—Where a witness qualifies himself as an expert his opinion as to the value of crops at a particular stage of development is admissible. *Gulf, C. & S. F. R. Co. v. Simonton*, 2 Tex. Civ. App. 558, 22 S. W. 285.

Opinions of qualified experts on value of crops are admissible though ground of opinions not given. *Galveston, etc., R. Co. v. Borsky*, 2 Tex. Civ. App. 545, 548, 21 S. W. 1011; *Gulf, etc., R. Co. v. Simonton*, 2 Tex. Civ. App. 558, 562, 22 S. W. 285.

Value of Live Stock.—See ante, "Value of Live Stock," VI, P, 7.

Z. WATERCOURSES, DAMS, AND OVERFLOWS.

A dam 4 feet high was built by defendant 500 feet below plaintiff's field. The creek had banks from 15 to 30 feet higher than the dam. Plaintiff brought action for an overflow of his field, claimed to have been occasioned by the dam. Held, that the testimony of an expert in such matter, who had made a topographical survey of the premises, should have been allowed as to whether such a dam, constructed within such banks, and as to whether this particular dam in this particular place, could have any effect in producing an overflow. *Texas & P. Ry.*

Co. v. Cochrane, 69 S. W. 984, 29 Tex. Civ. App. 383.

VII. Nonexpert Opinion.

A. ADMISSIBILITY.

1. General Rule and Exceptions.

General Rule.—It is a general rule that the mere opinion, conclusion, or belief of a witness is not admissible as evidence, unless the witness qualifies as an expert. The correct practice is for the witness to state the facts, where they are such as can be detailed to the jury, and leave it to the jury to draw the proper conclusions and deductions arising therefrom. *Sheffield v. Sheffield*, 3 Tex. 79; *Haynie v. Baylor*, 18 Tex. 498, 509; *Clardy v. Callicote*, 24 Tex. 170, 173; *Purnell v. Gandy*, 46 Tex. 190; *Gabel v. Weisensee*, 49 Tex. 131, 142; *Houston, etc., R. Co. v. Smith*, 52 Tex. 178, 186; *I. & G. N. R. Co. v. Klaus*, 64 Tex. 293, 294; *Kauffman v. Babcock*, 67 Tex. 241, 244, 245, 2 S. W. 878; *Shifflet v. Morelle*, 68 Tex. 382, 388, 4 S. W. 843; *Harris v. Nations*, 79 Tex. 409, 413, 15 S. W. 262; *Johnston v. Martin*, 81 Tex. 18, 21, 16 S. W. 550; *Brown v. Mitchell*, 88 Tex. 350, 367, 31 S. W. 621; *Kansas, etc., R. Co. v. Scott*, 1 Tex. Civ. App. 1, 4, 20 S. W. 725; *Dill v. State*, 6 Tex. Cr. App. 113, 119; *McKnight v. State*, 6 Tex. Cr. App. 158, 163; *Carr v. State*, 24 Tex. Cr. App. 562, 568, 7 S. W. 328; *Johnson v. Galveston, etc., R. (Civ. App.)*, 30 S. W. 95, 96; *Willis & Bro. v. Sims (Civ. App.)*, 57 S. W. 324; *St. Louis, etc., R. Co. v. Ball*, 28 Tex. Civ. App. 287, 66 S. W. 879; *Oakes v. Prather (Civ. App.)*, 81 S. W. 557, affirmed in 98 Tex. 627, no op.

The opinions of witnesses as to matters concerning which the jury are as competent to form an opinion, from the facts proven, as are the witnesses, are inadmissible. *Sheffield v. Sheffield*, 3 Tex. 79.

Evidence which is the mere con-

clusion of the witness as to a matter of facts of which she claimed to have knowledge, is incompetent. *Oakes v. Prather (Civ. App.)*, 81 S. W. 557.

A question eliciting merely the conclusion of the witness as to a matter of opinion or of law is not admissible, and objections thereto when the depositions were offered should have been sustained. *Purnell v. Gandy*, 46 Tex. 190.

A witness may not testify to legal conclusions from facts given either by himself or testified to by another. *Brown v. Mitchell*, 88 Tex. 350, 31 S. W. 621.

Exceptions.—There are exceptions to the general rule that witnesses must speak alone as to facts. There are cases, where the question is not one of science or skill, in which witnesses are permitted to express their opinions. And in these cases, the witnesses need not be men of skill or science. In these cases, too, the opinion given is not a speculative opinion, but is knowledge, which may amount to certainty, or may not. *Cooper v. State*, 23 Tex. 331, 337; *Rogers v. Crain*, 30 Tex. 284, 290; *Gulf, etc., R. Co. v. Dunman*, 85 Tex. 176, 181, 19 S. W. 1073; *Galveston, etc., R. Co. v. Daniels*, 9 Tex. Civ. App. 253, 258, 28 S. W. 548, 711; *Missouri, etc., R. Co. v. Brantley*, 26 Tex. Civ. App. 11, 62 S. W. 94, affirmed in 94 Tex. 692, no op.

The conclusions or opinions of common observers, testifying to the results of their observations made at the time as to common appearances or facts, and a condition of things which can not be reproduced and made palpable to a jury, are admissible under an exception to the general rule excluding the conclusions of a witness. *McCabe v. San Antonio, etc., Co.*, 39 Tex. Civ. App., 614, 88 S. W. 387, affirmed in 101 Tex. 647, no op.

"Illustrations of this latter class of cases, are furnished whenever witnesses

are called to establish the identity of an individual; to prove the handwriting of any one; or to testify concerning the sanity or insanity of an individual, with whom the witness is intimately acquainted." *Cooper v. State*, 23 Tex. 331, 337.

"So it is sometimes the case that no better evidence can be obtained upon questions relating to time, quantity, number, speed, distance and the like, and when this is so, such evidence derived from actual observation is very generally held admissible." *Sabine, etc., R. Co. v. Broussard*, 69 Tex. 617, 622, 7 S. W. 374.

"Such evidence, however, should never be received unless the witness is shown to have been in a position and to have used the means necessary to enable him to form an estimate." *Sabine, etc., R. Co. v. Broussard*, 69 Tex. 617, 622, 7 S. W. 374.

Principle upon Which Exception Admitted.—The exceptions to the rule against opinion evidence are based upon the reason that the facts which constitute the cause from which the opinion of the witness is deduced as an effect, can not themselves be so presented or communicated to the mind of the jury as to impart to them the knowledge actually possessed by the witness. *Turner v. Strange*, 56 Tex. 141, 143; *Cooper v. State*, 23 Tex. 331, 339; *Missouri, etc., R. Co. v. Martin*, 2 App. Civ. Cases, § 654; *Gulf, etc., R. Co. v. John*, 9 Tex. Civ. App. 342, 345, 29 S. W. 558, affirmed in 93 Tex. 662, no op.

Opinion, so far as it consists of a statement of an effect produced on the mind, becomes primary evidence, and hence admissible whenever a condition of things is such that it can not be reproduced and made palpable in the concrete to the jury. *Meyers v. State*, 37 Tex. Cr. App. 208, 39 S. W. 111.

2. Must Give Facts upon Which Opinion Is Based.

The mere opinion of a witness is

inadmissible in absence of the facts upon which it is based. *Cockrill v. Cox*, 65 Tex. 669; *Moore v. Kennedy*, 81 Tex. 144, 147, 148, 16 S. W. 740; *Gulf, etc., R. Co. v. Hepner*, 83 Tex. 136, 18 S. W. 441; *Henderson v. State*, 49 Tex. Cr. App. 511, 93 S. W. 550; *Fults v. State*, 50 Tex. Cr. App. 502, 98 S. W. 1057; *First Nat. Bank v. McGinty*, 29 Tex. Civ. App. 539, 69 S. W. 495; *Hart v. Hart (Civ. App.)*, 110 S. W. 91.

No conclusion can rise higher than the facts from which it is made, and when conclusion is sought to be made the facts upon which it is based must be clearly proved. *Jones v. State*, 38 Tex. Cr. App. 87, 105, 40 S. W. 807, 41 S. W. 638.

Thus upon a trial for homicide, the wife of the defendant had testified that the deceased on various occasions had been guilty of improper and insulting conduct toward her, and that she had, previous to the homicide, communicated the fact of such conduct to her husband, the defendant. To discredit this testimony of the wife, the state introduced a witness to swear that on one occasion he saw a woman in the office of the deceased, apparently on a friendly visit; that the deceased had told the witness that said woman was Mrs. J., the name given being the name as that of the defendant, and the inference sought to be raised being that the woman in question was the wife of the defendant, and that she had made friendly visits to the office of the deceased subsequent to the date of the improper conduct mentioned in her evidence. The witness did not identify the wife of defendant as the woman he had seen in the office of deceased, and his evidence was solely to the effect that deceased had stated that the woman was Mrs. J. Speaking upon this evidence and its admissibility the court said: "This testimony, as presented, is purely hearsay. If, in fact, Mrs. Jones visited Veal, as attempted

to be shown by Richardson, this would have been a very strong circumstance with the jury, tending to negative or disprove everything that she had said about the insulting conduct of the deceased. The conclusion would have been very strong, indeed, that she had manufactured this story for the purpose of saving the life and liberty of her husband. Now, the rule is that no conclusion can rise higher than the facts from which it is made. When a conclusion is sought to be made, the fact upon which it is based must be clearly proved. Vague suspicions, leading to hurtful conclusions, are not permitted in law." *Jones v. State*, 38 Tex. Cr. App. 87, 40 S. W. 807, 41 S. W. 638. See *Burrill Cir. Ev.*, p. 126.

A nonexpert may express his opinion if he has seen and observed cause and effect, and states the facts upon which his opinion is based. *Gulf, etc., R. Co. v. Richards*, 83 Tex. 203, 206, 18 S. W. 611.

Nonexperts giving the facts upon which their opinions are based may testify to such opinions. Such witnesses should not be permitted to indulge in argument upon the subjects on which their opinions are given, unless called upon in cross-examination. *Galveston, etc., R. Co. v. Daniels*, 1 Tex. Civ. App. 693, 20 S. W. 953.

In determining whether a judgment is excessive, as required by Laws 1893, p. 89, the court of civil appeals will disregard the opinions of witnesses as to the value of the property in dispute, unaccompanied by any statement as to their means of knowledge. *Ft. Worth & R. G. Ry. Co. v. Hurd* (Civ. App.), 24 S. W. 995.

A married woman testified, in answer to interrogatories as to where and how she obtained the money paid for the land in controversy that "the money was her own," and "her individual money," and that she "bought the lots herself, with her own individual money." Held that, as witness

had refused to testify to the facts, her answers were properly stricken out as conclusions of law. *Ballew v. Casey* (Sup.), 9 S. W. 189.

3. Sufficiency of Facts or Knowledge upon Which Opinion Based; Qualification of Witness.

a. In General.

In order to render such evidence competent the facts must appear to be such as would enable them to arrive at an intelligent opinion with respect to the subject. *Gulf, etc., R. Co. v. Hepner*, 83 Tex. 136, 18 S. W. 441.

A question and answer given, which affords a conclusion from facts known to the witness, may properly go to the jury as evidence, though the weight of such testimony be little. *Tompkins v. Toland*, 46 Tex. 584.

Want of familiarity with a subject about which a witness testifies, is no objection to admissibility of testimony; it goes only to its weight. *Gonzales College v. McHugh*, 21 Tex. 257, 259.

b. In Particular Cases.

See, generally, post, "Particular Subjects of Opinion Evidence and the Evidence Admissible Thereon," VII, C, et seq.

(1) Opinion of Impeaching Witness.

When it was apparent that the belief of a witness, introduced to impeach the testimony of another witness, was based upon his individual opinion and feelings, and not upon his knowledge of the reputation for veracity of the assailed witness in the community of his residence, the testimony of the impeaching witness was properly excluded. *Ayers v. Duprey*, 27 Tex. 593.

(2) Freight Rates.

It is not error to permit a witness to testify from his own knowledge as to what the freight rates between two points are, where he testifies that he knows it because he has paid it a number of times. *Texas Cent. R. Co. v. Miller* (Civ. App.), 88 S. W. 499.

c. Review of Discretion of Trial Court.

Where a witness is qualified to give an opinion as to the value of land in condemnation proceedings is largely within the discretion of the trial judge. *Telephone & Telegraph Co. v. Forke*, 2 Willson, Civ. Cas. Ct. App. § 365.

4. Opinions upon Mixed Questions of Law and Fact.

The fact that a witness may possess greater knowledge as to the existence of facts entering into an inquiry than the jury would be supposed to have does not render his conclusion admissible where such conclusion is based upon a mixed question of law and fact. *Houston & T. C. R. Co. v. Roberts*, 101 Tex. 418, 108 S. W. 808.

Where, in an action against a carrier for rough handling of and delay in transporting cattle, there was evidence of the value of the cattle on their arrival at the point of destination in the condition described, and of their value when received by the carrier for shipment, testimony of witnesses as to what, in their opinion, would have been the reasonable value of the cattle if transported within a reasonable time and with ordinary care, was erroneous, as calling for the opinion of the witnesses on a mixed question of law and fact. *Gulf, C. & S. F. Ry. Co. v. Kimble*, 49 Tex. Civ. App. 622, 109 S. W. 234.

5. Opinions Encroaching upon the Province of the Jury.

Conclusions and Inferences Which Jury Should Draw.—"A fact known to the witness, though only from his own consciousness, and which may be pertinent to the issue, is admissible, but not when to such fact is added the exercise of the judgment upon its relation to other facts and an opinion upon such combination is expressed." *Schmick v. Noel*, 72 Tex. 1, 4, 8 S. W. 83.

A witness can not, from statements and acts of plaintiff in evidence, testify

that he is a liar and thief; it being for the jury to determine what conclusion should be drawn from the evidence. *Bailey v. Chapman*, 38 S. W. 544, 15 Tex. Civ. App. 240.

The belief or opinion of a witness to the effect that certain other persons would swear to the truth was not admissible. *Hardin v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.), 88 S. W. 440.

A witness who has testified as to what certain persons had told him should not be permitted to state that he was sure they had not lied to him. *Clapp v. Branch*, 11 Tex. Civ. App. 203, 207, 32 S. W. 735.

Statements of a witness as to his conclusions drawn from the facts shown by exhibits, or his opinion as to what is the law are not admissible. *Pioneer Sav., etc., Co. v. Peck*, 20 Tex. Civ. App. 111, 132, 49 S. W. 160, affirmed in 93 Tex. 717, no op.

It is error to permit a party to testify to the meaning of depositions and writings on file in a case, as it is an invasion of the province of the jury. *Thomson-Houston Electric Co. v. Berg*, 10 Tex. Civ. App. 200, 30 S. W. 454.

Before the trial, plaintiff told witness that if he would tell the truth about the matter he would not lose anything. Witness offered to state that he understood this as a hint to testify in plaintiff's favor. The evidence was objected to as being merely the opinion of the witness. Held, that it was properly excluded, it being for the jury to judge the meaning of the expression. *Gulf, C. & S. F. R. Co. v. Fox* (Sup.), 6 S. W. 569.

A witness testifying as to the effect of certain injuries received by plaintiff may testify that he is satisfied with the correctness of his conclusion as to the injuries. *Missouri, K. & T. Ry. Co. of Texas v. Sledge* (Civ. App.), 30 S. W. 1102.

Opinion Embracing Very Matter at Issue.—When an issue is one upon which a witness may properly state his opinion, it is immaterial that his answer embraces very issue on trial. *Scalf v. Collin County*, 514, 16 S. W. 314.

6. Irrelevant Opinion.

In a suit to set aside a transfer of an insolvent's property for fraud, the theory of a witness as to what induced the buyer to pay an exorbitant price therefore is irrelevant, since the issue is the market value of the goods when sold. *Halff v. Goldfrank* (Civ. App.), 49 S. W. 1095.

7. Appeal and Error.

Admission of Similar Evidence without Objection.—The right to complain of evidence that it was merely the opinion of witness is lost where testimony of the same character from other witnesses went to the jury unchallenged. *Galveston, etc., R. Co. v. Eckles*, 25 Tex. Civ. App. 179, 60 S. W. 830, affirmed in 94 Tex. 705, no op.

B. EVIDENCE HELD TO BE OR NOT TO BE OPINION EVIDENCE.

See post, "Particular Subjects of Opinion Evidence and the Evidence Admissible Thereon," VII, C, et seq.

C. PARTICULAR SUBJECTS OF OPINION EVIDENCE AND THE EVIDENCE ADMISSIBLE THEREON.

1. Matters of Common Appearance and Observation.

a. In General.

See ante, "General Rule and Exceptions," VII, A, 1.

b. Time and Distance.

The opinion of a witness as to time, space, or distance is admissible. *International & G. N. R. Co. v. Satterwhite*, 47 S. W. 41, 19 Tex. Civ. App. 170.

On a trial for murder, where a witness was asked to state whether he

knew the distance from a certain point to where defendant stood when he shot deceased on a certain date, an objection thereto because irrelevant and incompetent and hearsay was properly overruled, since the witness could properly state whether he knew the distance between two certain points. *Neely v. State* (Cr. App.), 56 S. W. 625.

Time to Deliver Telegram.—On the trial of an action for a failure to deliver a telegram, it was not reversible error for the court to permit plaintiff to testify that it would not have taken a person more than 30 minutes to deliver a message to him, at the place where he was working when the telegram should have been delivered. *Western Union Tel. Co. v. Drake*, 38 S. W. 632, 14 Tex. Civ. App. 601.

Time Required to Cross Track.—In an action for injuries received by a collision at a railroad crossing, it is proper to allow a witness to state how long it would take a team to cross the track from the beginning of the approach to the crossing. *International & G. N. R. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. 58.

Whether Injured Person Had Time to Get Off Track.—One not an expert can not testify as to whether a man walking on a railroad track had time to get off the track after signals had been given by a locomotive. *Houston & T. C. R. Co. v. Smith*, 52 Tex. 178.

Held Not to Be Opinion.—In an action by a landlord for conversion of a crop delivered by his tenant and subtenants to third persons made defendants, the testimony of a witness that the crop was delivered within two or three weeks after the same was threshed, and that the delivery did not take over two weeks, was competent as a statement of a fact, and not a mere conclusion. *Sexton Rice & Irrigation Co. v. Sexton*, 48 Tex. Civ. App. 190, 106 S. W. 728.

Sufficiency of Knowledge on Which Opinion Based.—Where a witness stated that he had seen the distances between two points on a certain railroad set out in defendant's folder, had traveled over the road, and could judge of the distances by the amount of fare paid, he was entitled to testify what he thought the distance was. *San Antonio & A. P. Ry. Co. v. Griffith* (Civ. App.), 70 S. W. 438.

c. Location, Relative Position of Persons and Objects.

Statements by a witness that he saw deceased standing upon the pilot of an engine, and, in his belief, upon the right side of the pilot, are admissible, not as statements of belief, but as showing the position of the deceased according to witness' recollection. *Terrell v. Russell*, 16 Tex. Civ. App. 573, 42 S. W. 129, affirmed in 93 Tex. 721, no op.

In an action for a breach of a liquor dealer's bond providing that he should keep an open house, testimony that a screen inside the saloon obstructed the view was not objectionable as being opinion evidence. *Merzbacher v. State* (Civ. App.), 36 S. W. 308, 309.

d. Speed.

In an action by the driver of a hose cart of a fire department, and his minor son, a member of such department, against a street railway company, for personal injuries to the son received while crossing defendant's track, caused by its defective construction, such driver may give his opinion as to whether he was driving at the time at a safe rate of speed, where it appears that he has had much experience in driving such carts. *Houston City St. Ry. Co. v. Richart* (Civ. App.), 27 S. W. 918.

2. Age.

Qualification of Witness.—Brother is competent witness as to age of party and may base his testimony upon declarations of mother. *Kalteyer v.*

Wipff, 92 Tex. 673, 680, 52 S. W. 63, affirming 49 S. W. 1055.

The opinions of a daughter, and of another, who had known deceased a long time, as to his age, are admissible; the daughter testifying that deceased did not know his age exactly, and that his age was not in the family Bible. *St. Louis Southwestern Ry. Co. of Texas v. Bowles*, 72 S. W. 451, 32 Tex. Civ. App. 118.

3. Appearance, Conduct and Demeanor.

As to Whether One Was Looking at a Certain Person.—Testimony that witness could not say whom a certain person was looking at, but that he looked as if he were looking at M., is admissible within the rule allowing witnesses to state the appearances of things coming under their observation. (Civ. App.) *Gulf, C. & S. F. Ry. Co. v. Miller*, 79 S. W. 1109, 35 Tex. Civ. App. 116, judgment affirmed 83 S. W. 182, 98 Tex. 270.

Conduct as Polite, Courteous, or Otherwise.—In an action against a railway company for refusing a ticket, witnesses may testify whether the conductor, on refusing the ticket, was polite and courteous, or otherwise, though the question calls for their opinion. *Rutherford v. St. Louis S. W. Ry. Co. of Texas*, 67 S. W. 161, 28 Tex. Civ. App. 625.

Conduct Showing Grief.—The conduct of plaintiff's wife, showing grief at being unable to attend her father's funeral, may be shown by bystanders as evidence of damage. *Western Union Tel. Co. v. Carter* (Civ. App.), 20 S. W. 834, reversed in 85 Tex. 580.

Cause of Conduct as Indicating Purpose, Intention.—In trespass to try title, a statement of a witness that he knew that plaintiff had not abandoned a sheriff's sale of the land because of his whole course of conduct in regard thereto, and especially by his indignation at the perfidy of his agent in trying to keep the land after buying it

for him as per agreement, was properly excluded as being but the conclusion of the witness and argumentative. *Byrnes v. Morris*, 53 Tex. 213.

Conduct as Indicating Intention to Commit Suicide.—Testimony on the issue of suicide, in an action on a life policy, that, the last time witness saw deceased conscious, there was nothing in his actions or remarks to indicate that he had the least intention of taking his own life, is objectionable, as being the opinion of the witness. *Mutual Life Ins. Co. v. Hayward*, 27 S. W. 36, 12 Tex. Civ. App. 392, 34 S. W. 801.

Intoxication.—A witness may give his opinion as to whether another person was drunk. *Pace v. State* (Cr. App.), 79 S. W. 531.

In an action against a carrier for mental anguish and pain suffered by a female passenger, owing to the conductor of the train having permitted profane and indecent language in the car, testimony that some of the passengers were either drunk or seemed to be so, and were rude and boisterous, was not objectionable as the opinion of the witness. *St. Louis Southwestern Ry. Co. of Texas v. Wright* (Civ. App.), 84 S. W. 270.

Held Not to Be Opinion.—The statement of a witness that the agent of a railway company saw the children accompanying plaintiff before he gave them the tickets is the statement of a fact, and not the conclusion of the witness. *International & G. N. R. Co. v. Anchonda*, 75 S. W. 557, 33 Tex. Civ. App. 24.

In an action against a railroad for injuries to a child at a crossing, testimony that a brakeman stood near, and knew, as a fact, that the plaintiff and children with him were attempting to cross, is not objectionable, as being the opinion of the witness. *Gulf, C. & S. F. Ry. Co. v. West* (Civ. App.), 36 S. W. 101.

Same; Appearance of Person after

Accident.—In an action for personal injuries on an issue as to whether or not plaintiff was injured, testimony of a person at whose house plaintiff had visited after the accident that, at the time of the visit, nothing in her appearance or actions indicated that she was hurt or injured was not an expression of witness' opinion as to plaintiff's having been injured, but only testimony as to her appearance, and hence was admissible. *St. Louis & S. F. R. Co. v. Boyer*, 44 Tex. Civ. App. 311, 97 S. W. 1070.

4. Boundaries and Surveys.

A witness need not be an expert, to testify to marks on trees purporting to relate to a survey. *Vogt v. Geyer* (Civ. App.), 48 S. W. 1100.

Witness testified that the land described in the petition was embraced in that involved in the judgment, and to this testimony objection was made upon the ground that witness did not show himself qualified as an expert surveyor nor how he knew the facts testified to. Held, that if the witness knew of his own personal knowledge the fact to which he testified his testimony was competent, although he had no knowledge of surveying. *Henry v. Red Water Lumber Co.*, 46 Tex. Civ. App. 179, 102 S. W. 749, affirmed in 102 Tex. 584, no op.

5. Business, Occupation, etc.

a. Business in Which Certain Person Engaged.

A question calling for the opinion of a witness as to whether defendant had been engaged in the retail liquor business during a certain time was properly excluded. *Grady v. Rogan*, 2 Willson, Civ. Cas. Ct. App. § 264.

b. Profit and Loss of Business.

It is not reversible error to allow a witness to state what was the clear profit on a particular transaction, after he has testified fully as to the items of receipts and disbursements in the transaction. *Glass v. Wiles* (Sup.), 14 S. W. 225.

c. Solvency and Insolvency.

The opinion of witnesses as to solvency is not objectionable as a conclusion of law or fact. *Reed v. Timmins*, 52 Tex. 84, 87.

Of Person Making Fraudulent or Voluntary Conveyance.—Where a creditor of a deceased husband sought to subject property conveyed by him to his wife, by a deed which was not recorded until after the husband's death, he is competent to testify that the husband was insolvent at the date of the deed; he having given the facts on which he based his opinion. *Gonzales v. Adoue* (Civ. App.), 56 S. W. 543 (see 93 Tex. 684, no op.).

Of Estate.—A witness may testify as to the solvency of an estate. *Reed v. Timmins*, 52 Tex. 84.

Oral evidence that the personal property of an estate is sufficient to pay the debts is objectionable as opinion evidence. *McCown v. Terrell* (Civ. App.), 40 S. W. 54, reversed *Terrell v. McCown*, 43 S. W. 2, 91 Tex. 231.

Of Corporation; Qualification of Witness.—In an action for fraudulent representations inducing plaintiff to buy corporate stock, the person who acted as secretary, bookkeeper, and treasurer of the corporation was a competent witness by whom to prove that at the time plaintiff purchased his stock the corporation did not have sufficient assets to authorize representations made by defendant that the company was perfectly solvent. *Collins v. Chipman*, 95 S. W. 666, 41 Tex. Civ. App. 563.

On an issue as to solvency of an association at a particular time, a witness can not give his opinion, gathered from the records, books, and interviews with various persons, as to its solvency at such time, where no facts that he discovered are disclosed. *Pioneer Savings & Loan Co. v. Peck*, 49 S. W. 160, 20 Tex. Civ. App. 111.

Evidence Not Held to Be Opinion.

—On an issue whether defendant was

financially able to buy property at a certain time, a witness who testifies that he has knowledge of defendant's condition at that time does not give a mere conclusion, in stating that defendant then "had nothing." *Davis v. Davis*, 49 S. W. 726, 20 Tex. Civ. App. 310.

As to What Constitutes Insolvency.—The opinion of a witness as to what constitutes the insolvency of a savings and loan association is inadmissible, since such question is for the court. *Pioneer Savings & Loan Co. v. Peck*, 49 S. W. 160, 20 Tex. Civ. App. 111.

d. Particular Business or Occupation.

See post, "Contracting and Building," VII, C, 7; "Electricity," VII, C, 10; "Insurance," VI, C, 13; "Railroading," VII, C, 24, et seq.; "Well Drilling," VII, C, 31.

6. Character, Reputation and Influence; Habits.

Evidence that plaintiff in an action for injuries was a hard-working woman was not objectionable as a conclusion. *St. Louis & S. F. R. Co. v. Smith*, 79 S. W. 340, 34 Tex. Civ. App. 612.

Reputation and Influence of Newspaper.—In a libel suit, it is proper to reject an offer of evidence that defendant's paper "has a greater power of molding public opinion throughout the state than any other paper in it," though coupled with the offer of proper evidence as to the circulation of the paper, since the extent of the paper's influence is matter of opinion. *Patten v. Belo*, 79 Tex. 41, 14 S. W. 1037.

7. Contracting and Building.

a. Quality of Work and Labor; Compensation.

In an action brought to recover compensation for a stipulated job of carpenter's work, and upon a quantum meruit for extra work, it was error wholly to exclude the testimony of

witnesses who were not carpenters as to the character of the work. *Carroll v. Welch*, 26 Tex. 147.

Testimony of a witness not mechanic himself, as to quality and character of mechanical work, is admissible, but weight to be given such testimony is for jury to determine. *Carroll v. Welch*, 26 Tex. 147, 149; *Gonzales College v. McHugh*, 21 Tex. 257, followed.

b. Bridges.

Construction; Strength; Soundness.—A nonexpert witness, unfamiliar with the character and construction of a bridge and with the requisite strength of such structure, is incompetent to express an opinion as to its strength and safety hence the admission of depositions containing such testimony was error. *San Antonio, etc., R. Co. v. Lynch* (Civ. App.), 55 S. W. 517.

In an action against a railroad company for injuries received by a defective bridge, a nonexpert witness should not be allowed to state that, if the timbers of the bridge had been larger and sound, the bridge would have been sufficient for the uses of the railroad company except in extraordinary rain-falls as such testimony is not within the rule which allows a nonexpert witness to state facts within his knowledge, and give an opinion on these facts. *Galveston, H. & S. A. Ry. Co. v. Daniels*, 1 Tex. Civ. App. 695, 20 S. W. 955.

In an action for damages caused by a defective bridge it was not error to refuse to permit a witness to testify where travelers were expected to cross such bridge, and as to whether it was in good condition on a certain day preceding the accident, when he examined it, since such evidence was mere opinion. *City of Marshall v. McAllister*, 54 S. W. 1068, 22 Tex. Civ. App. 214.

In an action for injuries caused by a defective bridge, a nonexpert witness can not testify that, judging from its appearance and his inspection of the bridge, he should think it needed re-

pair. *Baldrige & Courtney Bridge Co. v. Cartrett*, 75 Tex. 628, 13 S. W. 8.

Destruction; Cause of.—In an action against a railroad company for injuries caused by the fall of its bridge, the opinion of a nonexpert witness, who examined the bridge immediately after the wreck, as to the cause of its fall, is competent, if he has qualified himself by stating the facts upon which his opinion is based. *Galveston, H. & S. A. Ry. Co. v. Daniels*, 9 Tex. Civ. App. 253, 28 S. W. 548, 711.

In an action for injuries caused by a defective bridge, one who lives near the bridge, and is familiar with the canon over which it was built, and who has sworn that it was built on a gravelly or soft foundation, is competent to give an opinion as to the effect of a freshet on such gravelly foundation. *Galveston, H. & S. A. Ry. Co. v. Daniels*, 9 Tex. Civ. App. 253, 28 S. W. 548, 711.

8. Construction and Interpretation of Language.

Spoken Language.—It is incompetent for a witness to state that a message from him did not contain threats of a criminal prosecution, but he should state the language of the message and leave its import and meaning for the jury. *Perkins v. Adams & Co.*, 17 Tex. Civ. App. 331, 43 S. W. 529.

Written Language.—Testimony that the estimates of an engineer, under a contract between a railroad company and contractors employed to build a road, included damages for delay in furnishing materials, was inadmissible as an opinion and conclusion of the witness. *Gorham v. Dallas C. & S. W. Ry. Co.*, 95 S. W. 551, 41 Tex. Civ. App. 615.

Testimony that particular improvements to defendant's property, into which material furnished entered, were intended to be provided for by a deed of trust executed by defendant, was a mere opinion or conclusion of the wit-

ness. (Civ. App.) *Martin v. Texas Brquette & Coal Co.*, 77 S. W. 651, judgment affirmed *Vaughan Lumber Co. v. Martin*, 81 S. W. 1, 98 Tex. 80.

A certificate of the secretary of a lodge of Masons as to when a certain person became a member of the lodge was inadmissible to establish the fact as the certificate merely stated the conclusions of the witness derived from the lodge records. *Howard v. Russell*, 75 Tex. 171, 12 S. W. 525.

Legal Effect.—An opinion or conclusion of a witness as to the legal effect of a written contract is not admissible, e. g., a railroad construction contract. *Gulf, etc., R. Co. v. Shearer*, 1 Tex. Civ. App. 343, 347, 21 S. W. 133, affirmed in 93 Tex. 662, no op.

9. Damages.

a. General Rule as to Admissibility of Opinion.

Damages must be established like any other fact, and no testimony which amounts to mere opinion is competent. *International & G. N. Ry. Co. v. Philips*, 63 Tex. 590; *Turner v. Strange*, 56 Tex. 141, 144; *Southern Pac. R. Co. v. Duncan*, 3 App. Civ. Cases, § 234.

"In this state the general rule is, that the opinion of a witness as to damages is not admissible. (W. & W. Con. Rep., § 1109.)" *Southern Pac. R. Co. v. Duncan*, 3 App. Civ. Cases, § 234.

"There are exceptions to this general rule, however. (2 W. & W. Con. Rep., §§ 365, 392.)" *Southern Pac. R. Co. v. Duncan*, 3 App. Civ. Cases, § 234.

Measure of Damages.—It is error to allow a witness to give his opinion as to the measure of damages. *Houston & T. C. R. Co. v. Burke*, 55 Tex. 323.

The measure of damages for wrongful branding of cattle can not be proved by opinion evidence. *Taylor v. Long* (Sup.), 16 S. W. 1084.

b. As to Whether Claim Filed.

Where, in an action against a carrier by a shipper, a witness testified to facts within his knowledge which showed that, if a claim for damages had been made by plaintiff before commencement of suit, the same would have passed through his hands, his further testimony that it was not probable that any such claim could be made without coming to his knowledge was properly excluded as a conclusion. (Civ. App.) *Pecos & N. T. Ry. Co. v. Evans-Snyder-Buel Co.*, 42 Tex. Civ. App. 60, 93 S. W. 1024, judgment affirmed *Same v. Evans-Snyder-Buel Co.*, 100 Tex. 190, 97 S. W. 466; S. C., 42 Tex. Civ. App. 60, 93 S. W. 1024.

c. Injuries to the Person or Reputation.

As to personal injuries, see post, "Personal Injuries," VII, C, 20.

False Imprisonment—Mental Suffering.—In an action for false imprisonment, testimony of plaintiff that he was damaged \$50 per day by mental suffering is inadmissible. *Landrum v. Wells*, 7 Tex. Civ. App. 625, 26 S. W. 1001.

d. Injury to Business, Credit, Good Will, etc.

The opinion of a witness is not admissible, to prove that a party has been damaged by the suing out of a writ of sequestration, or attachment or the amount of such damage. *Clardy v. Callicoate*, 24 Tex. 170, 172; *Thompson v. Miller*, 1 App. Civ. Cases, §§ 1108, 1109.

A witness can not state his opinion as to the amount of injury caused by an attachment, though he also states the facts within his own knowledge on which his opinion rested. *Clardy v. Callicoate*, 24 Tex. 170.

In an action for wrongful attachment, the injury to plaintiff's credit being assigned as an element of damages a question asked plaintiff, as a

witness on his own behalf, as to what he considered his credit to be worth, is improper, as calling for the witness' conclusion. He could testify to facts, such as his good credit, business capacity, capital, and liabilities, but the jury must draw the conclusion from such facts. *Kauffman v. Babcock*, 67 Tex. 241, 2 S. W. 878; *Hernsheim v. Babcock* (Sup.), 2 S. W. 880; *Turner v. Strange*, 56 Tex. 141, 142; *Clardy v. Callicoate*, 24 Tex. 170, 174; *Gabel v. Weisensee*, 49 Tex. 131, 142.

The business capacity of the party, his liabilities, capital, and profits of his business; his good credit before the writ issued, and want of it after its execution; his being pressed by creditors, and stopping business, are facts that may be shown, to aid the jury in determining the amount of damage incurred. But such a case is not an exception to the general rule, that witnesses must state facts, and not opinions and conclusions from facts, either disclosed or not disclosed. *Clardy v. Callicoate*, 24 Tex. 170.

Where, in defense to an action on a promissory note, a counterclaim was interposed for damages sustained through the wrongful issuing of an attachment by the plaintiff, it was error to allow a witness to testify as to his opinion of the amount of damages sustained by defendants through the attachment, he giving his evidence merely as a matter of opinion as a business man. *Lee v. Wilkins*, 1 Posey, Unrep. Cas. 287.

Plaintiff testifying in a suit for damages for wrongful seizure may be asked "How much were you damaged by the seizure of your property?" *Lyons v. Reed*, 2 Posey 581, 582.

Effect on Credit.—In an action for wrongful seizure on execution of a partner's interest in partnership property, evidence as to its probable effect on plaintiff's credit is inadmissible. *Middlebrook v. Zapp*, 79 Tex. 321, 15 S. W. 258.

What effect it would have on his credit for a merchant to ask for an extension is a matter of opinion, and the testimony of witnesses is not admissible upon the question. *Willis v. McNeill*, 57 Tex. 465.

e. Through Injury or Destruction of Personal Property.

(1) In General.

Where an action for damages is based on the complete destruction of the property, and not on a depreciation in value, evidence of its value may be given by witnesses, who have not qualified as experts. *Galveston, H. & S. A. Ry. Co. v. Serafina* (Civ. App.), 45 S. W. 614.

In a suit against a railway company to recover damages for a carriage wrecked by railway, a driver who knew its condition before and after injury, and who was present at the time, is a competent witness on question of injury to carriage. *Missouri, etc., R. Co. v. Peay*, 7 Tex. Civ. App. 400, 403, 26 S. W. 768.

(2) Goods in Transit.

Failure to Prevent Injury.—Where, in an action against connecting carriers as partners for delay in delivery of goods and for injuries thereto by flood, the partnership was admitted, and it was not denied that the car containing the goods was not in the yard of one of the defendants at the time of a flood, the exclusion of evidence as to what was and what could have been done in the yards of such company with reference to sending such car forward or in protecting the shipment had the car been in its yards, was not error. *Missouri, etc., R. Co. v. Jarrell*, 38 Tex. Civ. App. 425, 86 S. W. 632, affirmed in 101 Tex. 649, no op.

Cause of Injury.—On an issue as to the cause of damage to a shipment in transit, testimony of a witness that it was his judgment, from the general appearance of the shipment, that it was due to the improper storing or packing of the goods in the car was

admissible as the statement of a fact, and not merely an opinion. *Texas & P. Ry. Co. v. Warner*, 42 Tex. Civ. App. 280, 93 S. W. 489.

In an action for the loss of several barrels of molasses in shipment, testimony that the witness had inspected the shipment at a certain point, but was unable to stop the leakage, as all of the barrels seemed to be in good condition, and the leaking appeared to be from fermentation, was not a conclusion of the witness. *International & G. N. R. Co. v. H. P. Drought & Co.* (Civ. App.), 100 S. W. 1011.

In an action for the loss of several barrels of molasses in shipment, testimony that "some of the barrel heads showed to have been staved inwards by heavy blows from the outside," was not a conclusion of the witness, but testimony as to a fact. *International & G. N. R. Co. v. H. P. Drought & Co.* (Civ. App.), 100 S. W. 1011.

As to Whether Car Well Iced.—In an action against a railroad for damages to a car of vegetables, caused by not keeping them sufficiently iced, evidence that the vegetables were carefully packed, and that the car was well iced with 500 pounds of ice when it left the starting point, is not objectionable, as stating a conclusion. *Ft. Worth & D. C. Ry. Co. v. Harlan* (Civ. App.), 62 S. W. 971.

Amount of Loss.—In an action against a carrier for household goods destroyed in transportation, it was not error to exclude offered testimony of a witness as to his estimate of the amount of plaintiff's loss, since such testimony was not expert evidence; it not being proposed to prove by him that he had seen the property, and had knowledge of its value. *Missouri, K. & T. Ry. Co. of Texas v. Davidson*, 60 S. W. 278, 25 Tex. Civ. App. 134.

f. Injuries to Live Stock in Transportation.

(1) Sufficiency of Stock Pens.

In an action against a railroad for

negligence in furnishing insufficient pens at the shipping point for the accommodation of plaintiff's cattle, it was error to permit a witness to state his conclusion that the pens were insufficient; the question being one for the jury. *Texas & P. Ry. Co. v. Slator* (Civ. App.), 102 S. W. 156.

(2) Delay in Furnishing Cars.

In an action by a shipper against a carrier, testimony that the time within which cars were furnished plaintiff was a reasonable time was properly excluded as involving a conclusion. *Pecos & N. T. Ry. Co. v. Evans-Snyder-Buel Co.*, 42 Tex. Civ. App. 60, 93 S. W. 1024, judgment affirmed; same *v. Evans-Snyder-Buel Co.*, 100 Tex. 190, 97 S. W. 466.

(3) Time Consumed in Transportation.

There was no error in not permitting a witness to answer a question whether in this case the shipment of cattle was as rapid as possible under the circumstances. *St. Louis, I. M. & S. Ry. Co. v. Gunter*, 44 Tex. Civ. App. 480, 99 S. W. 152.

Reasonable Time; Qualification of Witness.—In an action against a carrier for delay in transporting cattle, the shipper was incompetent to testify as to what would be a reasonable run or a reasonable length of time to make the run. *Galveston, etc., R. Co. v. Noelke* (Civ. App.), 110 S. W. 82.

In an action to recover damages resulting from alleged delays in transporting live stock, where it was shown by uncontradicted testimony that there was unreasonable delay and defendant failed to show that it could not have been avoided by the exercise of ordinary care, it was not reversible error to admit the testimony of shippers as to what they regarded as a reasonable time for the transportation. *Gulf, etc., R. Co. v. Rogers* (Civ. App.), 102 S. W. 739.

A shipper of cattle, who had shipped over defendant's railway, and was ac-

quainted with the speed of cattle trains, was qualified to state the usual time required for cattle trains to run from a Texas station to St. Louis. *International & G. N. R. Co. v. McGehee* (Civ. App.), 81 S. W. 804.

In an action against two railroads for damages to a shipment, a witness testified that he went with the shipment, and that he had made a shipment between the points in question since that time over defendant railroads, though he did not go with it, and that he had made shipments between the points in question over another road. Held, that in view of such testimony, and in view of the fact that the court would take judicial notice of the respective runs and locations of the roads between the points in question, it was proper to permit the witness to testify as to the reasonable time required to transport cattle over defendant roads between such points. *Texas, etc., R. Co. v. Walker*, 43 Tex. Civ. App. 278, 95 S. W. 743.

Cause of Delay.—A witness' answer to a question as to why cattle remained in the pens at a certain place for the length of time they did, that he did not know, but presumed that they were waiting for an early stock train the next morning, on which they were taken out, was improperly admitted, being the opinion of the witness. *Dupree & McCutchan v. Texas & P. Ry. Co.* (Civ. App.), 96 S. W. 647.

The statement of the witness in charge of the shipment that the delay on defendant's line was the cause of subsequent delays on connecting lines was inadmissible, as being a conclusion. *San Antonio & A. P. Ry. Co. v. Woodley*, 49 S. W. 691, 20 Tex. Civ. App. 216.

(4) Care and Attention.

Where it is not shown that a witness had opportunity to know as to cattle on trains other than that on which he rode, his testimony that none of the

cattle on three trains, a day apart, was fed and watered, was inadmissible. *Gulf, etc., Ry. v. White* (Civ. App.), 32 S. W. 186, 188.

(5) Cause of Injury.

A witness familiar with cattle would be competent to testify from the appearances of the cattle as to what caused their condition, provided he gave the data upon which he based his opinion. *San Antonio, etc., R. Co. v. Barnett*, 27 Tex. Civ. App. 498, 66 S. W. 474.

(6) Nature and Extent of Injuries; Amount of Damages.

In an action against a railroad for injuries to live stock in transit, testimony showing the value of the animals had they been carried to their destination "in good condition" was properly admitted, the phrase "good condition" being sufficiently explicit, and not objectionable as a conclusion. *Texas & P. Ry. Co. v. White*, 80 S. W. 641, 35 Tex. Civ. App. 521.

In an action for injuries to a shipment of live stock, caused by the delay of defendant carrier in its transportation, a witness can not state what, in his opinion, was the actual loss in money on each head of stock, without giving any data on which his opinion is based. *Gulf, C. & S. F. Ry. Co. v. Hughes* (Civ. App.), 31 S. W. 411.

In an action for injuries to a shipment of live stock, a witness should not state the amount, in dollars, the cattle were injured, without giving any data, but should give the data to enable the jury to draw a conclusion as to the amount of damage. *Gulf, C. & S. F. Ry. Co. v. White* (Civ. App.), 32 S. W. 322.

Opinions of witnesses as to damage per head to market value of cattle from ill treatment, which is the true measure of damages, are admissible, it being clear the witnesses confined themselves to the legitimate items of damage to be considered in making the estimate. *Gulf, C. & S. F. Ry. Co.*

v. Leatherwood, 69 S. W. 119, 29 Tex. Civ. App. 507.

Where a witness shows himself to be qualified to express an opinion as to the amount of damage to stock, and the evidence indicates that in giving his opinion he took into consideration only the legitimate elements of damage, his opinion is admissible. *Ft. Worth & D. C. Ry. Co. v. Waggoner Nat. Bank*, 81 S. W. 1050, 36 Tex. Civ. App. 293.

It appearing that the evidence was directed to the issue of the difference between the market value of the cattle in the condition in which they arrived at their destination and that in which they would have arrived, had due care and diligence in transportation been exercised, the admission of testimony of the witness that they were in condition for beef, and worth \$20 apiece, when shipped, and were damaged \$6 each en route—being on arrival in condition to be put on feed—and that they were somewhat skinned and bruised, was not reversible error. *Red River, etc., R. Co. v. Eastin*, 39 Tex. Civ. App. 579, 88 S. W. 530, affirmed in 101 Tex. 653, no op.

Where a case was tried by the court without a jury and there was competent evidence to prove damages to the amount recovered, the admission of the mere opinion of a witness as to the amount cattle were damaged per head in their transportation, without showing upon what he based it, was not ground for reversal. *Chicago, etc., R. Co. v. Hasell*, 98 Tex. 244, 83 S. W. 15, affirming 81 S. W. 1241, affirming 35 Tex. Civ. App. 126, 80 S. W. 140.

In an action by a shipper against a railroad company to recover damages for not furnishing cattle transportation at the time agreed on, it appeared that plaintiff, relying on the agreement of defendant's station agent to furnish transportation, had his cattle at the station at the time agreed on, but de-

fendant not being ready to transport them, he was obliged to keep them in muddy pens, during a cold day and night, without food. Held, that the court erred in permitting plaintiff to ask his witnesses how much, in their opinion, the cattle were damaged by such treatment, since, after they had testified to the effect such treatment would have in reducing the weight and injuring the appearance of the cattle, the amount of damages was a question for the jury under the instructions of the court. *Gulf, C. & S. F. Ry. Co. v. Wright*, 1 Tex. Civ. App. 402, 21 S. W. 80.

Qualification of Witness.—A witness' testimony as to the market value of cattle at a certain time and place and as to average net loss on shipments, is inadmissible, where he has not qualified himself. *Houston, etc., R. Co. v. Williams* (Civ. App.), 31 S. W. 556, 559.

In an action for injury to stock in transit, plaintiff and another, who were acquainted with injury to the stock, were competent to give their opinion as to extent of damage. *Galveston, etc., R. Co. v. Tuckett* (Civ. App.), 25 S. W. 150.

In an action against a carrier for damages to cattle detained after reaching their destination, it was error to permit a witness to give his opinion of the deterioration in market value, where his only knowledge was that on the day of their arrival a person asked witness if they could be bought for \$25 a head, and on the next day told witness that he would give \$22.50 for them. Judgment (Civ. App.) 65 S. W. 502, affirmed. *Missouri, K. & T. Ry. Co. of Texas v. Dilworth*, 67 S. W. 88, 93 Tex. 327.

Where, prior to the shipment of bees, plaintiff informed the carrier's agent that he had sold the bees at \$3.65 per stand, delivered, and after the bees had been injured in transportation plaintiff examined them, and was fa-

miliar with their market value and the extent of their injury, he was entitled to testify as to the amount of damages sustained, less than the price for which the bees had been sold. *International & G. N. R. Co. v. Athen* (Civ. App.), 81 S. W. 346.

Where there was nothing in the bill of exceptions to show that the witness knew the market value of cattle at any place except at the initial point of the carriage, near which place he had sold defendants in error a part of the cattle, it was held, that presumably he was testifying as to his knowledge of the value of cattle there, and for the reason that the plaintiff in error did not offer to prove that the witness knew the relative value of cattle of the different classes at the place of destination or generally in some territory embracing that place, he failed to connect the proposed testimony so as to make it material, and that therefore the court did not err in excluding it. *Texas, etc., R. Co. v. Sherrod*, 99 Tex. 382, 385, 89 S. W. 956, affirming 89 S. W. 956.

In an action against a railroad for injury to cattle, it was not error to admit testimony as to the market value of the cattle at their destination, if they had been shipped with reasonable dispatch and care, though the witnesses had not seen the cattle prior to shipment. *Texas & P. Ry. Co. v. Felker*, 90 S. W. 530, 40 Tex. Civ. App. 604.

A witness acquainted with live stock and their values generally and who saw the cattle at the point of destination may testify to their value and condition there, and the condition they would have been in if properly transported, although he did not see the cattle when shipped or en route. *San Antonio, etc., R. Co. v. Barnett*, 27 Tex. Civ. App. 498, 66 S. W. 474.

Cross-Examination.—To show that one's opinion that cattle were depreciated by sickness, ten dollars per

head was not correct, and thus to impeach the reliability of his judgment, he may be asked what price he sold them for forty or fifty days later. *Houston, etc., Oil Co. v. Trammell*, 96 Tex. 598, 74 S. W. 899.

g. As to Damages for Breach of Contract.

Admission of evidence to the value of a contract, in an action for breach thereof, where the measure of damages is what plaintiff would have realized but for the breach, is error, which can not be held harmless, though the court correctly charged as to measure of damages. *Burnett v. Munger*, 23 Tex. Civ. App. 278, 56 S. W. 103.

Loss of Profits.—The plaintiff claimed and the court allowed damages for profits lost by the breach of the agreement. It appears by bill of exceptions that the court allowed the plaintiff's own depositions to be read, over the objection of defendants, giving his estimate or opinion of the amount of profits thus lost to him. In this, the court erred. (1 Greenl. on Ev., § 440; *Giles v. O'Toole*, 4 Barb. 264.) The case seems to come within the general rule which excludes mere opinion as evidence. *Hunt v. Reilly*, 50 Tex. 99, 103.

Breach of Contract to Mill and Sell

Rice.—In an action in which defendant claimed damages for breach of a contract by which plaintiff agreed to sell rice, after milling it, to the best advantage, testimony of the defendant as to what the rice would have netted him, if it had been milled and sold at the proper time, was inadmissible as a conclusion. *El Campo Rice Milling Co. v. Montgomery* (Civ. App.), 95 S. W. 1102.

Loss of Sale of Cotton.—Where a witness has testified that he was familiar with the market value of cotton during certain months, his opinion as to how much a person had been damaged by the wrongful withholding from sale of

a certain quantity of cotton for a period of time covered by his formed testimony is competent, though a conclusion from facts known to him. *Tompkins v. Toland*, 46 Tex. 584.

Failure to Deliver Machinery.—Damages for failure to deliver machinery according to contract may be proved by persons competent to state difference between value of that delivered and that contracted for, or by proof of costs of supplying deficiencies or removing defects. *Stark v. Alford*, 49 Tex. 260, 275.

Breach of Warranty on Refrigerator.—Testimony of the purchaser of a refrigerator that he thought that he lost \$100 worth of meat because of defects in the refrigerator, and would be safe in putting his loss at that amount, was not competent proof of the damages sustained by a breach of warranty as to the refrigerator. *C. H. Dean Co. v. Standifer*, 83 S. W. 230, 37 Tex. Civ. App. 181.

Failure to Furnish Cistern.—General opinions of witnesses as to amount of damages from failure to furnish cistern, based in part on loss of crop, were erroneously admitted. *Turner v. Strange*, 56 Tex. 141.

Failure of Carrier to Forward Trunk.—In an action by a passenger for damages resulting from the carrier's delay in forwarding plaintiff's trunk, opinion evidence of such damages is admissible. *Gulf, C. & S. F. Ry. Co. v. Vancil*, 2 Tex. Civ. App. 427, 21 S. W. 303.

Revocation of Railway Pass.—In an action by a passenger against a carrier for his ejection from a train, where plaintiff claims as damages the value of a pass good for a number of years over defendant's road, and which it is alleged was repudiated by defendant, testimony of plaintiff that he would probably have made a certain number of trips over the road each year, had the pass not been revoked, is inadmissible. *Kansas Gulf S. L. R. Co. v.*

Scott, 1 Tex. Civ. App. 1, 20 S. W. 725.

h. Damages to Real Property.

(1) By Reason of Nuisance.

On the question of the impairment in value of property caused by the maintenance of a nuisance, testimony of persons familiar with the value of property in the neighborhood before and since the nuisance, that it had depreciated a certain per cent by reason thereof, is admissible. *Brennan v. Corsicana Cotton-Oil Co. (Civ. App.)*, 44 S. W. 588.

The opinion of a witness as to permanent depreciation in value of land because of a garbage nuisance thereon, based on the theory that the locality has been prejudiced in the matter of land values as compared to other localities because of such nuisance, is too speculative. *San Antonio v. Mackey*, 22 Tex. Civ. App. 145, 148, 54 S. W. 33, affirmed in 93 Tex. 702, no op.

(2) Same; Maintenance and Operation of Railroad.

Upon an issue as to the damage to property from the construction and operation of a railroad in a street, the opinions of witnesses may be received as to the value of the property, when they are shown to be qualified to give an opinion. *Eastern, etc., R. Co. v. Eddings*, 30 Tex. Civ. App. 170, 70 S. W. 98; *San Antonio, etc., R. Co. v. Ruby*, 80 Tex. 172, 175, 15 S. W. 1040.

In an action for damages from the depreciation in value of property owing to the occupancy of a neighboring street by a railroad company, the evidence of a witness who admits that he does not know the effect upon values which the railroad produced, and undertakes only to state that he himself would prefer the property if the road were not there, and also what other people said to him, is inadmissible. *Judgment (Civ. App.)*, 75 S. W. 366, reversed. *Eastern Texas Ry. Co. v. Scurlock*, 78 S. W. 490, 97 Tex. 305.

A question in an action for damages to real estate due to the construction and operation of a railroad asked plaintiff as to what amount, if any, his property had depreciated in market value by reason of the construction and operation of the railroad taking into consideration the physical disturbances to the property only, such as noise, smoke, obnoxious vapors and vibrations and excluding from his consideration all damages and inconveniences sustained in common with the community at large, was objectionable as calling for plaintiff's opinion on a matter involving a mixed question of law and fact. *Gainesville, Henrietta & W. Ry. Co. v. Hall*, 78 Tex. 169, 14 S. W. 259.

In an action for damages to property occasioned by the construction of a railroad, the testimony of a witness as to the amount of the difference in value of the property before and after the building of the road, excluding benefits and injuries common to the whole community, was properly excluded, as calling for a conclusion of a mixed question of law and fact. (Civ. App.), *Boyer & Lucas v. St. Louis, S. F. & T. Ry. Co.*, 72 S. W. 1038, reversed in 76 S. W. 441, 97 Tex. 107.

A witness acquainted with the land and its market value immediately before and after the construction of the railroad may testify as to the difference in such value. *Denison & P. S. Ry. Co. v. Scholtz* (Civ. App.), 44 S. W. 560.

In an action for damages to property caused by the maintenance of a nuisance incident to the construction and operation of a railroad, evidence that the market value of the property had depreciated fifty per cent by reason of such nuisance was admissible, though witness was unable to state in dollars and cents the amount of depreciation. *St. Louis, S. F. & T. Ry. Co. v. Payne*, 47 Tex. Civ. App. 194, 104 S. W. 1077.

Construction of Additional Tracks.—

The damages to be awarded against a railway company for constructing and maintaining new railroad tracks in addition to those already in use in front of plaintiff's premises are not to be measured, necessarily, by the numerical proportion or the use of the new tracks as compared with the old, but a verdict may be sustained upon the opinions of witnesses, expressed in a general way, as to the amount or damages occasioned by the new tracks. *Gulf, etc., R. Co. v. Necco* (Sup.). 18 S. W. 564.

Cross-Examination.—Cross-examination of a property owner, testifying to the sum to which the value of the property has been reduced by the proximity of a nuisance, as to whether he will take that for it and as to what he will take, is proper. Judgment (Civ. App.), 75 S. W. 366, reversed. *Eastern Texas Ry. Co. v. Scurlock*, 78 S. W. 490, 97 Tex. 305.

(3) In Condemnation Proceedings; Construction of Public Roads and Railroads across Land.

In condemnation proceedings, witnesses acquainted with premises may be permitted to give their opinions as to amount of damages which would accrue to land owner. *G. H. & W. R. Co. v. Waples*, 3 App. Civ. Cases, § 409.

In condemnation proceedings it was proper to permit witnesses who were acquainted with the premises to give their opinions as to the amount of damages which would accrue to the land owner by reason of the causes depreciating the value of the remaining portions of the owner's land. *G. H. & W. Ry. Co. v. Waples, Painter & Co.*, 3 Willson, Civ. Cas. Ct. App. § 411.

Establishment of Public Road.—In an action against a county for damages caused by the establishment of a public road across plaintiff's land, the opinions of witnesses as to the extent

to which plaintiff's property has been damaged by the establishment of the road are incompetent. *Bell County v. Flint* (Civ. App.), 91 S. W. 329.

Construction of Railroad across Land.—One called to give his opinion as to the extent a tract of land is injured by the construction and operation of a railroad through it, is properly allowed to state that a railroad runs through his land. *Dallas, P. & S. E. R. Co. v. Day*, 3 Tex. Civ. App. 353, 22 S. W. 538.

In right of way condemnation proceedings, the amount of damages or depreciation in the land is a matter of opinion. *Dallas, etc., R. Co. v. Chenault*, 4 App. Civ. Cases, § 110, 16 S. W. 173.

Witnesses who, though acquainted with land sought to be condemned and how the railroad crosses it, admit their ignorance of its market value, may not testify how much the running of the railroad across it has depreciated its market value. *Chicago, R. I. & T. Ry. Co. v. Douglass*, 76 S. W. 449, 33 Tex. Civ. App. 262.

Though they had stated that they did not know how much the land had decreased in market value, witnesses were allowed to testify that in their opinion it had been damaged in a certain sum. The court charged the burden of proof was on the landowner to show the damages sustained by him, and, if the value was less after the taking, and the decrease was the result of the construction and operation of the railway, then the jury should find for the landowner the amount of such decrease in addition to the value of the land taken. Held, that when considered in reference to the charge of the court there was no prejudicial error in the admission of the testimony. *Dallas, etc., R. Co. v. Chenault*, 4 App. Civ. Cases, § 110, 16 S. W. 173.

When a plaintiff sued a railway company for damages to his land, from

construction of railroad across it, it was competent for plaintiff to state his opinion as to the value of the land without the road upon it and extent to which its value had been diminished by the road. *San Antonio, etc., R. Co. v. MacGregor*, 2 Tex. Civ. App. 586, 587, 22 S. W. 269.

Although evidence is inadmissible as to the amount of damage a witness has sustained through construction of a railroad over his land, yet where he has already stated the value of the land before the road was constructed, and the deterioration afterwards, the error is harmless. *San Antonio & A. P. Ry. Co. v. MacGregor*, 2 Tex. Civ. App. 586, 22 S. W. 269.

Same; Taking More Land than Necessary.—In a suit by the owner of land who has deeded a railway company a right of way over it, for unnecessarily damaging his land, a witness familiar with the facts, though not an expert, may give his opinion that the company could have constructed its embankment across plaintiff's land without taking up as much land as it did. *Gulf, C. & S. F. Ry. Co. v. Richards*, 83 Tex. 203, 18 S. W. 611.

In a suit by the owner of land, who has deeded a railway company a right of way over it, "with right to use such additional land as may be necessary for the construction and maintenance of its road, * * * and to take and use water and stone therefrom," against the company, for unnecessarily damaging his land, a witness, though not an expert in railway construction, but who is familiar with the land and the manner of the construction of the road, can testify that, in his opinion, plaintiff's land would not have been damaged by standing water had the road been constructed in a different manner. *Gulf, C. & S. F. Ry. Co. v. Richards*, 83 Tex. 203, 18 S. W. 611.

Cross-Examination.—In condemnation proceedings by a railroad, wit-

nesses having testified as to the extent to which the condemnation affected the value of defendant's land not taken, it was proper on cross-examination to require them to state the effect of such condemnation on the different parts into which the tract was segregated by certain railroads and highways. *Panhandle & G. Ry. Co. v. Kirby*, 42 Tex. Civ. App. 340, 94 S. W. 173.

(4) Injury to Access.

In a suit for damages caused by an obstruction to plaintiff's means of egress, testimony that plaintiff's only thoroughfare now is over private property is not objectionable as being a conclusion. *Denison & P. S. Ry. Co. v. O'Maley*, 45 S. W. 225, 18 Tex. Civ. App. 200.

(5) Flooding Land.

In an action against a railroad for flooding plaintiff's land, it was not error to allow a witness, who had not qualified as an expert, to testify as to the value of the land before and after the floods. *Texas & P. Ry. Co. v. Maddox*, 63 S. W. 134, 26 Tex. Civ. App. 297.

In an action by a landlord against a railroad company for permanent injuries resulting from overflows, a witness, who lives a short distance from the land, and frequently passed by it, may testify to the extent of damage, though he has never been on the land since the overflow. *Gulf, C. & S. F. Ry. Co. v. Harmonson* (Civ. App.), 22 S. W. 764.

(6) Destruction of Trees, Grass, Crops, etc.

In an action for the negligent destruction of pear trees, witnesses' opinions that such trees added nothing to the value of the soil in that locality was inadmissible. *Gulf, C. & S. F. Ry. Co. v. Burroughs*, 66 S. W. 83, 27 Tex. Civ. App. 422.

In an action for burning grass and sod, testimony as to general effect of

burning grass or sod, at time and in condition grass in question was burned, was admissible. *Gulf, etc., R. Co. v. Jagoe* (Civ. App.), 32 S. W. 1061, 1063, affirmed in 93 Tex. 662, no op.

(7) Deterioration or Destruction of Improvements.

On an issue as to the amount of deterioration in the value of such property as houses, fences, and other improvements, opinion evidence is competent. *Webb v. Daggett*, 39 Tex. Civ. App. 390, 87 S. W. 743, affirmed in 101 Tex. 665, no op.

Where the value of certain improvements removed from land was in issue, and a witness detailed the respects in which the improvements had deteriorated since their erection, it was proper to admit the evidence of a carpenter that he had seen the house two years before the removal, and had estimated what it cost to build it, and that he did not think it been damaged much since it was built, or that it would have been damaged much in two years. *Smith v. Frio County* (Civ. App.), 66 S. W. 711.

Where, in an action by a landlord for damages caused by the destruction of improvements on the leased premises, there was direct evidence of the destruction of property of much greater value than the sum found by the jury, error, if any, in admitting opinion evidence of the value of property, was harmless. *Webb v. Daggett*, 39 Tex. Civ. App. 390, 87 S. W. 743, affirmed in 101 Tex. 665, no op.

10. Electricity.

Where an electric lineman was directed to work on certain wires after his foreman had attempted to cut off the current in a cut-off box, and was injured, a question, in an action therefor, as to whether experienced linemen, under the conditions in which plaintiff's foreman found the box, would have thought it necessary to have climbed the pole to see whether or not the wires had been jumped out

of the box, was properly excluded as calling for an opinion. *Dallas Elec. Co. v. Mitchell*, 33 Tex. Civ. App. 424, 76 S. W. 935.

In an action for injuries to an electric lineman, questions asked of a witness as to whether a man, seeing certain cut-off boxes pulled, and the wires south of the box dead, it would be his duty to see what wires passed through the box, and whether it was his duty to see that the wires passing through it had been killed, were objectionable as calling for witness' opinion. *Dallas Elec. Co. v. Mitchell*, 33 Tex. Civ. App. 424, 76 S. W. 935.

In an action for injuries to an electric lineman, a question asked of a witness as to whether a cut-off box, in the condition it was in when plaintiff's foreman went to cut off the current, not knowing that the wires had been jumped out of the box, would indicate that the current had been cut off, was not objectionable, as calling for an opinion. *Dallas Elec. Co. v. Mitchell*, 33 Tex. Civ. App. 424, 76 S. W. 935.

11. Fires.

See, also, post, "Negligence," VII, C, 23.

Cause of Fire.—Where the question was as to the cause of the burning of a wagon load of goods in the course of transportation, it was held that the opinions of witnesses who were at the place soon after the burning, formed upon grounds stated by them, were not admissible in evidence; it was for the witnesses to depose only the matters of fact which came to their observation or knowledge, and leave the jury to draw their own conclusions from the facts and circumstances deposed to. *Haynie v. Baylor*, 18 Tex. 498.

To allow witnesses to state that the fires for which action is brought must have been started by defendants' engine is improper, and, unless he also states the facts on which he bases his

conclusion, is error. *D. H. Fleming & Son v. Pullen* (Civ. App.), 97 S. W. 109.

In an action against a railway company for negligently setting fire to plaintiff's warehouse or barn, it was not error to permit witnesses who saw the fire start on the company's right of way, from three to six feet from the barn, to testify that "there was no opportunity for the barn to catch fire when it did, except from defendant's engine." *Texas & P. Ry. Co. v. Wooldridge* (Civ. App.), 63 S. W. 905.

12. Identity.

To secure the best evidence of identity, physicians or persons skilled in anatomy—experts—should be called; and unless called, and when the opinions of others have been admitted, the error is ground of reversal. *Wilson v. State*, 41 Tex. 325.

A witness can not testify as to his belief that a certain man was the identical person he represented himself to be. *McCamant v. Roberts*, 80 Tex. 316, 15 S. W. 580, 1054.

In an action against a railroad company for killing plaintiff's decedent while walking on the track, it was not error to permit a witness to testify that, in his opinion, deceased was one of the men he saw walking on the track shortly before deceased was killed, from the resemblance of the dead man, in form and clothes, to the second man he saw going along the track. *Gulf, C. & S. F. Ry. Co. v. Matthews*, 88 S. W. 192, 99 Tex. 160.

Upon an issue as to whether such a person as W. W., under whom plaintiffs claimed, ever existed or not, the testimony of S. W. that his brother, the said W. W., was killed at Goliad was a conclusion on his part; but as the deposition showed that it was founded upon facts to which he elsewhere testified, and the evidence as to which was not objected to by the defendants, its admission was not re-

versible error. *Wallace v. Byers Bros.*, 14 Tex. Civ. App. 574, 38 S. W. 228, 231, affirmed in 93 Tex. 676, no op.

13. Insurance.

a. Fire Insurance.

Validity of Policy.—In a suit to reform a policy and to recover thereon as reformed, evidence that when the policy was delivered to plaintiffs, the agent told them that the policy was all right, and would stand in any court, was not objectionable as a conclusion; the statement that the policy "was all right" being a statement of fact, and the balance of the statement being admissible as a part of the entire conversation. *Ætna Ins. Co. v. Brannon* (Civ. App.), 91 S. W. 614.

Whether Insured Burned the Property.—The question, "Did you, or did you not, directly or indirectly, remotely or otherwise, have anything to do with the burning of the building?" was not objectionable as calling for an opinion or conclusion. *Fire Ass'n of Philadelphia v. Jones* (Civ. App.), 40 S. W. 44.

b. Life Insurance.

Delivery of Certificate.—In an action on a mutual benefit certificate, evidence of an officer of the benefit association that none of the other officers of the defendant had any knowledge as to the delivery of the certificate with respect to the health of the insured at the time was inadmissible as a conclusion of the witness. *Sovereign Camp Woodmen of the World v. Carington*, 90 S. W. 921, 41 Tex. Civ. App. 29.

Assessments.—Where an assessment call by a beneficial association is regular if made by its executive committee by a certain date, and within certain limits, a witness may state that an assessment call within such limits was "regularly" made by the executive committee before the required date, and was not paid, since, under such circumstances, the use of the word "regularly" does not make the statement a

conclusion of the witness. *Superior Council American Legion of Honor v. Landers*, 57 S. W. 307, 23 Tex. Civ. App. 625.

Payment of Premiums.—Where the insured in a life policy had made an application for reinstatement, reciting therein that the policy was forfeited because of nonpayment of a certain premium, it was not error to receive the testimony of the president of the company that the premium was not paid at the time required by the policy, over objections that the question asked for a conclusion, and for want of knowledge of witness. *Ash v. Fidelity Mut. Life Ass'n*, 63 S. W. 944, 26 Tex. Civ. App. 501.

Conduct Indicating Suicide.—See ante, "Appearance, Conduct, and Demeanor," VII, C, 3.

14. Intent, Motive, Purpose, Deduction, etc.

a. Generally as to Intent or Motive.

Intent or Motive of Witness.—A witness can testify as to his own motive but not as to another's. *Phillips v. Edelstein*, 2 App. Civ. Cases, § 449.

A witness may testify that he did or did not entertain a particular intent, but can not state a conclusion of law which may be based on other circumstances besides existence of the specific intent. *Gimbel v. Gomprecht* (Civ. App.), 36 S. W. 781, 782.

Where the motive of the witness in the doing of an act involves a legal conclusion, his statement of that motive is incompetent evidence. But where the motive of the witness is not opinion or legal conclusion, but knowledge, it is admissible. The fact that such evidence is not attended by some of the assurances of truth, affects its weight, but not its competence. *Hamburg v. Wood & Co.*, 66 Tex. 168, 18 S. W. 623.

Intention of Other Persons.—A witness can not be allowed to state what the intention of another person was

in doing a certain act. *Hammond v. Hough*, 52 Tex. 63.

Admission of testimony as to what witnesses understood to be the purpose and intention of the grantor in certain deeds was error. *McKnight v. Reed*, 71 S. W. 318, 30 Tex. Civ. App. 204.

On an issue of abandonment of a homestead it is error to permit witnesses to state that it was the intention of parties to return to their homestead, the statements being merely opinion. *Graves v. Campbell*, 74 Tex. 576, 580, 12 S. W. 238.

b. As Being Fraudulent or in Good Faith.

Cases Holding against Admission.—

See, also, the title ATTACHMENT, vol. 2, p. 544.

It is error to allow a witness over objections, to state his opinion or belief as to whether or not there was fraud in the transaction under investigation. *Burnham v. Walker*, 1 White & W. Civ. Cas. Ct. App. § 902.

It is incompetent to allow a witness to testify that a contract was made in good faith. A fact known to a witness though only from his own consciousness, and which may be pertinent to the issue, is admissible; but not when to such fact is added the exercise of the judgment upon its relation to other facts and an opinion upon such combination is expressed. *Schmick v. Noel*, 72 Tex. 1, 8 S. W. 83.

It has been held repeatedly by the supreme court that the seller or grantor in a transaction alleged to be fraudulent will not be permitted to testify that he made the sale or conveyance in good faith, or that he did not intend to defraud his creditors. (*Schmick v. Noel*, 72 Tex. 1, 8 S. W. 83; *Miller v. Jannett*, 63 Tex. 86.) The reason for the exclusion of such testimony is that the question of fraudulent intent in such cases is a mixed one of law and fact, and that to say that the intent was not fraudulent, or that the

transaction was made in good faith, is to state a legal conclusion. A witness must state only facts but his purpose in making a sale is a purely a matter of fact as the fact of the sale itself. The question is not an open one in the supreme court. *Sweeney v. Conley*, 71 Tex. 543, 545, 9 S. W. 548; *Hamburg v. Wood*, 66 Tex. 168, 18 S. W. 623; *Brown v. Lessing*, 70 Tex. 544, 7 S. W. 783.

If the elements constituting fraud accompanied the sale it was unimportant what the real object of the parties was, and no honest intention on their part would have made that valid which the law declares shall be void under the circumstances. Besides, this is an assumption by the witness to pass upon the very questions submitted with proper instructions to the jury. The testimony does not come under that class of cases discussed in *Hamburg v. Wood*, 66 Tex. 168, 18 S. W. 623; *Schmick v. Noel*, 72 Tex. 1, 4, 8 S. W. 83; *Miller v. Jannett*, 63 Tex. 82.

Testimony of a witness that the giving and receiving of notes was in good faith was a statement of a conclusion. *Schmick v. Noel*, 72 Tex. 1, 8 S. W. 83.

The question whether a vendor's lien was inserted in a deed in good faith is one of fact to be determined from the circumstances, and not one to be assumed by the grantor as a witness. *Seay v. Fennell*, 39 S. W. 181, 15 Tex. Civ. App. 261.

On the issue whether a mortgage was fraudulent, the question whether its execution was in fraud of the grantor's creditors called for a conclusion, and was incompetent. *Cleveland v. Duggan*, 2 Wilson, Civ. Cas. Ct. App. § 84.

Where a sale is attacked as being in fraud of creditors, it was not error to permit the vendor, when called as a witness to support the sale, to be asked: "Did you sell for any other

purpose than to pay your debts?" nor to allow his answer, "that he sold for no other purpose." *Sweeney v. Conley*, 71 Tex. 543, 9 S. W. 548.

"The witness Duke was asked to 'state whether or not the transfer of said goods was a fair and just transaction in payment of said debt,' and answered: 'The transfer was fair and just, to the best of my knowledge and belief.' We think that this question and answer were alike objectionable, as calling for, and eliciting the conclusion of the witness as to a matter of opinion or of law, and not as to any distinct fact." *Purnell v. Gandy*, 46 Tex. 190, 200.

Contra.—In a suit involving good faith with which a sale of goods was made, which was attacked for fraud, the answers of the vendor in his own behalf, regarding his motives in selling, are admissible in evidence. *Brown v. Lessing*, 70 Tex. 544, 7 S. W. 783.

"Chambers, one of the vendees, made a witness by appellant, was asked as to the motive of himself and partner in making the sale to claimants. This was objected to, and the objection overruled, and the witness was permitted to state that 'his only motive was to pay claimants' debt, who were and had been their friends, and had let the firm have about all goods used in their business.' This evidence was admissible." *Brown v. Lessing*, 70 Tex. 544, 546, 7 S. W. 783; *Hamburg v. Wood*, 66 Tex. 168, 18 S. W. 623.

In an action by a corporation to set aside a decree foreclosing a vendor's lien, it was not error to permit the former secretary and vice president of the corporation to testify that they had no intent to defraud the corporation in waiving service of citation in the foreclosure proceedings. *Fox v. Robbins* (Civ. App.), 70 S. W. 597.

On the trial it was in issue whether a sale by a merchant to his brother

was or not with intent to defraud creditors of the seller, he being insolvent. When on examination as witness he was asked, "In making this sale were you trying to put your property out of the reach of any one?" over objection he was permitted to answer and answered, "No sir." It was also a matter of inquiry whether the facts existed which would constitute fraud. Held, that the intention was a material inquiry, and the question did not call for an opinion, but for the intent of the party, which was a fact which he knew and to which he could testify. *Robertson v. Gourley*, 84 Tex. 575, 19 S. W. 1006.

"One of the defendants was permitted, over objection, to testify that his motive in accepting the transfer was to collect the debt due the defendants by Sands. In *Miller v. Jannett*, 63 Tex. 82, the question as to the intention of the party involved a legal conclusion, and the testimony was held inadmissible. Here, there was no such difficulty. The motive which actuated the witness in a given act was not opinion or legal conclusion, but knowledge as direct as that derived from the senses. Such testimony lacks some of the sanctions of an oath. It would perhaps be impossible to convict the witness of perjury; he can not be directly contradicted in what he states. But he is allowed to testify and knows the truth, known absolutely only to himself; and authority, almost without dissent, holds such testimony admissible." *Hamburg v. Wood & Co.*, 66 Tex. 168, 176, 18 S. W. 623.

c. As Being Malicious or Otherwise.

See, also, the title ATTACHMENT, vol. 2, p. 546.

In an action for malicious prosecution, defendant was asked by his counsel the following question: "State whether, in appearing before the grand jury as a witness against plaintiff at the time the indictment was found

against him, you had any malice against him." Held, that the question was inadmissible, as it sought to elicit the conclusion of the witness as to his understanding of the word "malice" in such a connection. *Gabel v. Weisensee*, 49 Tex. 131.

Opinion evidence as to defendants' motive in the alleged malicious prosecution is competent. *Hurlbut v. Boaz*, 4 Tex. Civ. App. 371, 23 S. W. 446.

d. Subjunctive Statements and Declarations.

In a suit to recover damages for nondelivery of a telegram directing an agent to purchase cattle, testimony of the agent that, had he received the message, he could and would have purchased cattle at the prices specified therein, is a statement of fact, and not a conclusion of the witness. *Western Union Tel. Co. v. Carver*, 39 S. W. 1021, 15 Tex. Civ. App. 547.

Where it is claimed that, plaintiff being away, a telegram to him should have been delivered to his wife or another person, it is permissible for them to testify that, if it had been delivered to them, they would have sent it to plaintiff; this not being a matter of opinion. *Western Union Tel. Co. v. Mitchell*, 44 S. W. 274, 91 Tex. Civ. App. 454.

e. As to Conclusions or Deductions.

Where there is an issue as to the wish or inclination of the plaintiff to go home to see his mother, his conclusions from the facts, his supposition, was a fact which the jury might weigh. It appears that plaintiff was to be notified of his mother's condition. His conclusion from not hearing from her were properly admitted. *Erie Tel. Co. v. Grimes*, 82 Tex. 89, 17 S. W. 831.

15. Intoxication and Intoxicants.

A witness may testify as to whether certain liquor is whiskey, without qualifying as an expert. *Johnson v. State* (Cr. App.), 55 S. W. 818.

Intoxication.—See ante, "Appearance, Conduct and Demeanor," VII, C, 3.

16. Matters Legal.

a. Contracts.

Existence of Contract.—A statement by a witness that no contract of employment existed is objectionable as a conclusion of the witness. *International Harvester Co. of America v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93.

The statement or opinion of a party that there was no partnership between himself and another is immaterial, and its admission in evidence is harmless, where no facts are shown by the testimony tending to establish the partnership. *Worsham v. Vignal*, 17 Tex. Civ. App. 324, 37 S. W. 17.

Performance of Contract.—In an action on a note given for improvements on certain land, it was error to permit plaintiff to answer whether he had not done everything required of him by the contract between plaintiff and defendant. *Taylor v. McFatter* (Civ. App.), 109 S. W. 395.

Where, in an action on a note given for improvements on land and certain hogs, it was undisputed that plaintiff had performed the contract except to deliver the hogs, for the value of which an allowance was made by the jury, defendant was not prejudiced by a ruling permitting plaintiff to answer a question calling for his conclusion as to whether he had not done everything required of him by the contract. *Taylor v. McFatter* (Civ. App.), 109 S. W. 395.

Willingness and Ability to Perform

Contract.—In an action by a broker for commissions in procuring a purchaser, the affirmative answer of the purchaser procured by the broker to the question as to whether he was ready, willing, and able to comply with the terms of sale was not objectionable as the opinion of the witness. *Clark v. Wilson*, 91 S. W. 627, 41 Tex. Civ. App. 450.

b. Divorce.

The opinions of witnesses are inadmissible to prove that a continuance of the conjugal relation would be insupportable. The jury must draw their own conclusions from the facts which are proved. *Sheffield v. Sheffield*, 3 Tex. 79.

c. Expectation of Child or Heir.

In an action against a railway for wrongful death, it was error not to exclude so much of a question as sought to elicit the opinion of one of plaintiffs, as a witness, as to whether or not plaintiffs had any expectation that deceased, their mother, would continue to aid in their support during her life and the answers to such question. *San Antonio & A. R. Ry. Co. v. Long*, 87 Tex. 148, 27 S. W. 113.

d. Probate Matters.

Qualification of Personal Representative.—The testimony by a widow that "she was acting in the capacity of surviving wife of her deceased husband," is not evidence that she had properly qualified to enable her to control the community estate; that is a question of law, to be established by proof of the facts which give such authority. *Roberts v. Longley*, 41 Tex. 454.

Presentation and Proof of Claims.—In an action attacking the validity of a voluntary conveyance, the grantee, holding under his father whose estate had been administered, over objection was permitted to testify touching the balance of the judgment through which the plaintiff claimed by sheriff sale, that "plaintiff had presented such claim for \$3000, which was rejected as an unjust claim." Held, the claim itself was the best evidence, and the statement that it was unjust was but opinion, and the admission of the testimony was error. *Dosche v. Nette*, 81 Tex. 265, 16 S. W. 1013.

e. Title and Ownership of Property.**(1) Real Property.****(a) In General.**

Title or Ownership of Witness.—Plaintiff can not prove title to land by testifying that he "owned" it, and was "in possession." *Western Union Tel. Co. v. Hearne*, 7 Tex. Civ. App. 67, 26 S. W. 478.

It is error to permit a witness to testify that he never owned title to land when the title is the matter in controversy. Title or absence of title is a conclusion of law to be determined from facts. *Gilbert v. Odum*, 69 Tex. 670, 7 S. W. 510.

Title or Ownership of Third Persons.

—In an action to subject property conveyed to a wife, to the debts of the husband, a question asked a witness as to the person in whom the title to the property stood was properly excluded, as calling for a conclusion of law. (Civ. App.) *Gonzales v. Adoue*, 56 S. W. 543, judgment reversed in 58 S. W. 951, 94 Tex. 120.

(b) Muniments of Title.**aa. Execution and Delivery of Deed.**

In trespass to try title, the testimony of defendant as to his impression that he had seen a deed under which his remote grantor held was admissible. *Wells v. Burts*, 3 Tex. Civ. App. 430, 436, 22 S. W. 419.

On the issue of the delivery of a deed, testimony of a witness that decedent did not deliver the deed to any of his children was properly excluded as a conclusion. *Chew v. Jackson*, 45 Tex. Civ. App. 656, 102 S. W. 427.

Where in an action to set aside a deed the grantor claimed that it had been improperly withdrawn from a bank where she had deposited it, evidence that the grantor had other papers in the bank for safe keeping with which the deed in controversy was placed, and that they were all alike subject to the grantor's call and control, was not objectionable as the opin-

ion of the witness. *Gatt v. Shive* (Civ. App.), 82 S. W. 303.

In an action involving the issue as to whether plaintiff had purchased property at a sheriff's sale against defendant in trust for the latter, under a promise to reconvey, defendant testified that "the deed conveying the [property] to plaintiff was not executed by the sheriff on the day of the sale, on account of a misunderstanding between plaintiff and Mrs. A. It seems that there had been an understanding that she should own an interest in the [property] when bought in by plaintiff." Held that, the facts upon which defendant's conclusion was based being proved by several witnesses, the evidence, if inadmissible, was harmless. *Smith v. Eckford* (Sup.), 18 S. W. 210.

bb. Legal Operation and Effect; Validity.

An offer to prove a witness that a person exhibited to the witness a complete chain of title to a land certificate down to himself is properly excluded as a conclusion of the witness. *Huff v. Crawford* (Civ. App.), 32 S. W. 592; S. C., 89 Tex. 214, 34 S. W. 606.

Testimony that C. had a complete chain of title down from G., but that witness could not remember names of intervening parties, was properly excluded as a conclusion of witness. *Huff v. Crawford* (Civ. App.), 32 S. W. 593.

(c) Public Land Rights; Location.

Plaintiff claimed title to the land in dispute through C., as the sole heir of F. Defendant claimed through S. and B.; the former and the mother of the latter being two alleged children of F. by a different wife, who it was claimed he had married in Mississippi before coming to Texas, where he had lived with C.'s mother as his wife. The court excluded evidence of B.'s wife that she knew, from her husband's sending money to S. to pay his part of the expenses, that the land certifi-

cate was located by S., and that B. paid his share of the expense of locating it, and that she knew F. had a headright claim for a league and labor of land in Texas, which was located by his son S. for the benefit of himself and B. Held, that the evidence was properly excluded, as being the mere opinion or conclusion of the witness. *Odom v. Woodward*, 11 S. W. 925, 74 Tex. 41.

Plaintiff, in an action against the heirs of his deceased grantor, under Rev. Stat., art. 4354, providing that "any person interested under any instrument in writing entitled to be proved for record" may sue to obtain a judgment proving such instrument, sought to prove for record an instrument purporting to have been executed by deceased, conveying certain lands to plaintiff. Held, that the testimony of a witness that plaintiff and the grantor in such instrument were joint owners of all the public land located in certain counties was inadmissible, being a mere expression of opinion. *Howard v. Zimpleman* (Sup.), 14 S. W. 59.

In an action by D. to recover an alleged interest in land patented to C. it was error to permit the surveyor to testify that he understood he was locating the scrip for C. and D. and that the scrip belonged to D. and that C. had a locative interest in it. *Craeger v. Douglass*, 77 Tex. 484, 14 S. W. 150.

(d) Loss of Records.

A witness, in response to the question whether "there are any files missing from the land office in regard to the C. certificate," answered, "It appears that the original file, * * * with contents, was abstracted from the general land office," etc. Held, that an objection to witness' answer on the ground that he was not stating a fact, but the appearance of a fact, was untenable, where his answer appeared to be only corroborative of testimony al-

ready given, and that he had stated all the facts, so far as the record of the land office showed, about the loss of the certificate and its subsequent return. *Pope v. Anthony*, 68 S. W. 521, 29 Tex. Civ. App. 298.

(e) Bona Fide Purchaser; Knowledge of Equities.

In trespass to try title, plaintiff claimed through a deed absolute in form, but which had been executed by defendant as security for a debt which had since been paid. The grantee in such deed had conveyed the land to plaintiff's grantor, who testified that he paid for it without notice of any defect in his grantor's apparent title. His cross-examination and other evidence tended to rebut this theory. Plaintiff offered testimony from a deposition of defendant's grantee that, so far as he knew, plaintiff's grantor had no knowledge that defendant was claiming or had ever claimed any interest in the lands at the time witness deeded them to such grantor, nor that the deed to witness was only a mortgage. Held error to reject the testimony, since it was important to plaintiff to rebut the adverse inference which would arise from the failure of the witness to testify on this point. *Long v. Fields*, 31 Tex. Civ. App. 241, 71 S. W. 774.

(f) Conveyances from Husband to Wife; Wife's Separate Estate.

Where a creditor of a deceased husband sought to subject property conveyed by him to his wife, by a deed which was not recorded until after the husband's death, he is competent to testify that the husband was insolvent at the date of the deed; he having given the facts on which he based his opinion. (Civ. App.) *Gonzales v. Adone*, 56 S. W. 543, judgment reversed in 58 S. W. 951, 94 Tex. 120.

Plaintiffs in trespass to try title claimed under a sheriff's deed from a sale had on a foreclosure judgment against B. Defendants, as heirs of

B.'s wife, alleged that the property was the separate estate of B.'s wife, and that plaintiffs knew of such fact before the execution of the mortgage; and, to prove such claim, offered to show by B. that the land was paid for with a note which he gave his wife in payment of a loan from her. Held error to have excluded the evidence as involving a conclusion of the witness, the same being of material facts within the knowledge of the witness. *Barrett v. Eastham*, 67 S. W. 198, 28 Tex. Civ. App. 189.

In an action to determine whether certain real estate was purchased with the money of defendant's wife, evidence by the husband that the money paid "belonged to his wife," and that "it was my wife's money," was inadmissible, as stating the conclusion of the witness. *Scott v. Witt* (Civ. App.), 41 S. W. 401.

(g) Partition of Real Estate.

The statement of a witness that, upon division of his father's estate, land was "set apart" to his sister, is incompetent to prove a partition, the nature of the partition being unexplained. *League v. Henckle* (Civ. App.), 26 S. W. 729.

(h) Adverse Possession.

Acts of Ownership.—Where defendants in trespass to try title claim that they held adversely, opinions of witnesses that defendants worked, improved, and acted towards the land as a reasonable man would act towards his own land, and indicated that they claimed the land, are not admissible. *Hintze v. Krabbenschmidt* (Civ. App.), 44 S. W. 38.

Claim to Land.—In trespass to try title, a question to plaintiff as to whether he had ever known of any one claiming the land, until the claim in suit, was not objectionable, as irrelevant, immaterial, hearsay, and calling for the opinion of the witness. *Boston v. McMenamy*, 68 S. W. 201, 29 Tex. Civ. App. 272.

A question asked one of defendants, "State who, if any one, claimed" the land after a certain date, was unobjectionable in form, because who claimed the land was a material point to be considered in determining the good faith of the possession, and witness was properly permitted to answer that her deceased husband (defendants' ancestor) always claimed it. *Field v. Field*, 87 S. W. 726, 39 Tex. Civ. App. 1.

Where, in trespass to try title, the defense was adverse possession, a question to a witness as to whether he knew whether a certain grantor of defendant had been claiming the land during a certain period was not objectionable, as hearsay, and the answer of the witness that he knew the party had been claiming the land, was not a conclusion. *Rice v. Melott*, 32 Tex. Civ. App. 426, 74 S. W. 935, affirmed in 97 Tex. 644, no op.

(i) Homestead.

Evidence by a mortgagor that at the time of the execution of the mortgage he owned no homestead except the premises in controversy is properly excluded as stating merely his own conclusion. *Johnston v. Martin*, 81 Tex. 18, 16 S. W. 550.

(2) Personal Property.

(a) In General.

The impression or knowledge of witnesses as to the ownership of property is not admissible. *Continental Ins. Co. v. Cummings* (Civ. App.), 95 S. W. 48.

To permit a witness in an action for trial of the right to property to state that the execution debtor owned the property at the time of the levy, instead of requiring the party to prove title by facts and circumstances, is reversible error. *Cullers v. Gray* (Civ. App.), 57 S. W. 305.

In an action for wrongful attachment, a statement by a witness that the goods were in possession of A. as his agent to hold until satisfactory

arrangements were made for payment, "and, when they were paid for, I then considered the goods belonged to him [plaintiff]," held not properly excluded as a conclusion of law. *Rosenthal v. Middlebrook*, 63 Tex. 333.

General statements that the goods were bought with the separate property of the wife, and that there was no community property of herself and husband are conclusions of law to which the witnesses could not testify, and which are not justified by the evidence from which they are drawn. *Epperson v. Jones*, 65 Tex. 425, 428.

(b) Sale of Property.

On an issue as to whether witness had sold certain personal property, her testimony that she "sold it" was incompetent as a statement of a legal conclusion. *Rea v. P. E. Schow & Bros*, 42 Tex. Civ. App. 600, 93 S. W. 706.

17. Live Stock.

a. Nature and Habits.

Where a complainant is injured by a horse which she was driving becoming frightened and backing the vehicle into a river adjacent to the street, which was not protected by suitable barriers, a witness can not give his opinion, based solely on the horse's action at the time of the accident, whether the horse was a suitable one for a lady to drive. *City of San Antonio v. Porter*, 59 S. W. 922, 24 Tex. Civ. App. 444.

b. Number.

In an action for damages for loss of stock resulting from an overflow of plaintiff's land, a witness who has stated fully his means of information as to the loss of the stock in plaintiff's pasture, and also what he saw there after the flooding, may give his estimate of the number of dead animals there at that time. *Sabine & E. T. Ry. Co. v. Broussard*, 69 Tex. 617, 7 S. W. 374.

c. Appearance and Condition.

Statements of witnesses describing

cattle by using the words "in bad condition," "hard lookers," "in very bad shape," are admissible as statements of fact, and are not objectionable as the opinion of the witnesses. *Gulf, C. & S. Ry. Co. v. Kimble*, 49 Tex. Civ. App. 622, 109 S. W. 234.

d. Injuries; Damages.

On the issue whether an animal was killed by a railroad, or was placed on the track, it appearing that its head was cut off, but not that the body was bruised or had been dragged or struck, testimony that several years before a witness had seen a horse on one side of a track, and its head on the other, was incompetent; he not having seen it struck, and not knowing how it was killed. *St. Louis, etc., R. Co. v. Terry*, 22 Tex. Civ. App. 176, 54 S. W. 431.

In an action against a railroad company for running over a team while being driven across its track, the opinion of a witness that "there was no way to save the team" is inadmissible in evidence, as, under such circumstances, facts alone should be stated. *Missouri Pac. Ry. Co. v. Burnett*, 3 Willson, Civ. Cas. Ct. App. § 236.

As to injuries to live stock in transit, see ante, "Injuries to Live Stock in Transportation," VII, C, 9, f.

e. Value.

See post, "Live Stock, Poultry, etc.," VII, C, 29, b, (4), (f), et seq.

18. Health and Bodily Condition.

See, also, post, "Insanity and Mental Capacity," VII, C, 19; "Personal Injuries," VII, C, 20.

a. In General.

In an action for personal injuries, testimony of a nonexpert that plaintiff, while at a certain place, "was ill" was admissible. *St. Louis & S. F. R. Co. v. Boyer*, 44 Tex. Civ. App. 311, 97 S. W. 1070.

It is not opinion evidence for a husband to state whether his wife had any cough, lung trouble, or heart failure prior to a certain exposure. *St.*

Louis Southwestern Ry. Co. of Texas v. Lowe (Civ. App.), 97 S. W. 1087.

b. Cause of Sickness.

"An unskilled witness may well be permitted to depose that the appearance of a person indicates bad health; but medical skill is required to determine whether the causes producing this appearance are recent or of long standing." *Rogers v. Crain*, 30 Tex. 284, 290.

Plaintiff and his wife occupied berths in a sleeping car. At 5 o'clock a. m. the train stopped at a water tank a half mile from their destination. The porter and conductor of the sleeping car awoke them suddenly, and told them they were at the depot. They were hurried off, partially dressed, and the train left them before they discovered where they were. The exposure resulted in injury to the wife's health. Held that, where the wife fully stated the circumstances of her exposure and sickness, she may testify that she knew of nothing else that could have caused her illness, except the exposure. *Pullman Palace Car Co. v. Smith*, 79 Tex. 468, 14 S. W. 993.

c. Nature and Character of Ailment.

Nonexpert witnesses can not testify as to the character of a disease. *Rogers v. Crain*, 30 Tex. 284.

In trespass to try title, it is competent to show by plaintiff, on an issue whether plaintiff's deceased husband executed a deed to the land in question, that he was paralyzed and could not speak, as such testimony is not a conclusion. *Abee v. Bargas* (Civ. App.), 65 S. W. 489.

In an action on a benefit certificate, witnesses may state from their personal knowledge that applicant was unable to speak above a whisper, was emaciated, and that her father stated she had consumption. *Home Circle Soc. No. 1, v. Shelton* (Civ. App.), 81 S. W. 84.

A witness testified that plaintiff had been very nervous, had attacks of

nervousness so that witness and her mother had been up with him two or three nights at a time; that he was troubled with his heart, imagined that it did not beat, and that sometimes it seemed as if his heart almost stopped; that he did not sleep, and shook in his nervous attacks which occurred about once a month and lasted three or four days. Held, that the testimony was a mere statement of fact, and was not objectionable as a statement of opinion. *Cunningham v. Neal*, 49 Tex. Civ. App. 613, 109 S. W. 455.

Even if such testimony should be considered as opinion, it was admissible under the rule that a nonexpert may give his opinion on a question of apparent condition of body or mind, sickness, health, etc. *Cunningham v. Neal*, 49 Tex. Civ. App. 613, 109 S. W. 455.

d. Warranty of Soundness of Slave; Subsequent Sickness.

In an action upon a warranty of soundness of a slave, the evidence of witnesses (not experts) of subsequent sickness is not admissible. *Walton v. Cottingham*, 30 Tex. 772.

19. Insanity and Mental Capacity.

a. General Rule as to Admissibility of Nonexpert Opinion.

Upon the issue of insanity, nonprofessional witnesses should be allowed to give their opinions, together with the facts on which their opinions are based, where it appears that their acquaintance with the defendant will enable them to form a correct estimate of his mental condition. This is in accordance with the general rule of evidence, as applicable to witnesses of a transaction who are not experts. *Garrison v. Blanton*, 48 Tex. 299, 303; *Thomas v. State*, 40 Tex. 60; *Renn v. Samos*, 33 Tex. 760, 766.

Upon the trial of a plea of insanity, nonprofessional witnesses should be allowed to state their opinion as to the sanity of the party, as the result of

their observation, accompanied with a statement of the facts observed. *Holcomb v. State*, 41 Tex. 125; *Carr v. State*, 24 Tex. Cr. App. 562, 568, 7 S. W. 328; *Williams v. State*, 37 Cr. App. 348, 39 S. W. 687.

Where the witnesses had detailed to the jury the facts on which they based their opinions, the opinions of nonexperts as to the deceased's mental condition were properly received in evidence. *Missouri, K. & T. Ry. Co. of Texas v. Brantley*, 62 S. W. 94, 26 Tex. Civ. App. 11.

Contra.—It has been held, however, that upon an issue of insanity, the nonprofessional witness should not be allowed to give his opinion as to sanity or insanity, but should be confined to the acts of the subject, leaving the jury to form their opinion as to their cause. *Hickman v. State*, 38 Tex. 190.

"A professional man may judge with some degree of accuracy, from pathological symptoms, of the mental condition of a patient; but the nonprofessional man has only the actual demonstrations of the person from which to form his judgment; and in that case it would, in our opinion, be a better practice, as a general rule, to confine the witness to a statement of those demonstrations, and leave the jury to form their own opinion as to the cause. And yet it is held by high authority that the opinions of witnesses on the question of sanity are admissible to prove that fact. 1 Greenl. Ev., p. 440." *Hickman v. State*, 38 Tex. 190, 191.

b. Must Give Facts upon Which Opinion Based.

(1) In General.

Opinions of nonexpert witnesses as to the mental capacity or sanity of another must in all cases be accompanied by a statement of the facts on which such opinions are based. *Cockrill v. Cox*, 65 Tex. 669; *Williams v. State*, 37 Tex. Cr. App. 348, 39 S. W. 687.

In a matter of opinion evidence as to sanity, it is the facts which a wit-

ness details, and the conduct which he describes, which chiefly and principally constitutes testimony to be relied upon. *Williams v. State*, 37 Tex. Cr. App. 348, 353, 39 S. W. 687.

Where, in a criminal prosecution, a nonexpert is called upon to testify on the issue of insanity, he must, before giving his opinion to the jury, relate the facts upon which he predicates his opinion. *Fults v. State*, 50 Tex. Cr. App. 502, 98 S. W. 1057; *Williams v. State*, 37 Tex. Cr. App. 348, 39 S. W. 687.

Illustrations.—Where a witness in a prosecution for assault with intent to rape testified that he had know the accused for some time, it was not proper for him to give his opinion as to the sanity of the accused without stating further the facts on which the opinion was predicated. *Henderson v. State*, 49 Tex. Cr. App. 511, 93 S. W. 550.

It was error to permit the sheriff to testify that in his opinion defendant was sane, after stating that he had had considerable experience with insane persons, and had had opportunity to observe defendant; the witness not having first stated the facts on which his opinion was based. *Hurst v. State* (Cr. App.), 40 S. W. 264.

(2) Must Be Facts in Evidence or within Witness' Own Knowledge.

One can not give his opinion as to the insanity of a person, based on what he had been told by others, but only on facts within his knowledge, or as testified to in the case. *First Nat. Bank v. McGinty*, 69 S. W. 495, 29 Tex. Civ. App. 539.

Hearsay Opinion.—On a trial for murder, it was proper to exclude, as hearsay, evidence of discussions, among employees where defendant worked at the time of the killing, as to his insanity, and the opinions of such employees that he was insane. *Hurst v. State* (Cr. App.), 40 S. W. 264.

Nor was evidence that deceased, a

few days before the homicide, told witness that defendant was not of sound mind, admissible. *Hurst v. State* (Cr. App.), 40 S. W. 264.

c. Comparison with Persons Known to Be Insane.

Insanity can not be proved by comparison, by witness not medical man, with other persons known by witness to be insane. *Gehrke v. State*, 13 Tex. 568, 572.

Where the person on trial for murder, "offered to show by witnesses (not medical men) that they were conversant with persons well known to be insane, and that the conduct and appearance of the prisoner were like such as they had observed in the said insane," it was held that the testimony was properly rejected. *Gehrke v. State*, 13 Tex. 568.

Where, on a trial for murder, the court excluded from the consideration of the jury such expressions of the witnesses (not medical men) as that he, the prisoner, looked and acted like one insane, in their opinion, it was held there was no error. *Gehrke v. State*, 13 Tex. 568.

d. Opinions Not Pertinent to the Issue.

The issue being merely whether the person giving the note was insane, and not whether the bank taking it had notice thereof, admission of evidence that its cashier thought at the time the person executed the note that he was insane, is error. *First Nat. Bank v. McGinty*, 29 Tex. Civ. App. 539, 541, 69 S. W. 495.

The testimony of one not an expert is incompetent to prove the mental condition of a person whose deposition has been read in evidence, at a time other than when the deposition was given, or to show the value of the deponent's testimony. *Howard v. Russell*, 75 Tex. 171, 12 S. W. 525.

e. Qualification of Witness, Sufficiency of Facts, Knowledge, etc.

To render opinion evidence of non-

professional witnesses competent as to the sanity of a party, the following must concur: (1) He must have adequate means of observation; (2) he must state what he personally knows of the party's sayings and doing indicating insanity, and his testimony must show such intimate and close relations between the alleged insane person and himself as fairly to lead to the conclusion that his opinion would be justified by his opportunities for observing the party; (3) he may state the facts, conduct, conversations and business transactions, and actions of the person; (4) it is necessary that the fact upon which the opinion is based must have come under his own observation. *Williams v. State*, 37 Tex. Cr. App. 348, 39 S. W. 687.

Evidence Held to Show Witness to Be Qualified.—Where nonexpert witnesses have had from one to seven years' acquaintance with a defendant charged with homicide, and have had business transactions with him, they may give their opinions as to his sanity. *Williams v. State* (Cr. App.), 53 S. W. 859.

Where, on a prosecution for embezzlement, prosecutor denies receipt of a payment claimed to have been made on the day of the embezzlement, a witness acquainted with his condition after a fit on that day may state that his condition was similar to that after a fit in the presence of the jury on the day of trial, as bearing on the state of prosecutor's mind, and showing the strength of his memory. *Stallings v. State* (Cr. App.), 63 S. W. 127.

A wife may testify as to the mental condition of her husband, and even as to his sanity, if she states the facts on which her opinion is based. *Haney v. Clark*, 65 Tex. 93.

The evidence in this case held to show that the witness exhibited such a knowledge of the mental condition of the alleged insane person based upon business transactions with him, coupled

with long acquaintance, as would justify him in stating his opinion as to said person's mental condition. *Field v. Field*, 39 Tex. Civ. App. 1, 87 S. W. 726, affirmed in 101 Tex. 635, no op.

Witnesses Held Not to Be Qualified.

—The declarations of bystanders, made at the time of and subsequent to a homicide, as to the sanity of defendant, were not admissible. *Carlisle v. State* (Cr. App.), 56 S. W. 365.

A nonexpert does not show a basis for giving her opinion of the sanity or insanity of a person, by testimony merely that she had worked with him a couple of days. *Young v. State* (Cr. App.), 102 S. W. 1144.

On an issue as to the sanity of accused, a nonexpert witness testified that he had known accused about four months, he having been working at the house of witness, and that, as a rule, he saw accused about twice each day, and another witness testified that he had known accused about two years and saw him frequently, and that he had seen him at church. Held, that there was no sufficient predicate laid for the admission of the opinions of such witnesses as to the sanity of accused. *Sims v. State*, 50 Cr. App. 563, 99 S. W. 555.

Where, on a trial for horse theft, defendant pleaded insanity, a state witness, who had only had conversations with defendant during one year before his arrest, and during a day or two afterwards; another witness, who had only seen defendant twice, and then only for a few minutes; another, who had never known him until his arrest, and had only seen him for a few minutes four or five times since, and a jailer, who had seen him two or three times a day, while looking after prisoners—were incompetent to give their opinions as to defendant's sanity. *Wells v. State*, 50 Tex. Cr. App. 499, 98 S. W. 851.

The depositions of an aged witness were taken by one of the parties. A

lawyer in employ of an adverse party subsequently visited the witness. Held, that his testimony giving his opinion as to the capacity of the witness to testify was not competent; he was not an expert, nor did he testify to the capacity of the witness at the time her depositions were taken. *Howard v. Russell*, 75 Tex. 171, 12 S. W. 525.

f. Invading the Province of the Jury.

(1) As to Business Capacity, Competency to Enter into Contracts, etc.

Upon the trial of the issue as to the sanity of the grantor of a deed a non-professional witness may state his opinion as the result of his observation, accompanied with a statement of the facts observed, notwithstanding his answer embraces the very issue on trial. *Scafe v. Collin County*, 80 Tex. 514, 16 S. W. 314.

It is not competent for a witness to testify that a grantor is not competent to make contracts, any more than a child of immature age and understanding, and to give his opinion of her mental capacity to appreciate and understand contracts. *Mills v. Cook* (Civ. App.), 57 S. W. 81.

A witness who testified that he was intimately acquainted with plaintiff's husband, and had transacted considerable business with him, was asked whether he knew that the husband became of unsound mind, and whether he had made any statement to witness concerning the land in suit, and, if so, whether he was then of sound mind; being asked to state the facts on which he based his opinion. Witness replied that the husband became of unsound mind several years before, and that at the time of a certain conversation, in which the husband stated to witness, in effect, that he had given the land to defendants' ancestor, he "was considered of sound mind, and transacted his business successfully." Held competent, the witness having shown himself qualified to express an opinion as to the husband's mental condition. *Field v.*

Field, 87 S. W. 726, 39 Tex. Civ. App. 1.

Incapacity from Drunkenness; Alcoholism.—Incapacity to contract from drunkenness, may be proved by opinion of witnesses who give the facts or on which their opinion is based. *Garrison v. Blanton*, 48 Tex. 299, 303; *Reynolds v. Dechaums*, 24 Tex. 174.

Where there was evidence on an issue whether an instrument was procured by fraud, and, if so procured, whether it was subsequently ratified, tending to show that grantor's mind was impaired by drink not only at the time of the original trade, but also at the time of the execution of the various instruments relied on by grantee for ratification, it was proper to show by a witness who had known grantor all his life, and had frequent conversations and consultations with him after the time in question, the real condition and state of his mind, not only at the time of the original transaction and the acts of ratification, but down to the day of trial, that the jury might determine whether or not such mental condition was merely the temporary influence of liquor or a permanent fixed mental condition resulting from its constant and excessive use. *Wells v. Houston*, 29 Tex. Civ. App. 619, 69 S. W. 183, affirmed in 97 Tex. 650, no op.

(2) Testamentary Capacity.

The decisions of the supreme court establish the rule that all witnesses, whether subscribing witnesses, experts, or others who know the facts, and having stated such facts, may express opinions, are founded upon their own knowledge as to the mental condition of a testator. *Brown v. Mitchell*, 88 Tex. 350, 31 S. W. 621, reversing 26 S. W. 1059.

The opinion of one who is present when a will is signed, and who witnessed the appearance, heard the conversation, and who can state the condition of the testator at the time, is admissible in evidence on the question

of mental capacity. *Brown v. Mitchell*, 75 Tex. 9, 12 S. W. 606, citing *Garrison v. Blanton*, 48 Tex. 299, 303; *Cockrill v. Cox*, 65 Tex. 669; *Bush. on Insanity*, 240, 249; 1 Redf. on Wills, 140, 145.

As to Mental Capacity of Testator to Make a Will.—It has been held in certain cases that a nonexpert witness may give his opinion as to whether a testator had or had not sufficient mental capacity to make a will. Thus, a witness may state his opinion as to decedent's capacity to make a will, after he has testified to the facts on which the opinion is predicated. *Cockrill v. Cox*, 65 Tex. 669, 675.

Upon an issue of mental capacity of testatrix, witness may, in response to question, give opinion as to such capacity, where he appears cognizant of facts upon which opinion is based. *Brown v. Mitchell*, 87 Tex. 140, 142, 26 S. W. 1059.

It is competent for a witness to give his opinion as to one's mental capacity to make a will, based upon the appearance of the party, and to detail concurring facts which entered into the formation of that opinion; and it is not material whether the witness details the describable facts on which his opinion is based, before or after he has given his opinion. *Garrison v. Blanton*, 48 Tex. 299.

It is held in a late case, however, that it is important to keep up the distinction between the opinions of witnesses upon a mental condition, as sanity or insanity and the like, which are allowed by nearly all of the authorities, and such opinions when directed to the question of legal capacity to perform the act in question. *Brown v. Mitchell*, 88 Tex. 350, 31 S. W. 621, reversing 26 S. W. 1059.

Upon established and sound principles of law, no witness will be permitted to testify to a legal conclusion from facts given either by himself or testified to by another. It is the province of the jury, from the testi-

mony, to find the facts; but it is the duty of the court alone to inform the jury as to the rule of law by which they are to be governed in determining upon the sufficiency of the facts given to them by the witnesses. *Brown v. Mitchell*, 88 Tex. 350, 31 S. W. 621, reversing 26 S. W. 1059.

No witness can give his opinion that testator had capacity to make a will. *Brown v. Mitchell*, 88 Tex. 350, 361, 31 S. W. 621. See, also, *Garrison v. Blanton*, 48 Tex. 299; *Reynolds v. Dechaums*, 24 Tex. 174; *Cockrill v. Cox*, 65 Tex. 669.

Evidence of testator's widow that she objected to her husband's executing the codicil, because he was unable to attend to business, was inadmissible. *Prather v. McClelland* (Civ. App.), 26 S. W. 657.

An interrogatory was propounded to witnesses as follows: "From what you saw and observed of Mrs. Lizzie Brown, deceased, her talk and actions, and her mental and physical condition during the last ten or twelve days of her illness, and at the time of the execution of said instrument of writing, do you think that she had sufficient capacity to declare her last will and testament and dispose of her property?" Answer: "I do not think she was capable of making her will. All day she had been out of her head, talking about dead babies, and asking if they were putting them on ice, and if the horse had come. We dressed her before she signed the will. She was very weak, and we had to lift her up." This raises the question of law, Can a witness, after giving the facts, state his opinion as to the legal capacity of a person to make a will? After a discussion of the authorities, it is held, that it is incompetent for the witness to give his opinion as to the legal capacity of the deceased to make a will. *Brown v. Mitchell*, 88 Tex. 350, 31 S. W. 621, reversing 26 S. W. 1059.

It is questionable whether a witness

who on direct examination had testified to the sufficient mental capacity of the testator, on cross examination could properly be asked whether he thought the testator "was in a condition to make a \$50,000 trade." And it was error to allow such witness to answer "that he would not be willing to trust him to make such a trade for him." *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543.

Susceptibility to Inference.—A non-expert witness may state opinions and conclusions after detailing the facts on which they are based. Hence witnesses detailing the facts as to the disposition and temperament of a testator may give their opinions based thereon as to susceptibility to influence. *Hart v. Hart* (Civ. App.), 110 S. W. 91.

That Subject Was Incapable of Self Control, etc.—In a will contest, the opinion of a witness that testator was not capable of self control or self government, was incompetent. *Franklin v. Boone*, 88 S. W. 262, 39 Tex. Civ. App. 597.

That Subject Controlled or Was Controlled by Others.—In a will contest, an opinion that, while the witness knew them, the testator was under the control of the defendant, was not admissible, since it was a question for the jury to decide on the facts stated, and not properly an opinion for the witness to express. *Hart v. Hart* (Civ. App.), 110 S. W. 91.

In a will contest, the question whether testator controlled his wife, or was controlled by the wife, called for a conclusion. *Franklin v. Boone*, 88 S. W. 262, 39 Tex. Civ. App. 597.

Opinion of Witness as to Qualification of Other Witnesses.—On an issue as to testator's sanity, it was not error to exclude his widow's answer that she thought subscribing witness and attending physician were better qualified than she, owing to her deafness, to judge of testator's mental condition when he signed. *Prather v. McClelland* (Civ. App.), 26 S. W. 657.

7 Tex—68

(3) Mental Capacity of Children.

As to Capacity of Child to Understand and Avoid Danger.—On an issue as to the contributory negligence of an infant, opinions as to his discretion were admissible to show his capability of contributory negligence. *St. Louis & S. W. Ry. Co. of Texas v. Shifflet* (Civ. App.), 56 S. W. 697.

In an action for injuries to a minor, struck by a railroad car while crossing a path over the tracks, it was error to permit plaintiff to ask the minor's mother if she knew whether he understood the danger of going around trains; the same being a matter to be determined by the jury. *Over v. Missouri, K. & T. Ry. Co.* (Civ. App.); 73 S. W. 535.

In an action against a railway company for an injury to a child, received on a turntable, a witness can not state that the child was old enough to see and avoid the danger, for such opinion is the issue to be determined by the jury. *San Antonio & A. P. Ry. Co. v. Morgan*, 58 S. W. 544, 24 Tex. Civ. App. 58.

20. Personal Injuries.

a. Cause and Manner of Injury.

The admissibility of the testimony of an eyewitness as to the cause of the fall of the injured person was not affected merely because he stated that the only conclusion he could come to was that the injured person slipped and fell. *McCabe v. San Antonio Traction Co.*, 88 S. W. 387, 39 Tex. Civ. App. 614.

In an action against a railroad for personal injuries, where a witness testified that plaintiff was injured by having his foot caught in a hole under the main-line rail, it is not error to permit him to state that there was no connection between plaintiff's being hurt and a switch rail, in which defendant claims plaintiff caught his foot, as it is merely a statement of fact and not a conclusion of the witness. *San An-*

tonio & A. P. Ry. Co. *v.* Brooking (Civ. App.), 51 S. W. 537.

In an action for injuries to a person struck by defendant's train while walking on the track, evidence as to what he would have done if he had heard the whistle of the engine was not objectionable as a conclusion of the witness. *International & G. N. Ry. Co. v. Davis* (Civ. App.), 84 S. W. 669.

Nonexpert witnesses after testifying to the facts were asked as to what the facts indicated as having caused the injury. The witnesses had not qualified as experts. The opinion of these witnesses as to how the injury was caused was incompetent. They had done all they could be permitted to do—to describe what they saw. It was the province of the jury to draw conclusions and form opinions from all the circumstances. *Houston, etc., R. Co. v. Sciacca*, 80 Tex. 350, 16 S. W. 31.

Opinions of persons who had not been qualified as experts, as to what caused injury complained of, are not admissible. *Houston, etc., R. Co. v. Sciacca*, 80 Tex. 350, 354, 16 S. W. 31.

Cause of Fright of Team.—Statement of one suing for personal injuries received by his team running away and becoming frightened by an engine that his team got frightened at the engine was the statement of a fact, and not his conclusion. *St. Louis Southwestern Ry. Co. of Texas v. Hall* (Civ. App.), 106 S. W. 194.

In an action for personal injuries resulting from being thrown from a carriage in a runaway, caused by the top of the carriage coming in contact with an overhanging wire and frightening the horses, it was competent for a witness who saw the accident to state that a loose wire across the street caused the horse to run away. *Dublin Gas & Electric Co. v. Frazier*, 46 Tex. Civ. App. 288, 103 S. W. 197.

Injury to Passenger.—In an action for injuries to an alighting passenger, the petition charging negligence in

causing the train to jerk, and the answer charging contributory negligence in plaintiff's attempting to alight from a moving train, it was error to permit plaintiff to testify that if the train had moved in the general way, without giving any unusual jerks, he could have gotten off safely, and that he had gotten off of trains before without being hurt. *Texas Southern R. Co. v. Long*, 80 S. W. 114, 35 Tex. Civ. App. 339.

Cause of Injury to Servant.—Evidence, in an action by a servant for injuries, that witness, an experienced man, had never seen a like injury inflicted in like manner, was properly rejected. *Bering Mfg. Co. v. Peterson*, 28 Tex. Civ. App. 194, 67 S. W. 133 (see 95 Tex. 684, no op.).

A statement of the servant that he would not have been injured if there had been more light is a mere opinion, and not admissible to establish such fact. *Judgment* (Civ. App.) 65 S. W. 491, reversed. *Hillje v. Hettich*, 67 S. W. 90, 95 Tex. 321.

Same; Injury to Brakeman.—In an action by a brakeman to recover for an injury received while coupling cars, through an alleged defect in the track, where plaintiff, in response to questions asked by defendant, has testified that at the time of the accident he had on rubber boots, and that the track was muddy and slippery, he may properly state on redirect examination that the muddy boots did not cause him to fall. *Gulf, etc., R. Co. v. Hockaday*, 14 Tex. Civ. App. 613, 37 S. W. 475, affirmed in 93 Tex. 684, no op.

In an action for the death of a brakeman during an attempt to "kick" a car upon a switch, a witness testified that, when he gave the engineer the signal to stop the cars separated, and that decedent's club hung under the "lift chain" of the car being "kicked," "turning him around far enough to throw his feet off the brake beam." Held, that the testimony was the statement of a fact, notwithstanding the part quoted,

as the statement did not involve an inference or conclusion on the part of the witness to any greater extent than is usual in the statement of any ordinary matter of fact. *Smith v. International & G. N. R. Co.*, 45 Tex. Civ. App. 81, 99 S. W. 564.

Where, in an action for the death of a car inspector by being struck by a switch target while he was hanging to the side of a car, defendant was permitted to show deceased's opportunities to become familiar with the location and proximity of the switches in the yard, evidence that he was familiar with the yard, and knew the targets, structures, switches, and switch stands, and their location and proximity to the track, was properly excluded, as calling for conclusions. *International & G. N. R. Co. v. Bearden*, 71 S. W. 558, 31 Tex. Civ. App. 58.

In an action for injuries to a railroad employee, sustained while uncoupling cars on an unsafe track, evidence that the employee had been "afforded an opportunity to know the condition of the track at and contiguous" to the point of accident was not admissible without a showing that witness personally knew what such opportunities were. *Galveston, H. & S. A. Ry. Co. v. Pitts* (Civ. App.), 42 S. W. 253.

In an action for injuries to a servant while carrying a rail, evidence that a man could not acquire knowledge of the handling of rails, such as that in question, by working at and around railroad shops and in railroad yards, was objectionable as a conclusion of the witness. *Bonn v. Galveston, H. & S. A. Ry. Co.* (Civ. App.), 82 S. W. 808.

Qualification of Witness.—In an action for personal injury, plaintiff as the sole witness, having testified as to all facts connected with accident, and admitted that he did not know the cause, his opinion thereon was properly excluded. *Johnson v. Galveston, etc., R. Co.* (Civ. App.), 30 S. W. 95, 96.

Where a witness, who has testified as to the manner in which plaintiff was injured, admits on cross examination that he did not see the accident, and that he merely gives opinion, his testimony should be stricken out. *Trinity, etc., R. Co. v. Lane*, 79 Tex. 643, 645, 15 S. W. 477, 16 S. W. 18.

In a suit to recover damages for personal injuries caused by an accident alleged to have been the result of the negligence of defendant, a witness was asked to state the extent of the accident, its cause, and to describe the thing that caused it. The witness was not an expert in matter relating to machinery, a defect in machinery being the alleged cause of the injury. Held, that while the question was objectionable in so far as it sought to elicit the opinion of the witness as to what caused the accident, yet as he stated also the facts on which he based that opinion, the failure to exclude the answer afforded no ground for reversal, since the jury was in possession of the evidence of machinists and experts, and could not have been misled by the opinion of the witness. *H. & T. C. R. Co. v. Larkin*, 64 Tex. 454.

b. Contributory Negligence.

In an action for negligence, causing death, it was proper to allow a witness to testify whether there was room for deceased to sit on the frame of a car without sitting on a plank, from which he fell when he was killed. *Beaumont Traction Co. v. Dilworth* (Civ. App.), 94 S. W. 352.

In an action for personal injuries witness was asked "whether it was or was not dangerous for a man to jump on one of these cars while it was going at that rate of speed." The answer was: "Yes sir, it is dangerous in getting on in front." Held, that this question and answer was not obnoxious as calling for the conclusion and opinion of the witness as to a matter which was not the subject of expert testimony; but that if it had

been, its admission was harmless where other witnesses had testified to the same fact without objection. *Galveston, etc., R. Co. v. Puente*, 30 Tex. Civ. App. 246, 70 S. W. 362, affirmed in 97 Tex. 633, no op.

A railway company was sued for damages for personal injuries alleged to have been inflicted through the negligence of the company's employees. The defendant, interrogating the plaintiff by written interrogatory, asked, "Describe minutely how the accident occurred; was it not your own fault and negligence?" Held, that the question was objectionable as calling for the opinion of the witness instead of for facts, which facts should be submitted to the jury, for them to find the existence of negligence *vel non* under a proper charge. *H. & T. C. R. Co. v. Reason*, 61 Tex. 613.

Contributory Negligence of Passenger.—The issue being contributory negligence, it is error to allow plaintiff to state whether he considered it unsafe to get off a train at the time and place he alighted. *Missouri, K. & T. Ry. Co. v. Miller*, 8 Tex. Civ. App. 241, 27 S. W. 905.

In an action for injuries to a passenger through being thrown off the platform of a car on which he was riding, a question whether the position he took on the platform and steps would have been dangerous if the train had been operated in the usual manner calls for a conclusion. *Ebert v. Gulf. C. & S. F. Ry. Co.* (Civ. App.), 49 S. W. 1105.

Where a shipper of live stock stands on the drawhead of a car while caring for the animals in the car, and is injured, the question as to whether it was necessary for him to assume that position is one of fact, and is not the subject of opinion evidence. *Receivers of International & G. N. Ry. Co. v. Armstrong*, 4 Tex. Civ. App. 146, 23 S. W. 236.

Contributory Negligence of Servant.—A question put to the plaintiff, on

cross examination, as to whether he "just assumed the risk and went under the bale of cotton," was improper, as calling for the conclusion of the witness. *Consumers' Cotton Oil Co. v. Jonte*, 80 S. W. 847, 36 Tex. Civ. App. 18.

In an action for injury caused to an employee going between two piles of lumber which fell on him, a witness was asked, "Did you not know, and was it not apparent to a man of ordinary prudence, that the place was dangerous to go in between?" Held, to be improper, as calling for the opinion of the witness. *Mayton v. Sonnefield* (Civ. App.), 48 S. W. 608.

Where it was alleged that plaintiff's injuries while in defendant's service as a section hand resulted from its negligence in running a train at a high rate of speed, without warning, so near to a hand car that one who assisted plaintiff in lifting it from the track became so frightened that he let go his hold, thereby injuring plaintiff, testimony that plaintiff thought that they could get the car off without being injured, and that if he had thought otherwise he would not have taken hold of it, was properly admitted over an objection that it was the opinion of the witness. (Civ. App.) *International & G. N. R. Co. v. Newburn*, 58 S. W. 542, judgment affirmed, 60 S. W. 429, 94 Tex. 310.

Qualification of Witness.—In an action for injury caused by plaintiff going in between two piles of lumber to remove lumber from one of the piles which fell on him, testimony of a witness not an expert, and who did not know the condition of the two piles, that, in his opinion, a person need not go in between to get a piece out if it lapped or caught under the edge of the other pile, was inadmissible. *Mayton v. Sonnefield* (Civ. App.), 48 S. W. 608.

c. Location, Description of Injury.

A nonexpert witness may testify

that the bullet wounds in deceased's back were lower than those in his breast. *Balls v. State* (Cr. App.), 40 S. W. 801.

d. Effects of Injuries.

Generally, as to Physical Appearance and Condition; Pain and Suffering.—

In an action for injuries, a nonexpert witness held entitled to testify that plaintiff limped, appeared to be crippled and was unable to work. *St. Louis, etc., R. Co. v. Brown*, 30 Tex. Civ. App. 57, 69 S. W. 1010.

In an action for injuries, a nonexpert, who had known plaintiff for 12 years, was entitled to testify that plaintiff was always in good health prior to the injury, but that afterwards her health had not been good at all, and that she had lost weight, etc. *G. A. Duerler Mfg. Co. v. Eichhorn*, 44 Tex. Civ. App. 638, 99 S. W. 715.

In an action against a railroad for injuries to a passenger occurring through defendant's alleged negligence, testimony as to appearance of plaintiff after the accident, as to whether or not he seemed to be suffering, and as to what he was doing, was admissible. *Mullen v. Galveston, H. & S. A. Ry. Co.* (Civ. App.), 92 S. W. 1000.

In an action against a railroad company for injuries to plaintiff's decedent, testimony by a witness that he was in the company of the decedent a few hours after the accident, and that decedent "appeared to be suffering," was not subject to objection as a conclusion or an opinion. *St. Louis Southwestern Ry. Co. v. Burke*, 81 S. W. 774, 36 Tex. Civ. App. 222.

Statements of witnesses that plaintiff "was not well able to leave much sooner, and she suffered much pain in head and back, and the back in particular; * * * suffered much the first three or four days after the hurt," and that "we had to help her out of the buggy upon reaching my house," can not be excluded as conclusions or opinions. *Gulf, C. & S. F. Ry. Co. v.*

Reagan (Civ. App.), 34 S. W. 796.

The statements of witnesses, testifying in a personal injury action, that the person injured could not, after the accident, lift anything, and that she was crippled, and that it could be seen that she was suffering pain, and that she could not walk very far without resting, were not objectionable as conclusions. *San Antonio Traction Co. v. Flory*, 45 Tex. Civ. App. 233, 100 S. W. 200.

In an action for injuries, evidence that plaintiff "seemed to be complaining some since the accident, and spitting up blood," was not objectionable as a whole, as being a conclusion of the witness. *Chicago, R. I. & T. Ry. Co. v. Williams*, 83 S. W. 248, 37 Tex. Civ. App. 198.

In a personal injury action it was proper to permit plaintiff's wife to testify as to plaintiff's physical condition after his injury, where he complained he was injured, and to some extent what was the effect of his injury. *Missouri, K. & T. Ry. Co. of Texas v. Hibbitts*, 49 Tex. Civ. App. 419, 109 S. W. 228.

In an action for injuries to plaintiff's wife, it was proper to allow plaintiff, a nonexpert witness, to testify as to the pain and physical suffering of the wife after the injury. *Texas, etc., R. Co. v. Clippenger*, 47 Tex. Civ. App. 510, 106 S. W. 155, affirmed, no op.

In an action for personal injuries, the testimony of plaintiff's mother that he suffered pain more or less all the time, when taken in connection with the facts detailed by her on which she based such opinion, was admissible in evidence. *St. Louis Southwestern Ry. Co. of Texas v. Schuler*, 46 Tex. Civ. App. 356, 102 S. W. 783.

Where, in an action for injuries, a witness was asked if he knew the extent of the injuries sustained by plaintiff while on the defendant's train, and to describe them in detail, and also as to whether he observed any evidence of

plaintiff's sufferings from such injuries, and, if so, as to what they were, it was error to refuse to exclude the witness' answers that plaintiff was suffering intense pain from the accident, and his hand was in a very bad condition; for such answers were mere conclusions, and not responsive to the questions. *St. Louis S. W. Ry. Co. v. Ball*, 66 S. W. 879, 28 Tex. Civ. App. 287.

In an action for injuries, an officer who, several months after the injury was inflicted, took the deposition of the injured party, may properly be allowed to testify as to her condition at that time. *Gulf, C. & S. F. Ry. Co. v. Ross*, 11 Tex. Civ. App. 201, 32 S. W. 730.

Effect upon Injured Person's Capacity for Work and Labor.—In an action for personal injuries, plaintiff was properly allowed to answer a question as to the extent that his ability to work had been reduced as result of the injury. *Texas, etc., R. Co. v. Watts*, 36 Tex. Civ. App. 29, 81 S. W. 326, affirmed in 98 Tex. 635, no op.

The testimony of plaintiff that since his injury he has been unable to follow any business, and that this has been on account of his condition, is not his mere conclusion as to the nature and extent of his injuries. *Galveston, H. & S. A. Ry. Co. v. Holyfield* (Civ. App.), 91 S. W. 353.

In an action for injuries, it was proper to admit the testimony of a nonexpert witness that plaintiff did not appear "to be 50 per cent as good a man" as he was before the accident. *St. Louis & S. F. R. Co. v. Smith* (Civ. App.), 90 S. W. 926.

In an action for personal injuries, the plaintiff's testimony that in his opinion his capacity for earning a livelihood by manual labor had been depreciated by reason of his injuries one-half was admissible in evidence. *Houston & T. C. R. Co. v. Fanning*, 91 S. W. 344, 40 Tex. Civ. App. 422.

In an action for injuries a nonexpert

witness was authorized to testify that plaintiff limped, appeared to be crippled, and was unable to work, basing his statement on the fact that he walked crippled, slowly, and with a stick. *St. Louis S. W. Ry. Co. of Texas v. Brown*, 69 S. W. 1010, 30 Tex. Civ. App. 57.

In an action by a husband for injuries to his wife, he may testify from his actual knowledge, derived from personal observation, as to the effect on the wife of her efforts to work, without qualifying as an expert. *Chicago, R. I. & T. Ry. Co. v. Jones*, 88 S. W. 445, 39 Tex. Civ. App. 480.

In an action for injuries, it was error to permit a witness not qualified as an expert to state that plaintiff had not been able to do much since the accident, though the witness lived near plaintiff, and had known him for a long time. *Wells, Fargo & Co. Express v. Boyle*, 87 S. W. 164, 39 Tex. Civ. App. 365.

Testimony of a nonexpert witness that, from what he saw and observed of plaintiff, his physical condition was such that he could not work, when not accompanied by the facts on which the witness' conclusion was based, was incompetent, as being the mere opinion of the witness. *St. Louis Southwestern Ry. Co. v. Dempsey*, 89 S. W. 786, 40 Tex. Civ. App. 398.

Same; Occupation of Engineer.—Testimony of an engineer in an action for personal injuries that they incapacitated him from following the occupation of engineer, is not a mere conclusion, but a statement of fact, as to which he can properly testify. (Civ. App.) *Southern Kansas Ry. Co. of Texas v. Sage*, 80 S. W. 1038, reversed 84 S. W. 814, 98 Tex. 438.

Even if testimony of plaintiff that his injuries incapacitated him from following the occupation of engineer, is an opinion, it is unobjectionable, he having showed himself qualified to testify on such issue, and detailing the

facts on which he based such opinion. (Civ. App.), *Southern Kansas Ry. Co. of Texas v. Sage*, 80 S. W. 1038, reversed 84 S. W. 814, 98 Tex. 438.

Upon Sense of Hearing, Sight, etc.—Where, in an action for injuries to plaintiff while walking by the side of defendant's railroad track, he claimed that his hearing was very acute before the accident, but had been greatly impaired since, his evidence as to his own condition, with respect to his sense of hearing and his experience in hearing sounds, was not objectionable as involving expert knowledge, but was admissible to show the degree to which his hearing was impaired. (Civ. App.), *Houston & T. C. R. Co. v. O'Donnell*, 90 S. W. 886, judgment reversed, 92 S. W. 409, 99 Tex. 636.

Plaintiff and his brother were properly permitted to testify, from personal observation, that plaintiff could not see and hear, nor turn his head, as well as before the accident. *Chicago, R. I. & T. Ry. Co. v. Long*, 65 S. W. 882, 26 Tex. Civ. App. 601.

In an action by a freight conductor against a railroad company for personal injuries, where plaintiff had testified as to the duties of a freight conductor, the character and extent of his injuries, and the effect of the same upon his eyesight and power of locomotion, evidence that he would not be strong enough to perform the duties of a freight conductor, and that he was not able to read and could not distinguish colors, was not objectionable as stating conclusions. *St. Louis Southwestern Ry. Co. of Texas v. McDowell* (Civ. App.), 73 S. W. 974.

Mental Condition.—The testimony of a witness that a person injured was not in a physical and mental condition to transact business, that he seemed to be in very bad health, and that his mental and physical condition was very much worse than before his injury, is admissible, when given in connection with facts indicating the mental and

physical weakness, and where the witness had known the injured person a long time, and had seen him frequently up to within two days of the time when he executed a release of his claim for the injury. *Galloway v. San Antonio & G. Ry. Co.* (Civ. App.), 78 S. W. 32.

The opinion of the wife of one injured that he was not conscious of what he was doing when he signed a release of his claim for the injury was admissible, in connection with the facts on which it was based. *Galloway v. San Antonio & G. Ry. Co.* (Civ. App.), 78 S. W. 32.

Whether Injured Person Improving or Growing Worse.—Where, in an action for injuries, plaintiff's appearance had been detailed by a nonexpert witness, his statement that plaintiff's condition had not improved since he was hurt was not objectionable. *St. Louis S. W. Ry. Co. of Texas v. Brown*, 69 S. W. 1010, 30 Tex. Civ. App. 57.

In an action for injuries, a nonexpert witness held entitled to testify that the plaintiff appeared to be worse than at time of the accident. *St. Louis, etc., R. Co. v. Brown*, 30 Tex. Civ. App. 57, 69 S. W. 1010.

In action for personal injury, plaintiff's testimony, "I am worse than I was, and getting worse every year," is not objectionable as being an opinion which he was not qualified to give. *Atchison, etc., R. Co. v. Click* (Civ. App.), 32 S. W. 226, 227, affirmed in 93 Tex. 699, no op.

Declarations of Person Injured.—In an action for injuries, evidence that plaintiff "seemed to be complaining some since the accident, and spitting up blood," was not objectionable, as a whole, as self-serving, hearsay, and a conclusion of the witness. *Chicago, etc., R. Co. v. Williams*, 37 Tex. Civ. App. 198, 83 S. W. 248.

In an action for injuries, it was error to permit a witness to testify that, while working after the accident, plaintiff was complaining all the time,

and that he finally had to quit work. *Wells, Fargo & Co. Express v. Boyle*, 87 S. W. 164, 39 Tex. Civ. App. 365.

e. As to Money Loss or Damage.

Value of Time Lost.—A question as to the value of time which a disabled person was compelled to lose by reason of his injuries was properly excluded, where the evidence as to the amount of time lost was conflicting; such question being for the jury. *Flanagan v. Womack*, 54 Tex. 45.

Value of Wife's Services.—Opinion of the husband as to the value of his wife's services is admissible in an action by him to recover for personal injuries sustained by her. *Chicago, R. I. & T. Ry. Co. v. Armes*, 74 S. W. 77, 32 Tex. Civ. App. 32.

Value of Son's Services.—In an action for the death of a plaintiff's son, the plaintiff's testimony was that his son contributed from twenty-five dollars to forty dollars a month, that son was twenty-seven, and had been contributing since he was seventeen; that he had contributed on an average of twenty-five dollars a month since he was twenty-one, is not objectionable as being too vague, or as stating mere conclusions or opinions of witness. *Galveston, etc., R. Co. v. Leonard* (Civ. App.), 29 S. W. 955, affirmed in 93 Tex. 707, nq op.

Amount Expended for Medicines, Treatment, etc.—In a suit for personal injuries it is an error to allow the plaintiff, testifying in his own behalf, to approximate the expenses he has been put to; he is bound to know items and must give them in detail. *Galveston, etc., R. Co. v. Wesch*, 85 Tex. 593, 598, 22 S. W. 957.

In an action for personal injuries, in answer to question as to how much he had paid for medicines, plaintiff's answer, "I suppose one hundred dollars, or more," was improperly admitted. *Galveston, etc., R. Co. v. White* (Civ. App.), 32 S. W. 186, 187.

In an action against a railroad com-

pany for personal injuries, it is error to permit plaintiff to testify that his expense caused by the injuries "was about \$750 or \$800," since a conclusion on mixed questions of law and fact. *Galveston, H. & S. A. Ry. Co. v. Wesch*, 85 Tex. 593, 22 S. W. 957, affirming (Civ. App.), 21 S. W. 62.

In action for personal injury, testimony of plaintiff as to what he thought doctor's bill would be was improperly admitted, yet objection to it is removed by admission of same testimony by doctor without objection. *Galveston, etc., R. Co. v. Duelm* (Civ. App.), 23 S. W. 596, 602.

Testimony of plaintiff in a personal injury case, "I expect I have spent something near \$30," for medicine, is not too vague and uncertain to be admissible. *Texas, etc., R. Co. v. Ross*, 35 Tex. Civ. App., 597, 81 S. W. 94.

21. Death and Dead Bodies.

Cause of Death.—In an action against a street-car company for injuries causing the death of plaintiffs' infant child, several witnesses for plaintiffs testified that they saw the accident, and that the wheel of the car passed over the child's head. Held, that the court properly refused to allow witnesses for defendant, who had examined the wound on the child's head, and had stated its appearance, to testify that the wound was not such that it could have been caused by the car wheel passing over the child's head; such witnesses not having qualified as experts. *Houston City St. Ry. Co. v. Sciacca*, 80 Tex. 350, 16 S. W. 31.

A witness who has not qualified as an expert can not give her opinion as to whether the death of one over a year after he was injured was caused by such injury. *International & G. N. R. Co. v. Kuehn*, 11 Tex. Civ. App. 21, 31 S. W. 322.

In an action against railroad for negligently causing death of child, its mother who had nursed it on train and during subsequent illness, is com-

petent to testify that death resulted from cold contracted on railway train. *Ft. Worth, etc., R. Co. v. Hyatt*, 12 Tex. Civ. App. 435, 437, 34 S. W. 677.

Sex.—Opinion of witness, ignorant of anatomy, is not competent to prove sex of person from examination of skeleton. *Wilson v. State*, 41 Tex. 320, 324.

22. Master and Servant—Principal and Agent.

a. Existence of the Relation.

A statement by plaintiff that he made the contract in controversy with E., an agent of defendant, was inadmissible, as a conclusion of the witness, and incompetent to prove E.'s agency. *Southern Home Building & Loan Ass'n v. Winans*, 60 S. W. 825, 24 Tex. Civ. App. 544.

On an issue whether a wife was her husband's agent, a question asking witness to state, from his dealings with the husband and wife, who was managing the business, calls for the witness' conclusion. *Arndt v. Boyd* (Civ. App.), 48 S. W. 771.

Where, in an action against two electric companies and the receiver of one of them to recover for injuries to a lineman, there was evidence justifying a conclusion that the two companies had consolidated, and that the D. Electric Company represented to plaintiff that he was in its employ, and by its acts induced plaintiff to believe that he and his superintendent were employees of defendant D. company, it was not error to permit plaintiff to testify that he believed he was working for such company and its receiver, and that the "superintendent and no other person ever told him he was not working for such company." *Dallas Elec. Co. v. Mitchell*, 33 Tex. Civ. App. 424, 76 S. W. 935.

b. Authority of Agent or Servant.

A statement by a witness that an agent of a corporation had no authority to employ salesmen for it, based on information deduced from

the witness' knowledge of the character of the agent's employment, is incompetent. *International Harvester Co. of America v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93.

A witness familiar with the subject may testify as to the powers habitually exercised by station agents, as bearing on the extent of the authority conferred on them by usage, but can not give his opinion, from what he had seen, as to the possession of powers he had not known them to exercise. *Lipscomb v. Railway, etc., Exp. Co.*, 95 Tex. 5, 64 S. W. 923.

Where it appeared that the duties and powers of a railway station agent rested on usage rather than contract, it was error to allow a witness to state his opinion that if such an agent believed the depot was about to be robbed, and thought it necessary, he could hire others to care for and protect the property. *Judgment, Houston & T. C. R. Co. v. Lipscomb* (Civ. App.), 62 S. W. 954, modified. *Lipscomb v. Houston & T. C. Ry. Co.*, 64 S. W. 923, 95 Tex. 5.

In an action for injury at a railroad crossing, opinion of witness as to authority of person bidding plaintiff, who was about to cross the track, to "come on," is inadmissible. *Austin, etc., R. Co. v. Duty* (Civ. App.), 28 S. W. 463, 464.

c. Duties, Character of Employment, etc.

Testimony of a conductor of a train that he had control of its movements and over the crew, and had the right to start and stop the train, is the statement of a fact, and not objectionable as an opinion. (Civ. App.), *Galveston, H. & S. A. Ry. Co. v. Brown*, 59 S. W. 309, judgment reversed 63 S. W. 305, 95 Tex. 2.

The testimony of a railway conductor of 14 years' experience that he had nothing to do with looking after the sleeping cars, but that that duty devolved on the conductor of those cars,

is not objectionable as being the conclusion of the witness. *Pullman Co. v. Norton* (Civ. App.), 91 S. W. 841.

In an action for injuries to a passenger, a question asked of the conductor as to whether it was the duty of the brakeman to caution and warn a passenger whom he saw about to commit an act that would probably result in injury to himself was not objectionable as calling for the conclusion of the witness, and an answer thereto should have been permitted. *Long v. Red River, T. & S. Ry. Co.* (Civ. App.), 85 S. W. 1048.

In an action for injuries to a car inspector by the movement of the train while he was between a car and the engine, evidence of a witness, appearing to testify from personal knowledge, that it was the duty of the switchmen to couple the cars together and set the air brakes as a means of safety to the car inspectors and repairers, was not objectionable as a conclusion. *St. Louis, etc., R. Co. v. Rea* (Civ. App.), 84 S. W. 428, reversing 99 Tex. 58.

Where a witness testifies that he is familiar with the duties of foremen and switchmen in H., where plaintiffs' decedent was wrongfully killed, he is a competent witness to testify to such duties. *Houston, etc., R. Co. v. White*, 23 Tex. Civ. App. 280, 56 S. W. 204, affirmed in 93 Tex. 710, no op.

In an action for the death of a foreman in a lumber yard while riding on the footboard of an engine in consequence of the footboard being caught on a plank walk by the side of the track, a witness testified that decedent was day foreman, and that the witness was night foreman. His testimony showed that he was testifying from actual knowledge as to the duties of decedent, and he stated that he knew it to be a fact that decedent's duties were identical with his own, and that it was not decedent's duty to

inspect or repair the track, and if it had been it would have been witness' duty also. Held, that the evidence was not objectionable as the conclusion of the witness. *Kirby Lumber Co. v. Chambers*, 95 S. W. 607, 41 Tex. Civ. App. 632.

Plaintiff, in order to rebut evidence that a witness was an independent contractor of defendant, was permitted by the testimony of such witness to show that he was a foreman for defendant. Held, that such evidence was not opinion evidence, and was properly admitted, being a fact witness would know. *Southern Cotton-Oil Co. v. Wallace*, 54 S. W. 638, 23 Tex. Civ. App. 12.

d. As to Whether Employees Careful, Competent, etc.

Evidence that witness knew plaintiff's fellow servant to be a careless and ignorant fellow, that he was slow, unsatisfactory, and unreliable, was a statement of a fact, and not objectionable as a conclusion. *Kansas City Consol. Smelting & Refining Co. v. Taylor*, 48 Tex. Civ. App. 605, 107 S. W. 889.

Declarations of the engineer that "no reliance could be placed in the damned negro brakeman on the road" and, "that if the brakeman had done his duty and signaled the accident would not have happened" is properly excluded as being matter of opinion rather than *res gestæ*. *De Walb v. Houston, etc., R. Co.*, 22 Tex. Civ. App. 403, 407, 55 S. W. 534.

When it is material to the issue to ascertain the fitness of a railway engineer for the performance of his duties, and it was shown that a witness had sworn prior to the trial that he knew nothing about the competency of the engineer, and who only knew him the day before his death, it was an error to permit the deposition of the witness to be read as to his opinion of the competency of the engineer. *East*

Line, etc., *R. Co. v. Scott*, 68 Tex. 694, 55 S. W. 501.

In an action for death of a servant by derailment of an engine, caused by a defect in the track, evidence that witness told defendant's roadmaster that C., who was claimed to have inspected the road as he went over it in a hand car shortly before the accident, was too inexperienced to properly take care of the curve at the point in question, was objectionable as an opinion of the witness, not shown to have been accepted by the roadmaster, and not tending to prove the incompetency of the inspector. *Thompson v. Galveston, H. & S. A. Ry. Co.*, 48 Tex. Civ. App. 284, 106 S. W. 910.

23 Negligence.

a. Ordinary Care and Prudence.

Evidence as to how witness would have acted had he been in plaintiff's place, and as to how a man of ordinary prudence would have acted, was objectionable as calling for a conclusion. (Civ. App.), *Gulf, W. T. & P. Ry. Co. v. Wittnebert*, 104 S. W. 424. Judgment reversed (Sup.), 108 S. W. 150.

The opinion of a witness is not admissible as to what an ordinarily prudent man would do under circumstances stated, when the question is one for the jury. *Sonnefield v. Mayton* (Civ. App.), 39 S. W. 166.

Nor can a witness state what he himself would do under such circumstances. *Sonnefield v. Mayton* (Civ. App.), 39 S. W. 166.

In Unloading Cars.—Where plaintiff was injured while endeavoring to unload an oil tank car, evidence as to the proper manner of unloading such cars, which was merely the witness' conclusion as to what ordinary care required a person to do under such circumstances, was properly excluded. (Civ. App.), *Gulf, W. T. & P. Ry. Co. v. Wittnebert*, 104 S. W. 424, judgment reversed (Sup.), 108 S. W. 150.

In Operation of Pile Driver.—In an

action by an employee for injuries caused by a plank falling on him from a pile driver, the opinion of a witness as to whether it was proper to have anything lying loose on the pile driver is inadmissible. *St. Louis, A. & T. Ry. Co. v. Jones* (Sup.), 14 S. W. 309.

Testimony of Plaintiff That He Looked Carefully, etc.—In an action for injuries to a licensee while walking by the side of a railroad track, his statement that he "looked carefully" at the time he started along the right of way was not objectionable as a conclusion of the witness. (Civ. App.), *Houston & T. C. R. Co. v. O'Donnell*, 90 S. W. 886, judgment reversed, 92 S. W. 409, 99 Tex. 636.

Negligence in Failure to Deliver Telegram.—See, also, ante, "Time and Distance," VII, C, 1, b.

The answer, "He was well known in and around T. by the laboring classes, as he made a canvass for public office within a radius of five blocks," given to the interrogatory, "To what extent was C. known by the men working about the yards of the C. B. Ry. Co.?" is not objectionable as being but the opinion of the witness. *Western Union Tel. Co. v. Drake*, 38 S. W. 632, 14 Tex. Civ. App. 601.

The answer, "If such inquiry had been made of me, I could have directed, and would have done so, as I knew his (C.'s), whereabouts at all times," given to an interrogatory as to whether the witness could have directed one inquiring for him where to find C., is not objectionable as being but the opinion of the witness. *Western Union Tel. Co. v. Drake*, 38 S. W. 632, 14 Tex. Civ. App. 601.

b. Fires.

In an action for damages for burning grass, the mere opinion of the person tending the fire, when unconnected with the facts on which it was based, that there was no danger in

leaving the fire, was not admissible in evidence. *Dunn v. Newberry* (Civ. App.), 86 S. W. 626.

In an action for damages for burning grass, evidence of defendant that he did not think there was any danger in leaving the fire, when connected with the facts on which the opinion was based, was proper. *Dunn v. Newberry* (Civ. App.), 86 S. W. 626.

In an action against a railroad for destruction of property through fire communicated from defendant's engine, a question asked defendant's engineer in charge of its engine at the time of the fire whether or not he operated the engine in a prudent and careful manner as it should be handled by an experienced and competent engineer was objectionable as calling for the conclusion of the witness; the conclusion or opinion not being based on disclosed facts. *Bryan Press Co. v. Houston & T. C. Ry. Co.* (Civ. App.), 110 S. W. 99.

24. Railroadings.

a. Track and Right of Way.

(1) Construction, as Dangerous, Proper, etc.

See, also, ante, "Bridges," VII, C, 7, b.

Locomotive firemen may testify that there are steep grades and sharp curves in a railroad track at certain points since these are mere physical facts not involving scientific or expert knowledge. *Galveston, etc., R. Co. v. Ford*, 22 Tex. Civ. App. 131, 133, 54 S. W. 37, affirmed in 93 Tex. 706, no op.

Where decedent, an engineer, was killed in a wreck at a curve, evidence of a witness, not shown to be an expert, after having testified to the sharpness of the curve, the condition of the rails, spikes, and ties, that the curve was dangerous, was objectionable as an opinion. *Thompson v. Galveston, H. & S. A. Ry. Co.*, 48 Tex. Civ. App. 284, 106 S. W. 910.

In a personal injury suit against a

street railway company, nonexperts can testify that guard-rails are to make it easier to drive over the rails. *Houston, etc., R. Co. v. Medlenka*, 17 Tex. Civ. App. 625, 43 S. W. 1028, affirmed in 93 Tex. 710, no op.

In a suit for personal injuries against a street railway company, non-expert evidence that rails of defendant's tracks were above the roadway street in holes, and there were no guard-rails, is not an opinion of witness, and was admissible. *Houston, etc., R. Co. v. Medlenka*, 17 Tex. Civ. App. 625, 43 S. W. 1028, affirmed in 93 Tex. 710, no op.

In an action against a railroad for killing a mule, it was error to permit witnesses to testify that the place where the mule was killed was "dangerous," and that it could be closed up by a fence constructed in a particular manner. *Southern Kansas Ry. Co. of Texas v. Cooper*, 75 S. W. 328, 32 Tex. Civ. App. 592.

(2) Condition, as Being Defective in Need of Repair, etc.

Persons, not railroads experts, are competent to state their opinions as to the unsafe condition of a track at the point where an accident happened, first stating the facts on which their opinions are based. *Missouri Pac. Ry. Co. v. Jarrard*, 65 Tex. 560.

Where a nonexpert eyewitness of the accident has testified without objection that the railway track spread, and caused the derailment of the engine, and that the ties were unsound, it is not prejudicial error for him to state, as the result of his observations, that the inferior condition of the ties caused the spreading of the track. *Gulf, C. & S. F. Ry. Co. v. John*, 9 Tex. Civ. App. 342, 29 S. W. 558.

The expression by a witness who had testified that railroad ties were rotten through and through, and that there was no good wood in them, of an opinion that the ties were too rotten to be used as such, added no

force to his testimony, and was not prejudicial. *Gulf, etc., R. Co. v. Boyce*, 39 Tex. Civ. App. 195, 87 S. W. 395, affirmed in 101 Tex. 639, no op.

(3) Maintenance and Repair.

On an issue of negligence in failing to maintain a safe track opinion evidence as to how the track could be made safest, is admissible as being pertinent to the injury whether proper care had been exercised to provide a reasonably safe track. *Galveston, etc., R. Co. v. Pitts* (Civ. App.), 42 S. W. 255, affirmed in 93 Tex. 639, no op.

b. Machinery and Equipment.

(1) Construction; Suitableness for Purpose, etc.

Testimony of plaintiff that the distance from the car step to the ground was too great for her to safely step was not objectionable as a mere expression of opinion. (Civ. App.), *International & G. N. R. Co. v. Clark*, 71 S. W. 587, judgment reversed (Sup.), 72 S. W. 584, 96 Tex. 349.

Where plaintiff, in an action for negligence, testified that a car he was climbing on when he was hurt was a medium-sized coal car, it was not error to permit a competent witness to testify as to the width of that kind of car. *Missouri, K. & T. Ry. Co. of Texas v. St. Clair*, 51 S. W. 666, 21 Tex. Civ. App. 345.

(2) Condition, as Defective or Otherwise.

It is proper, in an action for death, caused by a boiler explosion, to allow a witness who had exhibited to the jury certain bolts to state that they were fair specimens of the bolts in the fire box, and that the others were as badly rust-eaten. *Tyler S. E. Ry. Co. v. Rasberry*, 13 Tex. Civ. App. 185, 34 S. W. 794.

Nature and Cause of Defects.—In an action for injuries to a brakeman by reason of a defective handhold, testimony of witnesses who saw the handhold after the accident that the

handhold had pulled out of the wood was not objectionable as a conclusion. *International & G. N. R. Co. v. Gready*, 82 S. W. 1061, 36 Tex. Civ. App. 536.

Where, in an action against a railroad company for injuries to an employee caused by a defective handhold, the testimony of a nonexpert witness that he went over the car after plaintiff was hurt, and saw that the handhold had slipped around, that the car looked like it had been "cornered" (that is, struck by or against something on the corner), and that the defect was an old one, but that he could not say how old, as he made no examination of it, was not sufficient to render him competent to testify as to whether a car could be cornered like the one in question without injuring the handhold. *Missouri, K. & T. Ry. Co. of Texas v. Baker* (Civ. App.), 68 S. W. 556.

(3) Inspection and Repair.

Where the witness had not seen a coupler before the accident, held an error to permit him to testify that the break could be seen when coupler in place. *Galveston, etc., R. Co. v. Sweeney*, 6 Tex. Civ. App. 173, 176, 24 S. W. 947.

In action against railroad for damages for injuries sustained by employee in accident, it was error to permit witness to state that break in coupling could have been seen from outside. *Galveston, etc., R. Co. v. Sweeney*, 6 Tex. Civ. App. 173, 176, 24 S. W. 947.

A question asked a locomotive engineer on cross-examination, "Is it not a fact that when the engineer who brought the engine in has made his report, and the engine inspector has inspected the engine, that engineers customarily assume that there are no defects, and the engine is ready for duty?" was not objectionable as calling for a mere conclusion. *Galveston,*

H. & S. A. Ry. Co. v. Collins, 71 S. W. 560, 31 Tex. Civ. App. 70.

b. Operation of Trains and Cars.

(1) Rules, Custom, Usage.

As to Signs for Separating the Races.—Where, in an action for alleged insults to passengers on a street car, growing out of plaintiff's change of a negro sign in the car, it appeared that defendant had no rule governing the placing of such signs in the cars, and certain conductors offered as witnesses stated that they did not know what the general custom was, such witnesses were incompetent to testify as to the customary location of the signs in the cars. *San Antonio Traction Co. v. Lambkin* (Civ. App.), 99 S. W. 574.

As to Passengers Riding on Freight Trains.—Testimony that it was a common thing for passengers to ride on freight trains of defendant is not an expression of witness' opinion. *San Antonio & A. P. Ry. Co. v. Lynch* (Civ. App.), 40 S. W. 631, 55 S. W. 517.

(2) Schedules, Time Cards, etc.

The testimony of a witness as to the schedule of trains, predicated on knowledge derived from the official time card furnished the public by the railroad for guidance with respect to the schedule of its trains, is admissible, as against the objection that he had no primary knowledge of the subject. *Western Union Telegraph Co. v. O'Fiel*, 47 Tex. Civ. App. 40, 104 S. W. 406.

(3) Making Up Trains; Switching, Coupling, etc.

Where in coupling cars they were so jolted that a passenger in one of them was thrown from his seat and injured, in an action for the injuries it was proper to permit plaintiff to testify that the concussion was unusual and unnecessary. *Missouri Pac. Ry. Co. v. Martin*, 2 Willson, Civ. Cas. Ct. App. § 655.

In an action against a railway company for injuries alleged to have been

caused by negligence of defendant's engineer, defendant propounded a cross interrogatory, whether the injury arose from ignorance or want of knowledge on the part of the engineer, or from some other cause. Witness answered that they were coupling cars to the caboose, and that the engineer was backing down grade to make the coupling, working steam, when the accident happened; that he and the conductor tried to control the speed by brakes, but could not; that they signaled the engineer to shut off steam, but he did not do it; and that the force of the engine and train knocked the caboose two or three car-lengths back, with the brakes very tight. Held, that the answer was responsive to the interrogatory, being a statement of the facts, and not opinion. *Houston, etc., R. Co. v. Patton* (Sup.), 9 S. W. 175.

(4) Starting and Stopping.

(a) Negligence in Starting.

In an action for personal injuries from a street car accident, an answer by a witness that "the car moved ahead in obedience to the signals. It started with a jerk, as I have stated, and threw plaintiff off into the street," was not objectionable as stating conclusions and not facts. *El Paso Electric Ry. Co. v. Ruckman*, 49 Tex. Civ. App. 25, 107 S. W. 1158.

Where a brakeman, while sitting on a bumper over the trucks of a car in accordance with his duty, was thrown therefrom and injured by a sudden acceleration of the speed of the train, a question whether such jerk would be sufficient to cause him to lose his hold, if he had no warning that it was going to take place, was objectionable as calling for the witness' opinion; he not having been shown to be an expert. *Gulf, B. & K. C. Ry. Co. v. Harrison* (Civ. App.), 104 S. W. 399.

In an action for injuries to plaintiff in alighting from a street car, a witness testified that plaintiff "was stand-

ing talking to us when the car started; just as it started he said, 'Wait,' but the conductor could not hear him, and then he started to get off." Held, that it was error to strike out the words "but the conductor could not hear him," because from the position of the parties the witness could tell from observation whether plaintiff was heard by the conductor or not. *El Paso Electric Ry. Co. v. Boer* (Civ. App.), 108 S. W. 199.

(b) Power to Stop, Negligence in Stopping.

In an action against a railroad company for injuries at a crossing, it is error to allow a witness who is not an expert to testify that the train could have been stopped in time to avoid the accident had it been running slower. *International & G. N. R. Co. v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. 58.

In an action for injuries received in a collision with a street car, testimony "that the motorman tried to stop the car" is objectionable, as being merely the opinion or conclusion of the witness. *San Antonio Traction Co. v. Kumpf* (Civ. App.), 99 S. W. 863.

In an action against a street railroad for injuries to one attempting to board the car, a question as to whether the conductor could have stopped the car, and prevented injury, had he been on the rear platform of the motor car, or front platform of the trailer, called for an opinion, and was properly excluded. *Von Diest v. San Antonio Tract. Co.*, 33 Tex. Civ. App. 577, 77 S. W. 632, affirmed in 98 Tex. 636, no op.

At Railway Crossing.—In an action for injuries received in a collision between a street car and a railway train, the railway conductor was asked: "When a street car is approaching a crossing, when will it appear that it is going to stop? When would it become apparent that there was danger of a collision when the street car was

coming on M. street, like this?" Held, that the question was objectionable, as calling for an opinion of the witness. *Northern Texas Traction Co. v. Caldwell*, 44 Tex. Civ. App. 374, 99 S. W. 869.

(c) Distance Required for Stop.

In an action for death of a person on defendant's railroad track by being struck by a train, evidence as to the distance within which witnesses had seen similar trains to that in question stop at the same place was not objectionable as the opinion of the witnesses as to the distance within which such a train could be stopped. *Texas & P. Ry. Co. v. Brannon*, 43 Tex. Civ. App. 531, 96 S. W. 1095.

(d) Length of Stop; Sufficiency for Discharging and Receiving Passengers.

Witnesses can not testify that, in their judgment, the train stopped at the station long enough for plaintiff to alight; this being an issue of fact for the jury. *Texas, etc., R. Co. v. Lee*, 21 Tex. Civ. App. 174, 57 S. W. 573, 51 S. W. 351, affirmed in 93 Tex. 722, no op.

Where an action was brought for injuries to a child by the alleged premature starting of a train, a question asked of the child's mother, who failed to get off at the place of the accident, why she did not get off, to which she answered that the train did not stop long enough, was not objectionable as calling for a conclusion. *St. Louis S. W. Ry. Co. of Texas v. Byers* (Civ. App.), 70 S. W. 558.

In an action for death of a passenger while attempting to board the train as it was passing through an intermediate station, an answer of one of the conductors in a deposition that the train first ran up to the depot and stopped there a sufficient length of time to permit all passengers to alight and board the train, was properly excluded. *Houston & T. C. R. Co. v. Schuttee* (Civ. App.), 91 S. W. 806.

Where, in an action for injuries to a passenger by the premature starting of the train, a witness testified that the train stopped at the station from 3 to 3½ minutes, and longer than it usually stopped at that station, his opinion that the train stopped long enough to give sufficient time for all passengers to alight was inadmissible. *San Antonio & A. P. Ry. Co. v. Jackson*, 85 S. W. 445, 38 Tex. Civ. App. 201.

(5) Speed of Train or Car.

As Cause of Accident.—Permitting a brakeman on the train to testify that, in his opinion, the rate of speed of the train which came in contact with the obstruction on the track caused the derailment, was not prejudicial, where his opinion was in accord with the testimony in the case. *International, etc., R. Co. v. Vinson*, 28 Tex. Civ. App. 247, 66 S. W. 800, affirmed in 95 Tex. 680, no op.

Safe Speed.—In an action against a railroad company to recover for the death of a fireman killed as a result of the excessive rate of speed at which the engine on which he worked was being run, testimony of witnesses that the engineers of defendant had superintendence over the firemen, and that a reasonably safe rate of speed for operating a freight train at the place in question would be from 10 to 15 miles an hour, and that a high speed would be dangerous, is not objectionable, as being mere conclusions. *Galveston, H. & S. A. Ry. Co. v. Ford*, 54 S. W. 37, 22 Tex. Civ. App. 131.

Testimony as to Speed of Train.—In an action for injuries received by collision with a train at a highway crossing, eye-witnesses may testify that they thought the train was running at an unusual speed. *Galveston, H. & S. A. Ry. Co. v. Duelm* (Civ. App.), 23 S. W. 596.

In an action for death of a servant caused by falling from a car, testimony that, at the time of the accident, the

horses attached to the car were going full speed, was admissible, and not objectionable as an expression of opinion. *Beaumont Traction Co. v. Dilworth* (Civ. App.), 94 S. W. 352.

In an action for injuries to a passenger, where plaintiffs in their petition charged as one of the elements of defendant's negligence, which resulted in the wreck of the train and the injuries sustained, the excessive and dangerous speed across a switch and in and upon a side track, it was proper to allow testimony as to the speed of the train at the time of its derailment and wreck. *Texas, etc., R. Co. v. Clippenger*, 47 Tex. Civ. App. 510, 106 S. W. 155, affirmed, no op.

In an action for personal injuries received in a railroad wreck while plaintiff was a passenger on defendant's train, it is proper to permit a witness for plaintiff to testify in response to a cross interrogatory by defendant as to his knowledge of the rate of speed of the train at the time that "all were nervous and apprehensive, and the effect and sensations were those of very fast speed, and what seemed to me reckless speed." *Galveston, H. & S. A. Ry. Co. v. Wesch* (Civ. App.), 21 S. W. 62; *S. C.*, 85 Tex. 593, 22 S. W. 957.

Where a petition alleges that plaintiff had been aboard a train, and jumped off while it was moving rapidly from the yard, but that it was still at the station, where passengers got on and off, and he believed that it was moving slowly, it was competent for him to testify that the train was not going very fast, and he thought he could get off safely. *Texas & P. Ry. Co. v. Crockett*, 66 S. W. 114, 27 Tex. Civ. App. 463.

Same; Qualification of Witness.—A witness need not be an expert in order to be competent to testify that a train was running fast. *Galveston, H. & S. A. Ry. Co. v. Huebner* (Civ. App.), 42 S. W. 1021.

Nonexperts may testify to the rate of speed a train was moving at when passing a certain crossing. *Galveston, H. & S. A. Ry. Co. v. Sullivan* (Civ. App.), 42 S. W. 568.

In an action for personal injuries received in a rear-end collision, an eye-witness testified that he had traveled on trains, that he had worked on a railroad for 11 months, and that he could judge reasonably well as to a train's rate of speed. Held, that his opinion as to the rate of speed of the overtaking train was admissible. *Campbell v. Warner* (Civ. App.), 24 S. W. 703.

In action against railroad for damages for injuries sustained in collision, there is no error in allowing witnesses to state their opinion that train was running at unusual speed on night of collision though opinion was formed from observation made at distance from train. *Gulf, etc., R. Co. v. Bell*, 24 Tex. Civ. App. 579, 593, 58 S. W. 614, affirmed in 94 Tex. 700, no op.

In an action by a passenger for injuries, it was not error to permit a witness to testify as to the speed of the train on the night of the collision, though he was not in a position to know the fact, since the objection went only to the weight of the evidence, and was for the jury. *Gulf, C. & S. F. Ry. Co. v. Bell*, 58 S. W. 614, 24 Tex. Civ. App. 579.

Where Witness Was Standing on Track Straight Ahead.—A witness may testify from observation and experience that one standing on a straight railway track can not accurately judge the speed of an approaching train. *Gulf, etc., R. Co. v. Duvall*, 12 Tex. Civ. App. 348, 361, 35 S. W. 699, affirmed in 93 Tex. 730, no op.

(6) Signals.

By Bell and Whistle.—Testimony of a witness who was near a crossing that a passing train did not sound the bell or whistle is not an opinion. *Gal-*

veston, H. & S. A. Ry. Co. v. Garteiser, 9 Tex. Civ. App. 456, 29 S. W. 939.

In an action for injuries received by collision with a train at a highway crossing, eye witnesses may testify that, if any signals had been given, they believe they would have heard them. *Galveston, H. & S. A. Ry. Co. v. Duelm* (Civ. App.), 23 S. W. 596.

In an action for injuries to a street car passenger, in a collision with a railroad train at a crossing, it was competent for witnesses who saw the collision to state that they could have heard the bell or whistle of the engine. *St. Louis, S. F. & T. Ry. Co. v. Knowles*, 44 Tex. Civ. App. 172, 99 S. W. 867.

Flagging Train.—In an action for injuries to a railroad section foreman at a curve in the track, on the question of contributory negligence by plaintiff, in failing to send a man ahead to flag the train, it was proper to allow a witness who had knowledge of the situation to testify that the curve where the accident occurred was not such as required a section foreman, in the exercise of ordinary care, to flag the train. *Gulf, C. & S. F. Ry. Co. v. Minter*, 85 S. W. 477, 38 Tex. Civ. App. 8.

(7) Noise Made by Train.

In an action for injuries to a section hand by being struck by a passenger train, evidence that as such train approached it was making less noise than usual was not objectionable as a conclusion of the witness. *International & G. N. R. Co. v. Villareal*, 82 S. W. 1063, 36 Tex. Civ. App. 532.

In an action for injuries received in a collision, a witness for the railway company, who had made a test at the scene of the collision for the purpose of testifying, was asked whether or not it would be possible for a man standing 30 feet from that crossing, as he stood, listening for the train, not to hear it as it approached the

crossing Held, that the question was objectionable, as calling for an opinion of the witness. *Northern Texas Traction Co. v. Caldwell*, 44 Tex. Civ. App. 374, 99 S. W. 869.

25. Recollection, Understanding, and Belief.

a. Where Memory Grown Dim and Witness Thinks, Believes, or Has General Impression, etc.

What a witness believes as derived from a certain state of facts is but his conclusion and is not evidence, and when he has been in a position to know the facts but his memory has grown dim, what he thinks he recollects may be admitted in evidence, if it is relevant to the issue, to be weighed in connection with the other testimony in the case. *Harris v. Nations*, 79 Tex. 409, 15 S. W. 262.

A witness who has no positive recollection of a fact testified about, and who is yet satisfied, from circumstances which he does remember, that a fact existed, should be allowed to detail those circumstances. If his deduction from the circumstances detailed seems unreasonable, the evidence may be excluded; otherwise it should go to the jury, who are to weigh and judge. *Davie v. Terrill*, 63 Tex. 105.

A witness stating that testimony is "his impression" means his best recollection, and it is admissible. *Swinney v. Booth*, 28 Tex. 113, 116.

The belief of a witness, together with the facts upon which that belief is founded, is not admissible. *Haynie v. Baylor*, 18 Tex. 498; *Cooper v. State*, 23 Tex. 331.

The fact being admitted in a suit for damages on account of the negligence of the employee of a corporation, that he was legally in its employ, soon after the injury complained of, but controverted as to whether he was employed at the time the injury was inflicted, evidence of the "general impression" of the employees

that such employee was employed on the date of the injury, is not admissible. It would be competent to show by the recollection of witnesses the date when employee began to act as such; from that date the employer would be liable for his acts of negligence, if his assumption to act as employee was with the knowledge and consent of such employer. *Texas, etc., R. Co. v. Douglass*, 69 Tex. 694, 7 S. W. 77.

Testimony of a witness that he thought he had told the foreman of his inexperience is to be taken to be testimony as to what witness remembered. *Galveston, etc., R. Co. v. Parrish* (Civ. App.), 43 S. W. 536, affirmed in 93 Tex. 707, no op.

b. Conclusions Based Not upon Positive Recollection, but upon Habit, Custom, etc.

A witness may testify that he performed a certain act where his conclusion that he performed same is based not upon positive recollection, but upon his habits of business, and other circumstances. *Davie v. Terrill*, 63 Tex. 105, 108.

The testimony, "Finding the bond in this condition makes me think it may have been presented to me for approval and rejected," is inadmissible, as being only an opinion. *McFarlane v. Howell*, 43 S. W. 315, 16 Tex. Civ. App. 246.

c. Recollection or Belief as to Contents of Documents.

To prove the contents of a written contract, which can not be produced, the belief or opinion of a witness that it contained a certain stipulation is inadmissible. *International & G. N. R. Co. v. Startz* (Civ. App.), 27 S. W. 759.

Where a witness states that his testimony is from books, papers, etc., without stating the kind of documents, where or by whom kept, their accuracy, etc., his testimony is inadmis-

sible. *Texas, etc., R. Co. v. Parrish*, 1 App. Civ. Cases, § 942.

Witness' testimony that stipulations in a contract were the same as those in a block of printed contract forms, is inadmissible to prove the contract where he is not shown to have compared contract with forms. *International, etc., R. Co. v. Startz* (Civ. App.), 27 S. W. 759, 760.

Testimony of a witness that he investigated the books as far as he could to see if he could ascertain whether a corporation had purchased a certain piece of property, and that he found what he thought was an entry, covering the purchase of the property, and that he also found among the papers an instrument which seemed to convey the property to the association, and that his recollection was that it was in the shape of a memorandum, was inadmissible as stating conclusions or impressions from the books or papers. *Cobb v. Bryan* (Civ. App.), 97 S. W. 513.

d. Opinion as to Purport, Legal Operation and Effect of Documents.

The sufficiency of a lost deed to pass title can not be established by the mere opinion of witness who once saw it. He must recollect what its provisions were and state facts regarding its contents. Among the exceptions to the rule which ordinarily excludes the opinion of a witness, when offered as evidence, can not be included the long time that has elapsed since the occurrence of the matters about which the witness is called to testify. *Shifflet v. Morelle*, 68 Tex. 382, 4 S. W. 843, citing *Rosenthal v. Middlebrook*, 63 Tex. 333; *Purnell v. Gandy & Son*, 46 Tex. 190, 199; *Houston, etc., R. Co. v. McGehee*, 49 Tex. 481, 489; *Clardy v. Callicoate*, 24 Tex. 170, 172.

The testimony of an administrator that certain papers of his intestate which came into his possession, and

were afterwards destroyed by fire, and whose contents he could not remember, in his opinion vested a good title to land in said intestate, is inadmissible, as a legal conclusion based on imperfect recollection. *Shifflet v. Morelle*, 68 Tex. 382, 4 S. W. 843.

An oral testimony that records do not show that administration was closed, is inadmissible, as a mere conclusion of the witness. *Williams v. Davis*, 56 Tex. 250, 254.

e. Recollection and Understanding of Language, Conversation, Contract, etc.

A witness' "opinion" of his former testimony held admissible as his best recollection. *Wright v. Solomon* (Civ. App.), 46 S. W. 58, affirmed in 93 Tex. 678, no op.

In an action for breach of a broker's contract for the sale of oil, an answer of the broker, as a witness, to a question seeking to ascertain what the agreement was as to the capacity of tank cars to be furnished to take the oil, that he had an understanding with the seller that the cars were to be of 135 barrels capacity, was not objectionable as a conclusion of the witness. *Sherman Oil & Cotton Co. v. Dallas Oil & Refining Co.* (Civ. App.), 77 S. W. 961.

Transactions between Others.—A witness can not testify as to understanding of transactions between others not of his personal knowledge. *Hammond v. Hough*, 52 Tex. 63, 73.

A witness can not testify as to his understanding of a conversation heard by him. *Buzard v. McNulty*, 77 Tex. 438, 14 S. W. 138.

A question to a witness as to what he understood from the conversation of plaintiff and defendant had in his presence was objectionable as calling for the conclusion of the witness. *Oritz v. Navarro*, 10 Tex. Civ. App. 195, 30 S. W. 591.

Evidence of one of the indorsers of a note that plaintiff understood that

it was given under an agreement not to prosecute the maker for theft is incompetent as a mere opinion. *Biering v. Wegner*, 76 Tex. 506, 13 S. W. 537.

Evidence that the general superintendent reprimanded the section foreman for his failure to inspect the track the morning of the wreck is admissible, although witness could not remember the language used or the substance thereof. *Texas, etc., R. Co. v. Barron*, 4 Tex. Civ. App. 546, 23 S. W. 537.

Where, in an action to recover the value of goods and money delivered and charged to an employee of defendant, the latter denies that the goods or money were for him, or received for or used by him, the admission of testimony of a witness as to his understanding or how the account was to run is erroneous. *Shaw v. Gilmer* (Civ. App.), 66 S. W. 679.

It is error to allow a witness, who says he does not know why a judgment nil dicit was entered, to state that he thinks it was by written agreement, and then give the substance of a conversation with an attorney, as such evidence is merely hearsay. *Davis v. Beall*, 21 Tex. Civ. App. 183, 50 S. W. 1086.

A predicate having been laid to attack a party testifying as witness, a witness called to impeach such party should not be allowed to testify to his conclusion or understanding as to the effect of the conversations inquired about in laying the predicate for impeachment. *Buzard v. McNulty*, 77 Tex. 438, 14 S. W. 138.

26. Sanitation.

Testimony of plaintiffs that the location of the cemetery on the lands described would make their homes valueless for the reason that they could not drink water off of dead people is inadmissible as an opinion. *Elliot v. Ferguson*, 83 S. W. 56, 37 Tex. Civ. App. 40.

27. Solvency and Insolvency.

See ante, "Insolvency and Insolvency, VII, C, 5, c.

28. Streets and Highways.

Construction; Defects, etc.—In an action against a city for a defective walk, evidence by a nonexpert as to its construction, held objectionable as conclusion. *Lentz v. Dallas*, 96 Tex. 258, 72 S. W. 59.

In an action against a city for injuries caused by a defective sidewalk, the petition alleged that a grating where the injury occurred was originally too light, and a witness was asked if such grating was not "mighty light" to start with. Held, that it was objectionable, as a conclusion, for the witness, a nonexpert, to reply that he would judge the grating was too light, since it did not stand the test of use. Judgment, *City of Dallas v. Lentz* (Civ. App.), 69 S. W. 166, reversed. *Lentz v. Dallas*, 72 S. W. 59, 96 Tex. 258.

That a hole in a sidewalk in which plaintiff was injured was big enough for the witness' foot to go in was a fact of which he might testify without being an expert. (Civ. App.), *City of San Antonio v. Talerico*, 78 S. W. 28. Judgment modified, 81 S. W. 518, 98 Tex. 151.

Poles and Wires Interfering with

Traffic.—In an action by a city to enjoin defendant telephone company from using and occupying its streets and alleys with poles, wires, etc., any error in allowing a witness to testify to his conclusion that the poles as placed did not interfere with public travel was harmless, where the facts were given on which the conclusion was formed; the trial having been by the court without a jury. *Texarkana v. Southwestern Tel., etc., Co.*, 48 Tex. Civ. App. 16, 106 S. W. 915.

29. Value.

a. General Rules as to Admission of Opinion Evidence.

(1) Opinion Evidence Admissible.

In proving value it is often neces-

sary to receive opinion evidence, but before receiving such evidence it should appear that the witness is familiar with the facts so as to enable him to form an intelligent opinion. *Bellamy v. McCarthy*, 75 Tex. 293, 12 S. W. 849; *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 12 S. W. 815.

Opinions of qualified persons are competent as evidence of value. *Ft. Worth Compress Co. v. Chicago, R. I. & T. Ry. Co.*, 54 S. W. 967, 18 Tex. Civ. App. 622; *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 305, 12 S. W. 815; *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806.

(2) Market Value.

"Evidence as to market value is not objectionable because it is in a measure the opinion of a witness." *Ft. Worth, etc., R. Co. v. Hogsett*, 67 Tex. 685, 687, 4 S. W. 365; *Houston, etc., R. Co. v. Knapp*, 51 Tex. 592.

Knowledge of the market value of an article is a fact known upon information—it is more than an opinion. If a witness is not fully qualified to state the fact, a cross-examination will show it. *Missouri Pac. R. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749.

Opinions of qualified persons are competent as evidence of value. *Ft. Worth, etc., R. Co. v. Chicago, etc., R. Co.*, 18 Tex. Civ. App. 622, 45 S. W. 967, affirmed in 93 Tex. 660, no op.

(3) Qualification of Witness.

(a) Generally.

Before a witness can state an opinion as to the value of property, qualification to do so must be shown. *Judgment (Civ. App.)*, 81 S. W. 560, reversed. *J. B. Watkins Land Mortg. Co. v. Campbell*, 84 S. W. 424, 98 Tex. 372.

A witness' statement that he testifies from his knowledge does not qualify him to testify to value. *Gulf, W. T. & P. Ry. Co. v. Staton (Civ. App.)*, 49 S. W. 277.

(b) Opinion Based upon Market Reports.

Testimony as to the condition of the market from knowledge gained by witness from market reports is admissible. *Texas, etc., R. Co. v. Scott & Co. (Civ. App.)*, 86 S. W. 1065.

Where a witness was qualified to testify as to the market by reason of having read the market reports, his testimony was competent, though he also had the same information from other sources. *Southern, etc., R. Co. v. Bennett*, 46 Tex. Civ. App. 379, 103 S. W. 1115.

(c) Opinion Based upon Hearsay.

Where the evidence of a witness as to the market value of sand converted shows that he is but repeating the statement of another, and does not show that he is qualified to testify to such value, the admission of his evidence is error. *Texas & N. O. R. Co. v. White*, 62 S. W. 133, 25 Tex. Civ. App. 278.

(4) Criterion of Value.

Must Be Formed with Reference to Proper Criterion.—The opinion of witnesses as to value, when formed with reference to an improper criterion of value, is incompetent evidence. *Schoolher, Bernstein & Co. v. Hutchins*, 66 Tex. 324, 1 S. W. 266.

Where goods alleged to have been stolen are shown to have a market value, evidence as to value based on other standards is not admissible. *Baden v. State (Cr. App.)*, 74 S. W. 769.

Opinion Based upon Price Paid.

Where, in an action for injuries to personal property, plaintiff testified that she knew the market value of the property, and stated that she knew it from the price she paid for it, such statement did not disqualify her from testifying as to its value, in the absence of a showing that her only knowledge of the value was from what she had paid for it. *Houston, E.*

& *W. T. Ry. Co. v. Charwaine*, 71 S. W. 401, 30 Tex. Civ. App. 633.

Where No Market Value.—Where there is no market value, the testimony of witnesses, as to the value they would put upon the thing, is inadmissible to prove value. *G. H. & S. A. R. Co. v. Davis* 1 App. Civ. Cases, § 147.

Where, in an action for destruction of property, it is shown that the property has no market value, its intrinsic value may be shown by evidence of persons familiar therewith. *St. Louis S. W. Ry. Co. v. Campbell* (Civ. App.), 34 S. W. 186.

(5) Invading Province of Jury.

The opinion of a witness as to whether plaintiff's demand, in an action on a policy, was based on a fair valuation of the property, is inadmissible. *Lion Fire Ins. Co. v. Starr*, 71 Tex. 733, 12 S. W. 45.

(6) Harmless and Prejudicial Error.

Error on the admission of opinion evidence as to value was not harmless when the proof was doubtful as to the value being greater than the contract price, though the judgment recovered on account of such difference was much less than would be warranted by the opinion evidence improperly admitted. *Land Mortg. Co. v. Campbell*, 98 Tex. 372, 84 S. W. 424, reversing 81 S. W. 560.

b. As to the Value of Personalty.

(1) Market Value.

See, ante, "Market Value," VII, C, 29, a, (2).

(2) Rental Value.

The rental value of goods delayed by a common carrier may be proved by the opinions of witnesses properly informed on the subject. *Gulf, C. & S. F. R. Co. v. Maetze*, 2 Willson, Civ. Cas. Ct. App. § 636.

(3) As Affected by Place, Locality.

Objections to the testimony of a witness as to the value of certain goods because the place of value was not fixed, etc., are not available where

they are obviated by further testimony. *Half v. Goldfrank* (Civ. App.), 49 S. W. 1095, affirmed in 93 Tex. 708, no op.

(4) Particular Kinds of Personalty.
(a) Book Accounts.

Estimated value of book accounts is admissible in evidence on an action to set aside an alleged fraudulent conveyance thereof. *Moore v. Temple Grocer Co.* (Civ. App.), 43 S. W. 843.

(b) Business, Credit, Good Will, etc.

See ante, "Injury to Business, Credit, Good Will, etc.," VII, C, 9, d.

(c) Stocks and Bonds.

Where, in an action for damages for false representations inducing plaintiff to purchase certain corporate stock, plaintiff testified that defendant repeatedly told him that the corporation was perfectly solvent, owned a large amount of property, and had paid dividends of 20 per cent out of the net earnings for several years, evidence of a further statement that the stock was a splendid investment was admissible and not objectionable, on the ground that such statement was a mere expression of opinion, when taken in connection with the other statements. *Collins v. Chipman*, 41 Tex. Civ. App. 563, 95 S. W. 666, affirmed in 101 Tex. 632, no op.

Persons familiar with market value of bonds are competent to testify as to what railroad bonds could have been sold for on market. *Houston, etc., R. Co. v. Shirley*, 89 Tex. 95, 100, 31 S. W. 291.

(d) Goods.

aa. Generally.

Where, in an action by a vendee against a sheriff for wrongful attachment of goods as property of the vendor, the defendant claims that the sale was in fraud of creditors, he should be allowed, when shown qualified, to testify as to the value of the goods. *Reynolds v. Weinman* (Civ. App.), 33 S. W. 302.

bb. Mercantile Stocks.

Criterion of Value.—"The defendants asked a number of witnesses the following question: 'If you know, you may state what was the reasonable market value of the goods seized, for cash, in bulk, and at open, fair, public auction, at the time when seized in San Marcos,' expecting to prove by the witnesses that under such a test of value the goods would be shown to be of less value than found by the jury. The court refused this evidence, and, we think, correctly. This evidence would have tended to show what the goods would have sold for if sold in bulk at public auction. This would not have been a fair criterion of value. Thus sold, they might not have brought anything like their real value. If what they would have sold for at the time be the test of value, then what they would have sold for at a sale made in such manner as a prudent man would have sold them, with a view to realize their fair value, would be the test, and the net proceeds the measure of damages." *Schoolher, etc., Co. v. Hutchins*, 66 Tex. 324, 332, 1 S. W. 266.

Where a witness testified that he estimated the value of merchandise from an inspection of the goods as they lay in a store, it will be inferred that his valuation was in bulk. *Halff v. Goldfrank* (Civ. App.), 49 S. W. 1095.

Qualification of Witness.—A witness who never saw a stock of goods alleged to have been converted could testify that he had been ten years in the mercantile business; that at the date of the alleged conversion he knew the market value of general dry goods; that he never knew a stock of goods such as that described in the inventory attached to the deposition selling for original cost or value; and that such a stock, after having been kept for several years in a retail store, and having been sold from at retail,

and replenished in the ordinary way, would not have sold for cash, in bulk, for more than 50 or 60 cents on the dollar of original cost. *Reynolds v. Weinman* (Civ. App.), 40 S. W. 560.

A witness who testified that he had been engaged in the hardware business for a number of years, and knew the value of a stock like the one in question, was qualified to testify as to its value. *Belknap v. Groover* (Civ. App.), 56 S. W. 249.

Where a witness stated that he only valued part of a stock of merchandise, and that another valued the remainder, and that he had no recollection of the separate valuations, it was not error to exclude his testimony. *Halff v. Goldfrank* (Civ. App.), 49 S. W. 1095.

A witness who lived in the town where some of the goods were kept, had been a merchant, and was "tolerably" well acquainted with such stock, could testify to its value at the time of the sale. *Harris v. Schuttler* (Civ. App.), 24 S. W. 989.

One who had been a clerk for a year with the insured, and was acquainted with the stock, was competent to testify as to its value just before the fire. *Orient Ins. Co. v. Moffatt*, 39 S. W. 1013, 15 Tex. Civ. App. 385.

(e) Crops, Hay, Grain and Food Stuffs.**aa. Crops, Generally.**

In ascertaining the value of a crop destroyed by the overflow of a river caused by a railroad embankment, opinions of witnesses as to its market value in the field are admissible. *Gulf. C. & S. F. Ry. Co. v. Calhoun* (Civ. App.), 24 S. W. 362.

A witness giving the estimate of value of a crop destroyed by overflow, may state in detail, cost of planting, cultivation, harvesting and putting crop on market and its probable yield and value when placed on market. *Galveston, etc., R. Co. v. Parr*,

8 Tex. Civ. App. 280, 283, 28 S. W. 264.

Estimates of witnesses formed by guessing at what product of crop would have been, if not injured, are inadmissible to prove value of destroyed crops. *Missouri, etc., R. Co. v. Cox*, 2 App. Civ. Cases, § 287.

In an action against a railroad for the destruction of plaintiff's crops owing to the diversion of waters onto plaintiff's lands through a ditch constructed by defendant along the line of its road, testimony of witnesses residing in the locality, and who knew the nature of the season during which the destruction of the crops occurred, as to what amount of cotton the land would have produced per acre had it not been overflowed by the water, was competent. *Chicago, R. I. & G. Ry. Co. v. Longbottom* (Civ. App.), 80 S. W. 542.

bb. Grass and Hay.

In a suit for the value of certain grass, witnesses who are old settlers and own pastures are competent to testify as to its value. *Galveston, H. & S. A. Ry. Co. v. Polk* (Civ. App.), 28 S. W. 353; *Texas, etc., R. Co. v. Prude*, 39 Tex. Civ. App. 144, 36 S. W. 1046, affirmed in 101 Tex. 663, no op.; *Galveston, etc., R. Co. v. Rheiner* (Civ. App.), 25 S. W. 971.

Market Value.—Evidence of the market value of grass is not objectionable because it is in some measure the opinion of a witness. *Ft. Worth, etc., R. Co. v. Hogsett*, 67 Tex. 685, 4 S. W. 365.

Same; Inadmissible as Not Showing Market Value.—In an action against a railroad company for burning plaintiff's grass, a witness testified that the grass had a market value and that the witness had a "pretty good idea" thereof. He was then asked what the market value was, and answered that, considering the number of cattle on the land at the time and what it was used for and was go-

ing to be used for, the grass was worth from \$1.50 to \$2 per acre. He then stated, after objection, that he wanted to state what kind of cattle plaintiff had there, and what he was using it for, and again stated that under such conditions the grass was worth from \$1.50 to \$2 per acre. Held, that such evidence was inadmissible as not showing market value. *Texas, etc., R. Co. v. Pemberton*, 43 Tex. Civ. App. 291, 95 S. W. 1089.

Where No Market Value; Value for Feed, Pasturage, etc.—Where the grass burned had no market value, testimony of farmers and stock raisers familiar with the value of grass for grazing and feeding purposes is admissible on the question of value. *International & G. N. Ry. Co. v. Searight*, 8 Tex. Civ. App. 593, 28 S. W. 39; *Ft. Worth, etc., R. Co. v. Hogsett*, 67 Tex. 685, 4 S. W. 365; *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 12 S. W. 815; *San Antonio, etc., R. Co. v. Ruby*, 80 Tex. 172, 175, 15 S. W. 1040; *Gulf, etc., R. Co. v. Vancil*, 2 Tex. Civ. App. 427, 21 S. W. 303; *St. Louis, etc., R. Co. v. Pickens*, 3 App. Civ. Cases, § 398; *Galveston, etc., R. Co. v. Rheiner* (Civ. App.), 25 S. W. 971; *Galveston, etc., R. Co. v. Polk* (Civ. App.), 28 S. W. 353, 354; *St. Louis, etc., R. Co. v. Campbell* (Civ. App.), 34 S. W. 186.

Where there is no market value for grass situated as and in the condition plaintiff's was at the time it was destroyed by fire, it is competent, in an action for the value of the grass, for witnesses to give their opinions as to its value, after stating the facts upon which they base them. *Ft. Worth, etc., R. Co. v. Brown*, 45 Tex. Civ. App. 376, 101 S. W. 266; *Gulf, etc., R. Co. v. Dunman*, 85 Tex. 176, 181, 19 S. W. 1073; *Galveston, etc., R. Co. v. Polk* (Civ. App.), 28 S. W. 353.

In an action against a railroad company for the burning of grass on plaintiff's land, men qualified by experience

may give their opinions to the value of the grass for pasturage, or for use in the winter. *Galveston, H. & S. A. Ry. Co. v. Rheiner* (Civ. App.), 25 S. W. 971.

Sufficiency of Facts on Which Based.—Where the evidence, in an action for the value of certain burned grass, showed that grass was scarce, that the burned grass was good, that during hay-cutting time the grass was worth from \$2 to \$2.50, and that no grass was being sold or leased there at that time, it was a sufficient basis for an opinion as to the value of the grass. *Galveston, H. & S. A. Ry. Co. v. Polk* (Civ. App.), 28 S. W. 353.

On appellant's right of way were dry grass and weeds where fire from appellant's engine ignited the grass and weeds on the right of way, communicated to the grass upon appellee's land, and from thence to his rick of hay, which it consumed. It was not error to admit evidence of a single sale of hay in the neighborhood of appellee's hay; nor the opinions of witnesses; nor the general understanding of the community as to the value of hay. There was no market for the article at that place, and in such case this character of evidence is admissible to assist the judge or jury in arriving at a correct estimate of the intrinsic value of the article. *Gulf, etc., R. Co. v. Lowe*, 2 App. Civ. Cases, §§ 647, 648.

cc. Barn and Contents.

In an action against a railroad for the destruction of a barn, the contents of which consisted of hay, oats, corn, etc., put into the same at different times, and used in feeding plaintiff's stock as required, it having been impossible to give a more definite and accurate statement of the amount and value of the property destroyed, it was proper for a witness to state estimates of such value based on facts detailed by him. *St. Louis Southwestern Ry. Co. v. Crabb* (Civ. App.), 80 S. W. 408.

(f) Live Stock, Poultry, etc.

aa. Admissibility in General.

The value of stock may be proved by opinion, but whether or not there is market for injured stock in the injured condition is not provable by opinion evidence. *Texas & P. Ry. Co. v. Meeks* (Civ. App.), 74 S. W. 329.

In an action for injuries to horses shipped over defendant's railroad, the opinion of a witness as to what the horses would have been worth had they not been injured is admissible, objections to such testimony going to credibility, and not competency. *Missouri Pac. Ry. Co. v. Fagan*, 72 Tex. 127, 9 S. W. 749.

In an action against a carrier for conversion of cattle, there is no error in permitting witness shown to be familiar with values of cattle to testify as to value of cattle converted. *Missouri, etc., R. Co. v. De Bord*, 21 Tex. Civ. App. 701, 53 S. W. 587, affirmed in 93 Tex. 690, no op.

Testimony as to value in the case of injury to a herd of cattle in shipment may be somewhat speculative and unsatisfactory and yet be competent. *Gulf, etc., R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109, affirming 29 S. W. 806.

bb. Qualification of Witness; Sufficiency of Information on Which Opinion Based.

aaa. Generally.

In an action for injuries to cattle shipped, plaintiff held competent to testify as to the market value of the cattle. *St. Louis, etc., R. Co. v. Barnes* (Civ. App.), 72 S. W. 1041, affirmed in 97 Tex. 645, no op.

Facts in an action against a carrier for damages to cattle shipped held to show that it was error to permit a witness to give his opinion as to the market value. *Missouri, etc., R. Co. v. Dilworth*, 95 Tex. 327, 67 S. W. 88.

Witnesses who were in charge of a drove of horses being transported from one state to another and who

had sold horses in the state of destination about the time the horses in controversy should have reached there and knew the horses in question, were competent to testify as to their value in an action against the railroad company for their loss. *Gulf, Colorado & S. F. Ry. Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161.

Testimony of witness that at the time and place of the killing of a cow, and the injuring of others, there was a market value for cattle of that class, and that he knew what it was, that the value of the cow killed was from \$250 to \$300, and that of those injured was \$200 each, and the depreciation in their market value was \$150 or \$175 each; that men came there and bought cattle of him; that what he meant by market value was what anything was worth, the way he got at it was what he and others would give for an animal; that he kept posted from the newspapers, too; that the newspapers give him the market prices of cattle at certain other places; and that he could come pretty near telling what the cattle would have brought in those markets—is admissible as some evidence tending to establish both the market and the reasonable value of the cattle; it not showing witness relied solely on hearsay or information from others, and not excluding the idea that what he testified he meant by market value, and which he got at in a certain way, was the market value. *Houston & T. C. R. Co. v. Tisdale* (Civ. App.), 109 S. W. 413.

bbb. Experienced Cattlemen.

An experienced cattleman, familiar with the class of cattle in question, who knew the market price on a certain date, was properly permitted to give his opinion as to what they would have sold for on the market on that date. *St. Louis, I. M. & S. Ry. Co. v. Gunter*, 44 Tex. Civ. App. 480, 99 S. W. 152.

ccc. Plaintiff's Vendor.

On an issue as to the value of cattle at the destination of a shipment, it was proper to refuse to permit the one who sold the cattle to plaintiff to testify as to such value, in the absence of any showing that he was acquainted with the market values at the place of destination, or in any territory embracing such place. Judgment (Civ. App.), 87 S. W. 363, affirmed. *Texas & P. Ry. Co. v. Sherrod*, 89 S. W. 596, 99 Tex. 382.

ddd. Witness Who Has Not Seen Stock.

In an action against a railroad for injury to cattle, it was not error to admit testimony as to the market value of the cattle at their destination, if they had been shipped with reasonable dispatch and care, though the witnesses had not seen the cattle prior to shipment. *Texas, etc., R. Co. v. Felker*, 40 Tex. Civ. App. 604, 90 S. W. 530.

eee. Information Obtained from Others; Hearsay, etc.

An opinion as to value of mules at a certain point, not based on personal knowledge but on statements from others as to the value of the mules of character of those at bar, should be excluded. *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 306, 12 S. W. 815.

In an action for damages for delay in shipment of cattle, testimony as to market value, derived from information received from salesmen of commission houses, was hearsay and inadmissible, but testimony based on information obtained from newspaper market reports was properly admitted. *St. Louis, etc., R. Co. v. Gunter*, 39 Tex. Civ. App. 129, 86 S. W. 938.

In action for value of animal killed, information obtained by plaintiff from persons acquainted with animals of the class killed as to value held admissible. *Gulf, etc., R. Co. v. Wedel* (Civ. App.), 42 S. W. 1030.

A stockman gaining his information as to the market value of mules in a certain locality, at a certain time, through conversations with persons who had sold a great many mules at such place at such time, may testify as to their market value. *Missouri, K. & T. Ry. Co. v. Cocreham*, 10 Tex. Civ. App. 166, 30 S. W. 1118.

In an action for the value of an animal killed by defendant's train, information obtained by plaintiff from persons in another state, who were acquainted with animals of the class of the one killed, as to the value of such animals, was admissible. *Gulf, C. & S. F. Ry. Co. v. Wedel* (Civ. App.), 42 S. W. 1030.

fff. Limited Inquiries and Offers.

Opinion as to market value of cattle is not admissible where the witness shows no knowledge except from an inquiry and offer from one person. *Missouri, etc., R. Co. v. Dilworth*, 95 Tex. 327, 67 S. W. 88, affirming 65 S. W. 502.

ggg. Market Reports.

A witness who knew the market value of cattle at a certain place from quotations, was competent to testify thereto. *Houston, etc., R. Co. v. Williams* (Civ. App.), 31 S. W. 556, 559.

A testimony as to the market value of cattle on a given day based on newspaper reports, is admissible. *Ft. Worth, etc., R. Co. v. Daggett* (Civ. App.), 27 S. W. 186.

Testimony as to the market value of poultry at a certain time and place, based on knowledge derived from quotations sent out by commission merchants at the same time and from the same place, is competent. *Texas, etc., R. Co. v. Fisher*, 18 Tex. Civ. App. 78, 43 S. W. 584; *Missouri, etc., R. Co. v. Cocreham*, 10 Tex. Civ. App. 166, 30 S. W. 1118.

A witness may testify as to the market value of sheep in Chicago on a certain day, though he was in Texas at the time getting his information

from stock reports. *Texas, etc., R. Co. v. Donovan*, 86 Tex. 378, 379, 25 S. W. 10, affirming 23 S. W. 735.

Market Reports and Private Advices.—Where, in an action to recover for a loss sustained through defendant's alleged negligent delay in transporting plaintiff's sheep over its road to Chicago, it appeared that plaintiff had sold sheep in Chicago for nine years, and that during the whole time he had received daily accounts of sales and current prices, and private telegrams, from persons interested with him in Chicago in such business, it was competent for him to testify as to the market value of sheep in Chicago on certain days, months prior to the institution of the suit. *Texas & P. Ry. Co. v. Donovan* (Civ. App.), 23 S. W. 735.

Information Based on Market Reports and Conversations with Stockmen.—In an action against a railroad for damages, witness may testify as to market value of sheep at given time and place although his knowledge was obtained from market reports and from conversations with men who dealt in sheep. *Gulf, etc., R. Co. v. Patterson*, 5 Tex. Civ. App. 523, 525, 24 S. W. 349.

Where Report Does Not Cover Very Day in Question.—Admissibility of testimony as to market value founded on information and stock reports is not affected by inability of witness to remember whether they covered very days in question. Such fact goes rather to weight of evidence than to its admissibility. *Texas, etc., R. Co. v. Donovan* (Civ. App.), 23 S. W. 735, 736, affirmed in 86 Tex. 378.

hhh. Opinion Based on General Knowledge of Market Fluctuations.

It was competent for a witness to testify that the cattle market in Kansas City was better early on a stated Monday morning than at any other time in the day, by showing that

the market was generally better early in the morning than later in the day, the witness being familiar with the fact about which he thus testified. *Texas, etc., R. Co. v. Slaughter*, 37 Tex. Civ. App., 624, 84 S. W. 1085, affirmed in 101 Tex. 663, no op.

iii. Value at Different Place or under Different Conditions.

In an action against a carrier for damages to a shipment of live stock, it was error to permit a witness to give his estimate as to the market value at the place of destination, such estimate being based on his knowledge of the market value at another place. *Missouri, K. & T. Ry. Co. of Texas v. Allen*, 87 S. W. 168, 39 Tex. Civ. App. 236.

In an action against a carrier for damages to a shipment of cattle, it was not error to refuse to permit a witness to testify as to market value, based on conditions not existing at the point of destination at the time of the arrival of the shipment. *St. Louis, etc., R. Co. v. Dolan* (Civ. App.), 84 S. W. 393.

jjj. Where No Market at the Place.

Where, in a suit against a railway company for a Hereford bull, injured by its train, it is shown that there is no market for such an animal in the county where killed, his market value in counties where there is a market for such animals may be shown, but a witness can not testify what he thinks the bull would bring from any one who wanted a bull. *Gulf, etc., R. Co. v. Dunman*, 4 App. Civ. Cases, § 98, 16 S. W. 421.

One Lewis, a witness for plaintiff, was permitted to testify that plaintiff's bull would have brought \$250 from any one who wanted a bull. "He might have brought more. I know of no offer having been made for him." This evidence was incompetent and inadmissible, and constitutes reversible error, in view of the conflict in the legitimate evidence on this material

issue of the value of the animal. *Gulf, etc., R. Co. v. Dunman*, 4 App. Civ. Cases, §§ 98, 99, 16 S. W. 421.

In an action for injuries to mules by defendant's negligence in transportation, plaintiff testified that there was a market value at Cleburne for mules, and that he was acquainted with it; that the mule killed in transportation would have been worth \$100 in Cleburne in good condition; that the other mules, by reason of their haggard condition on arrival at Cleburne, were worth \$5 less per head than if carefully transported. On cross-examination, he testified that Cleburne was not a place to which such stock were shipped for sale; that he had seen a span of mules of about the same grade as his sell for \$200 at private sale; that he saw an old mule sell there for between \$50 and \$75; that he had never sold or tried to sell stock at Cleburne; that a few days after his stock reached Cleburne he drove them off without selling any of them. Held, that a motion to exclude the evidence as to market value of the mules, on the ground that plaintiff had shown on cross-examination that there was no sale for mules at Cleburne, and, if there was, he was not acquainted with it, was properly overruled. *Gulf, C. & S. F. Ry. Co. v. Russell* (Civ. App.), 23 S. W. 527.

cc. Cross-Examination.

In an action against a carrier for injury to a horse during transportation, the evidence as to market value was slight, and all the testimony on the subject was merely expression of opinions. The evidence covered a wide range, from that of a few hundred dollars to that of \$7,000. It was shown that the horse had been recently purchased for \$300. Held, that it was error to sustain an objection to a question, on cross-examination, to the witness who testified that the horse was worth \$7,000, as to whether, if the horse was bought for \$300, and

other horses like him could be bought in the market for the same price, the horse would be worth \$7,000. *Texas, etc., R. Co. v. Newsome*, 44 Tex. Civ. App. 513, 98 S. W. 646.

(g) Vehicles.

In an action against a carrier for the value of a shipment of second-hand vehicles, evidence of the plaintiff's president and witnesses called by him as to the value of the vehicles new, and their value second hand, at the time they should have reached the purchaser, is not objectionable as invading the province of the jury. *Texas & P. Ry. Co. v. Wilson Hack Line*, 46 Tex. Civ. App. 38, 101 S. W. 1042.

The driver of plaintiff's carriage, which was injured by defendant's engine, could state his opinion of its value before and after the injury. *Missouri Pac. Ry. Co. v. Peay*, 7 Tex. Civ. App. 400, 26 S. W. 768.

(h) Water Privilege.

The opinion of a witness was admissible to show the value of a water privilege granted by plaintiff to defendant, but it was not proper for him to state what he supposed such privilege would be worth. *Gulf, C. & S. F. Ry. Co. v. Dunman* (Civ. App.), 31 S. W. 1070.

On the issue of the damages incurred by the failure of a railroad to comply with an agreement to fill a certain tank, belonging to plaintiff, with water at fixed intervals, a witness may give his opinion as to the value of the water privilege, though there was no market value of such water privilege. *Gulf, C. & S. F. Ry. Co. v. Dunman*, 85 Tex. 176, 19 S. W. 1073.

(i) Work and Labor; Services.

Witness does not have to be an expert to testify that he knows the price of farm labor to be from \$13.50 to \$19 per month. (Civ. App.), *North Texas Const. Co. v. Bostick*, 80 S. W. 109, judgment reversed 83 S. W. 12, 98 Tex. 239.

In an action to recover on a quantum meruit, for services in erecting a stone building, persons not stone masons were held to be competent witnesses as to the value of the work done, on the ground that want of familiarity with the subject about which a witness testifies affects only his credibility, and not his competency. *Gonzales College v. McHugh*, 21 Tex. 257.

In an action for work and labor, the plaintiff (carpenter) charged his work by the day, and proved his skill as a workman, and the customary price paid for carpenter's work by the day; under such circumstances, it was error to reject testimony offered by the defendant to show that from the plaintiff's habits, respecting his industry, his work was not worth as much per day as other carpenters. *Yeiser v. Ward*, 3 Tex. 430.

c. As to the Value of Real Property and Improvements.

(1) General Rule as to Admissibility of Opinion Evidence.

The statement of a qualified witness as to the market value of land is a statement of fact, and is admissible. *St. Louis Southwestern Ry. Co. v. Terhune* (Civ. App.), 94 S. W. 381.

Evidence of witnesses as to the market value of land is admissible although it be a matter of opinion. *Houston, etc., R. Co. v. Knapp*, 51 Tex. 592, 601; *Ft. Worth, etc., R. Co. v. Hogsett*, 67 Tex. 685, 687, 4 S. W. 365.

In condemnation proceedings opinions of witnesses, not experts, conversant with value of land taken, are admissible, it being left to the judge's discretion as to witnesses' qualifications. *Telephone & Tel. Co. v. Forke*, 2 App. Civ. Cases, § 364; *San Antonio, etc., R. Co. v. Ruby*, 80 Tex. 172, 15 S. W. 1040; *Gulf, etc., R. Co. v. Abney*, 3 App. Civ. Cases, § 413.

Where only a part is taken, opinion

evidence is admissible to prove the value of the whole before the taking and the value of what remains thereafter. *Telephone & Tel. Co. v. Forke*, 2 App. Civ. Cases, §§ 364, 365.

(2) Grounds of Opinion; Circumstances Affecting Value, etc.

(a) In General.

A qualified witness giving his opinion as to value of real estate may properly state also the circumstances affecting it, such as rental value, location, improvements upon and those going on around it, both as supporting the estimate given by the witness, and, in case marked or salable value could be established, to determine its value by other means than the course of dealings; contemplated improvements by a purchaser could not be made a basis of the witnesses' estimate of value, but the capacity to be rendered more productive of rents by improvements might be. *Land Mortg. Co. v. Campbell*, 98 Tex. 372, 84 S. W. 424, reversing 81 S. W. 560.

(b) Prospective Improvements.

The effect of improvements to be made to property can not be considered by a witness in giving an estimate of its value before the improvements have been made. Judgment (Civ. App.), 81 S. W. 560, reversed. *J. B. Watkins Land Mortg. Co. v. Campbell*, 84 S. W. 424, 98 Tex. 372.

(c) Sums Which Witness Would Take for Land.

The testimony of a life tenant as to what he considers the value of his estate is not rendered inadmissible by the fact that he states that he would take such estimated value for it. *Coapland v. Lake*, 9 Tex. Civ. App. 39, 28 S. W. 104.

(d) Subjunctive Opinions.

In a suit for damages caused by the overflow of land, witness stated that the land was worth \$10, though overflowed, and that it would be worth \$20 an acre if it did not overflow. Held,

that the evidence, being nothing more than the testimony of a witness as to the market value of the land, was admissible, though to some extent it was a matter of opinion. *Houston & T. C. R. Co. v. Knapp*, 51 Tex. 592.

(3) Qualification of Witness.

(a) Generally.

A witness who is shown to be familiar with the locality and general surroundings of land, although he is not able to state absolutely its value, may give his opinion thereof. *San Antonio & A. P. Ry. Co. v. Ruby*, 80 Tex. 172, 15 S. W. 1040.

In order to render the testimony of witnesses admissible in condemnation proceedings as to the value of the land taken they need not have been owners or have heard of sales directly from sellers or buyers, it being merely sufficient that they are acquainted with the property and have information sufficient to qualify them to give an opinion. *Telephone & Telegraph Co. v. Forke*, 2 Willson, Civ. Cas. Ct. App. § 365.

(b) Knowledge Based on Limited Inquiries.

Evidence showing no knowledge of the value of property except from answers to inquiries made in the neighborhood held insufficient to qualify a witness to give an opinion on the subject. *Land Mortg. Co. v. Campbell*, 98 Tex. 372, 84 S. W. 424, reversing 81 S. W. 560.

(c) To Estimate Value of Improvements.

It was error to permit a witness, who stated that he had never examined the improvements in question before the fire, and did not know what buildings were burned, to give his estimate of the value thereof, as he should have been required either to state that he possessed information enabling him to give such opinion, or to state facts showing his qualification to do so. *Houston & T. C. R. Co. v. Smith* (Civ. App.), 46 S. W.

1046; *Southern Pac. R. Co. v. Maddox & Co.*, 75 Tex. 300, 305, 12 S. W. 815.

Where plaintiff claimed land under a lease from the state, and alleged that he owned improvements worth \$200, consisting of a well, windmill and dugout, and no objection was made as to defendant's qualification to give an opinion as to the value of such improvements, his testimony was competent, though he knew nothing about windmills, such fact only going to its weight. *Shelton v. Willis*, 58 S. W. 176, 23 Tex. Civ. App. 547.

(d) As to Rental Value.

A witness who is shown to be familiar with the locality of the land, and qualified to give an opinion as to its rental value, the testimony of such witness is admissible though the witness can not state the value absolutely. *Illies v. Frerichs*, 11 Tex. Civ. App. 575, 32 S. W. 915.

In an action against a railroad for damages for taking possession of plaintiffs' land, where a witness testified that other lands in the neighborhood had been rented for pasture, that he had rented a piece for that purpose near the strip in question, and that he knew the rental value of such lands, his testimony as to the value of the land per month for the purpose for which the defendant used it was admissible. *Cluck v. Houston & T. C. R. Co.*, 79 S. W. 80, 34 Tex. Civ. App. 452.

On the issue as to the rental value of property while unlawfully withheld, it was error to allow a witness, after stating that he was unacquainted with the business for which the property was used, to state what, from the facts in evidence, he would consider to be a fair rental per season for the property. *Texas Consolidated Compress & Manuf'g Ass'n v. Dublin Compress & Manuf'g Co.* (Civ. App.), 38 S. W. 404.

(e) As to the Value of Orchard Lands.

A witness who did not know what lands with peach orchards had been or could be sold for in a neighborhood was not competent to express an opinion as to the value of such lands. *Texas & N. O. R. Co. v. Smith*, 80 S. W. 247, 35 Tex. Civ. App. 351.

In an action for the destruction of a pear orchard by fire it was not permissible for a witness who knew nothing of plaintiff's orchard, but based his opinion on general knowledge of the condition of pear orchards in that section of the country, to state that such orchards added nothing to the value of the land on which they stood. *Gulf, etc., R. Co. v. Burroughs*, 27 Tex. Civ. App. 422, 66 S. W. 83.

(f) As to the Value of Arid Lands.

It was not error to admit testimony to opinion valuation of arid land situated within a large pasture inclosure of the defendant, the witness testifying as to its value to the defendants, at same time declaring that he did not know the land otherwise than its general character. *Pettus v. Dawson*, 82 Tex. 18, 17 S. W. 714.

In trespass to try title, B., the only witness on the point, testified that he did not know the rental value of the land; that he was acquainted with the land, which was situated in a dry section of the country, with no water on it, and inclosed in a pasture of 30,000 or 40,000 acres of land belonging to defendants, but that the land was worth four cents an acre per annum to defendants. Held, that the evidence was competent. *Pettus v. Dawson*, 82 Tex. 18, 17 S. W. 714.

(4) Examination of Witnesses.

Question Held Not Objectionable as Calling for Cash Market Value.—

In a proceeding to condemn land for a railroad right of way, where a witness, who was shown to be competent to testify as to the value, was asked what, in his opinion, was the market

value of the land in the neighborhood per acre, it was error to sustain an objection to the question as calling for the cash market value. *Sullivan v. Missouri, K. & T. Ry. Co. of Texas*, 68 S. W. 745, 29 Tex. Civ. App. 429.

(5) Striking Out Evidence.

Striking Out Evidence of Unqualified Witness.—Where a witness admitted on cross-examination that he did not know the market value of the realty, it was error to refuse to strike out his testimony as to its market value, on direct examination. *Tyler, etc., R. Co. v. Hitchins*, 26 Tex. Civ. App. 400, 63 S. W. 1069.

Where Witness Discredits Former Statement by Stating Smaller Valuation.—In an action for the breach of a contract for the sale of real estate, where a witness as to the value of property had duly qualified and testified to various circumstances affecting the value, the fact that he admitted that the property would not probably have brought more than a stated sum did not render inadmissible his previous testimony, but only affected its weight. Judgment (Civ. App.), 81 S. W. 560, reversed. *J. B. Watkins Land Mortg. Co. v. Campbell*, 84 S. W. 424, 98 Tex. 372.

30. Waters, Dams, and Overflows.

Unusual Freshet.—One who has had a general knowledge of the country in the vicinity of a railroad bridge for several years, and a special knowledge of the canon over which it was built, may give an opinion as to whether the freshet which washed the bridge away was a remarkable one, and such as was not to be expected in that section. *Galveston, H. & S. A. Ry. Co. v. Daniels*, 9 Tex. Civ. App. 253, 28 S. W. 548.

Cause of Overflow.—In an action for damages to plaintiff's land by overflow from waters deflected by the alleged negligent construction of a railroad, witnesses who were familiar with the lands and the usual rainfalls of

that section could testify as to how the water would flow and affect plaintiff's land if the railroad were not there, over the objection that nonexpert testimony was inadmissible. *Taylor v. San Antonio & A. P. R. Co.*, 83 S. W. 738, 36 Tex. Civ. App. 658.

When one issue was, whether a bridge constructed by a railway company across a stream had been so unskillfully constructed as to cause the waters of the stream to overflow, unskilled witnesses familiar with the bridge structure and the facts connected with the overflow were permitted to give their opinion as to whether the bridge, on account of being improperly constructed, caused the damage, and to state in that connection the facts within their knowledge. *I. & G. N. R. Co. v. Klaus*, 64 Tex. 293.

In an action against a railroad company for causing overflow of plaintiff's land by the construction of an embankment, it is proper to allow witnesses familiar with the region and the flow of water therein to testify that the overflow was caused by the embankment. *Gulf, C. & S. F. Ry. Co. v. Haskell*, 4 Tex. Civ. App. 550, 23 S. W. 546.

A witness was asked, "Why was it the water of the Bosque did not flow in 1887 as it did formerly?" To which the witness replied, "The railway obstructed it." This witness was not an expert, but he had testified to actual knowledge of facts—of the water flow before and after the railway had been built—was present at the flood causing the damage in controversy. Having given the attendant circumstances, his opinion as above was admissible. *Falwell v. Hening*, 78 Tex. 278, 279, 14 S. W. 611.

Same; Qualification of Witness.—In an action for the alleged negligent construction of a railroad embankment so as to obstruct the flow of a river in times of high water, thereby

flooding plaintiff's land, a nonexpert witness, who has been familiar with the land for 20 years, and who has testified to the facts relative to the flood and to the construction of the embankment, may also give his opinion as to whether or not the embankment did in fact obstruct the flow of the river on the occasion complained of. *Gulf, C. & S. F. Ry. Co. v. Locker*, 78 Tex. 279, 14 S. W. 611.

A witness who for 26 years had been familiar with a stream, and knew from observation what had obstructed or would obstruct its flow, may give his opinion of the cause of an overflow, alleged to have been caused by the negligent construction of a railroad, though he is not an expert in building embankments, bridges, and culverts. *Ethridge v. San Antonio & A. P. Ry. Co.*, 14 Tex. Civ. App. 634, 39 S. W. 304.

Witnesses who were not shown to have known anything as to the effect on the natural flow of the water of a stream by the construction of an embankment adjacent thereto, nor whether there was any difference in the volume or velocity of the water as it flowed over plaintiff's land before and after the construction of the embankment, were not qualified to give their opinions on the subject. (Civ. App.), *Gulf, C. & S. F. Ry. Co. v. Harbison*, 88 S. W. 452, affirmed 90 S. W. 1098, 99 Tex. 538; *Gulf, etc., Ry. Co. v. Wetherly* (Civ. App.), 88 S. W. 456, affirmed 90 S. W. 1097, 99 Tex. 536; *Gulf, etc., Ry. Co. v. Oates* (Civ. App.), 88 S. W. 457.

In an action for damages to lands from the overflow of a river it was error to admit the opinions of witnesses that the overflow was caused by a railroad embankment, when it appeared that they had little familiarity with the river, the rainfalls, and previous overflows, and that their knowledge of the embankment, as compared with the width, fall, and

volume of water in the river, was meager and indefinite. *Gulf, C. & S. F. Ry. Co. v. Hepner*, 83 Tex. 136, 18 S. W. 441.

Capacity of Culvert.—A witness who was not shown to have had any actual knowledge of the size, dimensions, and capacity of a culvert, although he had a knowledge of the general surroundings, was incompetent to testify as to its capacity. *Missouri, K. & T. Ry. Co. of Texas v. Huddleston* (Civ. App.), 81 S. W. 64.

Necessity for More Culverts and Sluices.—In action for damages for flooding land, it is error to admit testimony of nonexpert witnesses as to necessity for more culverts and sluices in defendant's embankment. *I. & G. N. R. R. v. Malone*, 1 App. Civ. Cases, § 231.

31. Well Drilling.

Testimony that "no well driller would put his tools in a well having iron dropped in it like that described as having been dropped in the well by the plaintiff" is the opinion of the witness, and inadmissible where the facts upon which it was based were not given. *Moore v. Kennedy*, 81 Tex. 144, 16 S. W. 740.

D. WEIGHT AND SUFFICIENCY.

That cattle sold for their market value is sufficiently shown by testimony by the witness who effected the sale that they were sold in the usual and customary manner at so much per hundredweight, live weight, at the National Stockyards, it being common knowledge that sales are there effected by brokers to the highest cash bidder. *St. Louis, etc., R. Co. v. White & Co.* (Civ. App.), 76 S. W. 947, reversed in 97 Tex. 493.

One or two of the witnesses used the expression that the plaintiff held possession of the premises; but the evidence shows what they meant; held, that it was the mere expression of their opinion as to what constituted the holding of possession, and

not the statement of a matter of fact and was insufficient to establish the fact of possession. *Lea v. Hernandez*, 10 Tex. 137, 139.

Evidence considered in absence of objection made at trial, held to show want of consideration for bond, though in nature of conclusion of witness. *Merchant v. Bowyer*, 3 Tex.

Civ. App. 367, 370, 22 S. W. 763.

"The simple opinion of a nonprofessional man on the question of insanity, independent of any and all facts upon which that opinion was founded, should have had but little influence upon the jury or the court below." *Hickman v. State*, 38 Tex. 190, 192.

Expert Witnesses.

See the title EXPERT AND OPINION EVIDENCE, ante, p. 972.

Explanations.

As to explaining answers to interrogatories, see the title DEPOSITIONS AND INTERROGATORIES, vol. 6, p. 391. As to right of witness to explain inconsistencies in testimony, see the title WITNESSES.

